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# When Can a U.S. Court Order Production of Materials for Use in a Foreign Authority's Investigation?

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# Case at a Glance

The Supreme Court is asked to determine the circumstances in which a U.S. district court is authorized to compel the production of materials at the request of a private party for use in an investigation by the Competition Directorate-General of the European Commission. In this case, the Ninth Circuit ruled that a federal district court was authorized to order discovery under 28 U.S.C. § 1782, even though the information sought would not be discoverable in the foreign proceeding itself.

## CIVIL PROCEDURE

### When Can a U.S. Court Order Production of Materials for Use in a Foreign Authority's Investigation?

by Jay E. Grenig

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#### ISSUE

Does 28 U.S.C. § 1782 authorize federal district courts to order discovery for use in an investigation by the Competition Directorate-General of the European Commission of the European Community on the theory that the investigation will lead to "a proceeding in a foreign or international tribunal" even if the information sought would not be discoverable in the foreign proceeding itself?

#### FACTS

Intel Corporation and Advanced Micro Devices Inc. (AMD) are worldwide competitors in the micro-processor industry. In October 2000, AMD filed a complaint with the Competition Directorate-General of the European Commission, claiming that Intel was abusing its dominant market position in the European Common Market in violation of European Community competition laws. Specifically, the complaint alleged that Intel had violated Article 82 of the treaty establishing the European Commission (EC).

Under the Directorate-General's procedures, it must conduct a preliminary investigation upon receipt of a complaint. The Directorate-General may gather information on its own, and it may provide the complainant with an opportunity to support its allegations. The initial investigation is not considered an adversarial proceeding. The Directorate-General also has authority to seek information directly from the alleged infringer and may punish a failure to provide information with fines and penalties.

Completion of the Directorate-General's preliminary investigation results in a decision whether to pursue the complaint. If the decision is not to proceed, the complainant is notified and given an opportunity to submit further information in support of its allegations. The EC then decides, in a final written decision, whether to formally proceed. A decision not to proceed is subject to review by the Court of First Instance and ultimately by the

*INTEL CORPORATION V. ADVANCED  
MICRO DEVICES, INC.*  
DOCKET NO 02-572

ARGUMENT DATE:  
APRIL 20, 2004  
FROM: THE NINTH CIRCUIT

Court of Justice for the European Community.

A decision to proceed with the complaint is handled in a slightly different manner. If the EC makes a preliminary determination that infringement may have occurred, it serves a statement of objections on the alleged infringer and appoints an independent hearing officer to conduct a hearing. The hearing officer then presents conclusions to the Directorate-General, which makes a recommendation to the EC on how to proceed. A decision by the EC to dismiss is subject to review by the Court of First Instance. If the EC decides to proceed with the complaint, a preliminary decision is drafted and forwarded to the EC's Advisory Committee, consisting of representatives of the EC's member states. The Advisory Committee drafts an opinion for the EC that, if adopted, becomes a final enforceable decision within the European Community.

As part of its investigation in this case, the Directorate-General submitted written questions to Intel concerning AMD's allegations. The Directorate-General provided AMD a redacted copy of Intel's response and sought AMD's comments. In preparing its response, AMD became aware that Intel had previously produced documents in another lawsuit in federal court in Alabama that could have a bearing on the allegations in AMD's complaint with the Directorate-General. Many of the documents had been submitted to the Alabama federal court in summary judgment proceedings.

AMD asked the U.S. District Court for the Northern District of California to authorize discovery under 28 U.S.C. § 1782 and require Intel to produce documents and transcripts of testimony from the proceeding in Alabama. Intel object-

ed to the discovery of the approximately 600,000 pages of documents, arguing that the matter before the Directorate-General was not a "proceeding in a foreign or international tribunal" within the meaning of § 1782.

The U.S. district court ruled in favor of Intel. The federal court emphasized that AMD's complaint to the EC is "in the initial stage of preliminary inquiry" and that the EC, "in the conduct of the investigation, performs the functions of investigator, prosecutor and decision-maker without any separation." The court also concluded that the EC does not conduct adjudicatory "proceedings" and is not a "tribunal" for purposes of § 1782. AMD appealed to the U.S. Court of Appeals for the Ninth Circuit.

Noting that this was a matter of first impression, the Ninth Circuit reversed the district court. 292 F.3d 664 (9th Cir. 2002). The Ninth Circuit explained that in its view, the Directorate-General qualified as a "foreign or international tribunal" under § 1782. Moreover, according to the Ninth Circuit, the proceeding for which discovery is sought under § 1782 need not be imminent.

The court also ruled that § 1782 does not require that the material being sought under that section be discoverable in a foreign proceeding, regardless of whether the request comes from a private party or a foreign tribunal. The court found nothing in the plain language or legislative history of § 1782 requiring a threshold showing by the party seeking discovery that what it seeks would be discoverable in the foreign proceeding.

The Ninth Circuit remanded the case to the district court to "proceed to consider AMD's request on the merits." Intel asked the

Supreme Court to review the Ninth Circuit Court's decision. While its petition for certiorari was pending, a magistrate judge issued a recommended order of discovery limiting the relief to include only those documents directly relevant to the EC proceedings. The district court has held further consideration of that recommendation in abeyance pending the disposition of the questions presented by Intel's petition for certiorari. The Supreme Court granted Intel's petition for review. 124 S.Ct. 531 (2003).

### CASE ANALYSIS

Section 1782 of Title 28 of the United States Code provides that a district court may order the production of documents or testimony "for use in a proceeding in a foreign or international tribunal or upon the application of any interested person." Amendments to § 1782 in 1964 eliminated the requirement that a foreign proceeding be "pending" and eliminated references to "civil action" and "judicial," referring only to discovery of evidence "for use in a proceeding in a foreign or international tribunal." A 1996 amendment to § 1782 permits discovery to aid foreign "criminal investigations conducted before formal accusation."

Intel argues that § 1782 does not authorize a private nonlitigant to come to a U.S. court to obtain, for the ostensible benefit of a foreign law-enforcement authority, massive discovery that it could not otherwise obtain under U.S. law and that the foreign authority itself would not authorize the nonlitigant to receive if the evidence in question were within its jurisdiction. In addition, Intel maintains that such discovery is unavailable in any event when there is no live "proceeding in a foreign ... tribunal" in the first place.

*(Continued on Page 388)*

Intel contends that § 1782 does not authorize discovery that would otherwise be unavailable to private nonlitigants under both U.S. law and foreign law. It points out that private-party discovery is unavailable in connection with EC antitrust investigations, because the EC has deliberately chosen to keep such investigations from becoming adversarial proceedings. In addition, Intel says that, if AMD had complained about Intel to U.S. antitrust authorities rather than to the EC, it would have no right under any provision of U.S. law to obtain these documents. Because AMD has not filed suit against Intel and thus has not assumed the responsibilities of an actual litigant, Intel says that it is a mere complainant to law enforcement authorities and therefore normally not entitled to obtain prelitigation civil discovery from prospective defendants.

It is Intel's position that § 1782 was enacted to place tribunals and litigants abroad in a position similar to the one they would occupy, for discovery purposes, if the evidence they sought were located in the foreign jurisdiction rather than in the United States. Intel argues that Congress did not intend to magnify the importance of geographic location by granting parties far greater discovery rights when the evidence sought happens to be located outside, rather than inside, the jurisdiction in which the discovery would be used.

AMD asserts that § 1782 does not include any such "discoverability" requirement. It argues that the aim of § 1782 is to provide liberal discovery to those involved in foreign proceedings so as to encourage foreign jurisdictions to provide liberal discovery to those involved in American proceedings. AMD contends that subjecting foreign tribunals and interested persons to a

costly and time-consuming fight over the nuances of foreign law would undermine these aims.

Intel contends that AMD's position in this matter is as inconsistent with the text and legislative record of § 1782 as it is with the basic comity goals of the statute. According to Intel, nowhere in § 1782 did Congress express any intent to create a new species of prelitigation civil discovery available neither in this country nor abroad. As to the 1996 amendment, Intel states that the amendment further demonstrates that Congress wished to limit prelitigation discovery to criminal investigations conducted by foreign sovereigns or their agents.

AMD says that the comity concerns do not justify denying it discovery under the terms of § 1782. According to AMD, there is no risk that parties will amass pretextual filings with the EC simply to obtain discovery under § 1782. AMD also rejects Intel's contention that the EC and other tribunals would be offended by an order granting § 1782 discovery of documents that would not be discoverable in the foreign proceeding. AMD claims that the EC affirmatively welcomes the submission of evidence by a complainant, even when it would not itself afford the complainant compulsory discovery rights.

Intel argues that AMD's application should be denied because no "proceeding" is now underway in a "foreign or international tribunal." Intel claims that AMD's approach would permit anyone to obtain a rival's documents in the United States, even in the absence of a foreign investigation, upon declaring an intent to trigger such an event or file a lawsuit at some indefinite period in the future.

AMD responds that its request unambiguously seeks documents for use in a "proceeding" in a "tribunal." First, it says that the document it seeks will be used in the quasi-judicial and judicial proceedings that necessarily will result from the current stage of the EC's proceedings. Even if the current investigative stage is not yet a pending "proceeding" within the meaning of § 1782, AMD argues that the section does not require that a proceeding be "pending" before discovery may be ordered. AMD points out that Congress deleted the word "pending" from § 1782 in the 1964 revision.

Second, AMD declares that the current EC proceeding is itself a "proceeding" in a "tribunal" within the meaning of § 1782. It is AMD's position that the contemporaneous historical record shows that § 1782's drafters specifically considered EC proceedings to be "within the compass of the statute."

Intel suggests that the Supreme Court adopt rules of practice precluding private nonlitigants from obtaining § 1782 discovery when either (1) such discovery would be unavailable in the foreign jurisdiction if the documents were located there, or (2) there is no live foreign proceeding. According to Intel, the alternative to clear rules of practice is a regime in which district courts are permitted to resolve these internationally significant issues on an unpredictable, case-by-case basis.

AMD disagrees, arguing that the Supreme Court should not impose, as general rules governing the exercise of discretion, the very requirements Congress chose not to include in the statutory text. Furthermore, AMD contends that the presence of the EC as *amicus* supporting denial of discovery in this particular case does not support

the establishment of such rules of practice. Acknowledging that the EC supports "aspects of Intel's untenable interpretation of the statute itself," AMD points out that the EC makes no suggestion that, if the statute must be read to allow the district court to order production to AMD, the court nevertheless should deny AMD the documents it seeks. According to AMD, the EC would be obliged to consider such evidence if AMD obtained and submitted it, and such evidence could be of significant value not only to the EC's investigation but also to any subsequent judicial review of the EC's decision on whether or not to act against Intel. In order to obtain the benefits of such discovery, AMD urges that an order must be issued promptly so that AMD can vindicate both its procedural right to support its EC complaint and its substantive right to operate in a competitive marketplace.

### SIGNIFICANCE

In contrast with the Ninth Circuit's decision, the First and Eleventh Circuits have construed § 1782 as imposing a requirement that an applicant show that it could obtain the discovery it is seeking in EC proceedings. *In re Application of Asta Medica*, 981 F.2d 1, 5-7 (1st Cir. 1992); *In re Request for Assistance from Ministry of Legal Affairs of Trinidad and Tobago*, 848 F.2d 1151, 1156 (11th Cir. 1988). Like the Ninth Circuit, however, the Second and Third Circuits have refused to impose such a requirement. *In re Application of Malev Hungarian Airlines*, 964 F.2d 97, 101-02 (2d Cir. 1992); *In re Bayer AG*, 146 F.3d 188, 193 (3d Cir. 1998). The remaining circuits that have considered the issue have distinguished between a request from a foreign tribunal and one from a private party and have not imposed a discoverability requirement on the former. *In re Letter of Request from*

*Amstgericht Ingolstadt, Fed. Republic of Germany*, 82 F.3d 590, 592-93 (4th Cir. 1996); *In re Letter Rogatory from First Court of First Instance in Civil Matters* (5th Cir. 1995).

According to the EC, permitting discovery requests on the grounds endorsed by the Ninth Circuit would undermine the EC's carefully balanced policies regarding the disclosure of confidential information by allowing complainants to obtain through § 1782 documents that they are not permitted to review under European law. The EC asserts that upholding the Ninth Circuit could encourage companies to file pretextual complaints with the EC solely in order to use § 1782, wasting the EC's scarce resources. In addition, the EC says that characterizing it as a "tribunal" poses serious threats to its anticartel Leniency Program by jeopardizing the EC's ability to maintain the confidentiality of documents submitted to it.

The Chamber of Commerce of the United States suggests that affirming the Ninth Circuit's decision would impermissibly broaden the scope of discovery that is allowed private parties who are seeking information from their business rivals under § 1782. The Chamber says that the Ninth Circuit's decision would govern any time a company from which discovery is sought is subject to the jurisdiction of any foreign sovereign's courts or regulatory bodies. It claims that important disincentives to harassing and unwarranted discovery requests would be eliminated if the Ninth Circuit's ruling is permitted to stand.

The United States, on the other hand, says that the Ninth Circuit was correct in ruling that § 1782 does not categorically preclude a district court from providing assis-

tance to a complainant in a EC proceeding that will ultimately result in an adjudication. It contends that district courts should retain discretion to take into consideration foreign discoverability in the course of considering whether to render the requested assistance under § 1782. The United States also questions whether the EC's views are widely shared in the international community.

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