

on all disputed issues. Intel would also be unfairly handicapped by its inability to cross-examine the EC decision's authors or key witnesses, and by the absence of unlimited trial time in which to rebut the decision's countless errors.

The EC decision is also inadmissible because it is unreliable. The EC's findings and record (which the EC controls—it alone possesses discovery rights) are distorted, from a U.S.-law perspective, by the EC's view that issues like causation and effects are immaterial. The EC's inquisitorial system lacks the procedural protections typical of U.S. agency proceedings and is therefore prone to biases—as shown most strikingly by the EC Competition Commissioner's assertion that the unprecedented fine would make Intel “the sponsor of the European taxpayer.”

DISCUSSION

I. THE EC DECISION IS IMMATERIAL AND IRRELEVANT

Rule 3.43(a) provides that “[i]rrelevant” and “immaterial” evidence “*shall* be excluded.” 16 C.F.R. §3.43(a) (emphasis added). The EC decision is inadmissible under those criteria. Complaint Counsel's contrary assertion (Mot. 6-10) rests on the mistaken assumption that the EC's view of competition law mirrors U.S. law.

The differences between U.S. monopolization law and the EC's views are profound. As Commissioner Rosch has observed, “the United States and Europe ... still have our differences in areas such as bundled discounts, loyalty discounts, tying, refusals to deal, exclusive dealing and predatory pricing—all of which are subject to different standards here [in Europe] than they are in the United States.” J. Thomas Rosch, *I Say Monopoly, You Say Dominance: The Continuing Divide on the Treatment of Dominant Firms, is it the Economics?* at 2 (Sep. 8, 2007) (<http://www.ftc.gov/speeches/rosch/070908isaymonopolyiba.pdf>).

Those differences relate directly to the purposes for which Complaint Counsel seeks to introduce the EC decision. For example, Complaint Counsel points to the EC's assessment of alleged exclusionary conduct.¹ As an EC official admitted, however, "the [EC] found in *Intel* that the existence of fidelity rebates is in principle sufficient to establish an infringement ... without a need to examine the effects of the behaviour. Hence, the [EC] pursued a form-based approach according to which this type of rebate is as a rule in breach of art. 82." Venit ¶53 n.43. Under this form-based approach, loyalty discounts are deemed unlawful "irrespective of the effects that the discount system can be shown to have in the individual case." *Id.* ¶53 nn.43-44.

According to the EC, "it is not necessary to demonstrate that [conditional discounts] had a concrete effect on the markets concerned." Decision ¶922. Even as to unconditional discounts, the EC asserts that "evidence of actual foreclosure" is not required. *Id.* ¶923. By contrast, U.S. law views loyalty discounts as *procompetitive* absent below-cost pricing, because "[r]ewarding customer loyalty promotes competition on the merits." *Virgin Atl. Airways Ltd. v. British Airways PLC*, 257 F.3d 256, 265 (2d Cir. 2001); see *Concord Boat Corp. v. Brunswick Corp.*, 207 F.3d 1039, 1062 (8th Cir. 2000).²

¹ While Complaint Counsel asserts that the EC's "dominance" finding "under European law largely mirrors the American approach," Mot. 6, under EC guidelines the threshold for a "dominance" finding is 40% market share, or even less in "specific cases." Declaration of James Venit ("Venit") ¶53 n.42. By contrast, under U.S. law, "it is doubtful that 60 to 64 percent would be enough" to pass the threshold. *Polypore Int'l, Inc.*, Dkt. No. 9327 at 304 (initial decision, Mar. 1, 2010). Given the EC's low market-share threshold, its incentive to rigorously address the other considerations that bear on a dominance determination is diminished, because they are less likely to be dispositive in the EC's analysis. In contrast, those other considerations assume much greater importance under U.S. concepts of monopoly power.

² The EC grudgingly offered a purported form of price-cost analysis, but that analysis was not tested by cross-examination and is infected by the EC's refusal to consider highly relevant evidence directly inconsistent with its preconceived views. See, e.g., Intel's Application to Court of First Instance ("CFI-App.") ¶¶153-181, 235-263, 306-311, 322-336, 373-409, 452-475 (App.

Whereas the EC assumes that discounts can be condemned without consideration of their effects, the Supreme Court has affirmed that “in the context of pricing practices, only predatory pricing has the requisite anticompetitive effect.” *Atl. Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328, 339 (1990). This principle applies “regardless of the type of antitrust claim involved.” *Id.* at 340; *Brooke Group Ltd. v Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 223 (1993). The Court has repeatedly stressed that low, non-predatory prices “benefit consumers regardless of how those prices are set.” *Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co.*, 549 U.S. 312, 319 (2007); *Brooke Group*, 509 U.S. at 223.

Moreover, contrary to the EC’s approach, proof of actual foreclosure is essential under U.S. law. As this Court observed, “[f]or challenged conduct to be exclusionary, a rival must have been excluded.” *Polypore Int’l, Inc.*, Dkt. No. 9327 at 313 (initial decision, Mar. 1, 2010). Even when challenging true exclusive dealing agreements whereby purchasers must buy exclusively from the seller (which was not alleged by the EC), a U.S. antitrust plaintiff must show that the challenged conduct is “likely to keep at least one significant competitor of the defendant from doing business in a relevant market” and “prove the degree of foreclosure.” *Id.* at 313-14 (citation omitted), 315 (quoting *United States v. Microsoft Corp.*, 253 F.3d 34, 69 (D.C. Cir. 2001) (en banc)). The foreclosure must be “significant,” as “[p]ermitting an antitrust action to proceed any time a firm enters into an exclusive deal would both discourage a presumptively legitimate business practice and encourage costly antitrust actions.” *Microsoft*, 253 F.3d at 69.

1) (redacted because European law precludes disclosure of the EC record unless the evidence is independently available to Intel, *see* Venit ¶¶46-52).

By contrast, the EC asserts “there is no requirement in the case-law to demonstrate actual foreclosure in order to prove an infringement of Article 82.” Decision ¶919.³ Further, according to the EC, even “the performance of competitors is not relevant” under Article 82. *Id.* ¶65. Indeed, the EC asserts that “whether the rebates were in fact the cause for [an OEM’s] choice for staying nearly Intel-exclusive is not relevant.” *Id.* ¶969. Thus, lack of causation is deemed immaterial, a viewpoint that puts the EC’s approach sharply at odds with U.S. law and renders it irrelevant and immaterial.

II. THE EC DECISION SHOULD BE EXCLUDED TO AVOID UNFAIR PREJUDICE, UNDUE DELAY AND WASTE OF TIME

Rule 3.43(a) provides that “Evidence, even if relevant, may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or if the evidence would be misleading, or based on considerations of undue delay, waste of time, or needless presentation of cumulative evidence.” These considerations compel exclusion of the decision.

A. The EC Decision Lacks Probative Value

Because the EC decision is keyed to the EC’s understanding of European competition law, it lacks probative value. *See Pucalik v. Holiday Inns, Inc.*, 777 F.2d 359, 363 (7th Cir. 1985) (report lacked probative value, in part because it “was not based on findings under [the relevant] law”). Additionally, the decision lacks probative value because it is untrustworthy. *See infra* Point III.

³ The requirement of proving anticompetitive effects is not obviated by §5 of the FTC Act. *See* J. Thomas Rosch, *The Path You Need Not Travel: Observations on Why Canada Can Do Without Section 5* at 5 (Feb. 10, 2010) (“Section 5 should only be used to combat conduct that has an anticompetitive effect.”) (<http://www.ftc.gov/speeches/rosch/100204roschcanadaspeech.pdf>).

Moreover, since Complaint Counsel presumably also plans to introduce evidence relied upon by the EC, the decision itself is of no value to the Court, which is fully capable of assessing that evidence for itself. *See Paolitto v. John Brown E. & C., Inc.*, 151 F.3d 60, 65 (2d Cir. 1998); *Denny v. Hutchinson Sales Corp.*, 649 F.2d 816, 822 (10th Cir. 1981) (agency findings had low probative value where fact-finder heard “substantial admissible evidence on the matter”); *Abramowitz v. Inta-Boro Acres, Inc.*, 1999 U.S. Dist. LEXIS 20005, at *21 (E.D.N.Y. Nov. 16, 1999) (findings had limited probative value where “[p]laintiff will have a full opportunity to present evidence on [the] issues”). And to the extent the evidence in the EC record will *not* be before the Court as a result of EC confidentiality rules (Venit ¶¶46-52), the decision’s probative value is further undermined because this Court cannot fully assess its reliability.

B. The EC Decision Presents A Serious Danger of Unfair Prejudice, Undue Delay, And Waste Of Time

On the other side of the equation, admission of agency findings “pose[s] a significant risk of unfair prejudice.” *Kyle v. City of New York*, 2006 U.S. Dist. LEXIS 61396, at *4 (S.D.N.Y. Aug. 15, 2006). That risk can substantially outweigh the probative value of an agency’s determination, particularly where, as here, “the party seeking to introduce administrative findings will have a full and fair opportunity at trial” to present evidence. *Id.* at *5. Moreover, unfair prejudice is particularly likely because the EC decision relies in part on confidential third-party submissions and *ex parte* statements or contributions of witnesses, corporations, and EC staff investigators and economists who cannot be cross-examined. Venit ¶¶28, 35. Intel would thus be unfairly hamstrung in its ability to show that the EC’s findings are unreliable. *See Rambus, Inc. v. Infineon Techs. AG*, 222 F.R.D. 101, 111 (E.D. Va. 2004).

Admitting the EC decision would also lead to undue delay and waste of time, because considerable time would be spent litigating over which assertions cited by Complaint Counsel are actually inadmissible legal conclusions rather than factual findings. *See, e.g., Hines v. Brandon Steel Decks, Inc.*, 886 F.2d 299, 303 (11th Cir. 1989). Moreover, “trustworthiness can also become an issue at trial itself.” *Coleman v. Home Depot, Inc.*, 306 F.3d 1333, 1346 n.11 (3d Cir. 2002). As this Court observed, “if this document is in evidence, [Intel will] ... be allowed to refute it, to defend it in any way you see fit. That’s just fair, if I get to that point.” 3/25/2010 Tr. 32 (App. 2). Thus, Intel would be entitled to present evidence to show that: the EC’s investigation was biased and one-sided; the EC’s structure and procedures render the decision suspect; and the EC based its findings on inadmissible or inaccessible evidence, an incomplete record, and a highly selective, one-sided assessment. And Complaint Counsel would presumably want to adduce its own evidence on these issues.

Admission of the EC decision would thus result in a “trial within a trial,” *Coleman*, 306 F.3d at 1346, and “protract an already prolonged trial with an inquiry into collateral issues,” *City of New York v. Pullman Inc.*, 662 F.2d 910, 915 (2d Cir. 1981). Accordingly, considerations of undue delay and waste of time substantially outweigh any probative value the decision might have. *See Paolitto*, 151 F.3d at 65 (court should consider “the likelihood that the trial will deteriorate into a protracted and unproductive struggle over how the evidence admitted at trial compared to the evidence considered by the agency”); *Rambus*, 222 F.R.D. at 111 (“utterly wasteful” to “overlay” the trial with “a series of mini-trials respecting the reliability of the [agency] findings”).

This Court will be receiving the actual testimonial and documentary evidence that the parties deem material and relevant, and is fully capable of resolving for itself any disputed

factual issues raised by the evidence. Nothing would be gained from introducing the EC's views regarding the application of different laws to a different (and one-sided) record, other than to impose unfair prejudice, delay, and waste of time on this proceeding. That very serious consequence is a huge problem in its own right, but is exacerbated by the time limits imposed by the Commission on the parties in the forthcoming trial. Admitting the decision would entail little trial time for Complaint Counsel, while subjecting Intel to the massive burden of responding to the EC's 448-page decision, unfairly chewing through Intel's trial time.

III. THE EC DECISION IS UNRELIABLE AND THEREFORE INADMISSIBLE

Federal Rule of Evidence 803(8)(C) renders agency findings inadmissible when "the sources of information or other circumstances indicate lack of trustworthiness." Rule 3.43(a) provides that "unreliable evidence *shall* be excluded," and that hearsay evidence may be admitted *only* if it "bears satisfactory indicia of reliability so that its use is fair." 16 C.F.R. §3.43(a) (emphasis added). Therefore, contrary to Complaint Counsel's suggestion (App. 2 at 41) that the Court should simply admit the EC decision and address reliability later, reliability is a threshold *prerequisite* to admissibility.

Courts have identified a number of factors evidencing untrustworthiness and unreliability. Those factors compel exclusion of the EC decision.

A. The EC Decision Reflects Suspect Motivations

An agency "report may be untrustworthy 'if the report appears to have been made subject to a suspect motivation.'" *Coleman*, 306 F.3d at 1342 (citation omitted). A showing of improper motivation "can outweigh all other trustworthiness factors," rendering the report inadmissible. *Gross v. King David Bistro, Inc.*, 84 F. Supp. 2d 675, 678 (D. Md. 2000).

1. Suspect motivation exists when “the public official or body who prepared the report has an institutional or political bias.” *Coleman*, 306 F.3d at 1342 (citation omitted). Here, the EC has institutional biases that render its findings untrustworthy for present purposes. Most fundamentally, the EC’s understanding of competition law is far different from U.S. law (Point I, *supra*), and thus the EC record and findings provide an unreliable basis for applying U.S. law. The EC’s views necessarily affected and distorted its creation of a record to support its findings, as well as the findings themselves, because the EC had no incentive to investigate fully such issues as causation and effects.

More generally, the EC’s structure, which lacks the procedural protections typical of U.S. agencies, engenders systemic biases. EC decisions result from an inquisitorial process that lacks separation between investigative, prosecutorial, and decisionmaking functions. As EC official Wouter Wils explained, “[t]he Commission’s final decision is drafted by officials from DG Competition, normally the same officials who conducted the investigation and drafted the statement of objections.” Venit ¶20 n.16. The European Parliament has stated that the EC “could not be regarded as a ‘tribunal,’” “its procedures are not in public,” and “essentially the same individuals are responsible both for making the case against a company and later for deciding whether that case has been sufficiently proved.” *Id.* ¶16 n.10.

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] ¶¶12, 14. [REDACTED] EC

official Wils has acknowledged that this institutional structure gives rise to three potential types of bias: (1) “confirmation bias, i.e. a tendency to search for evidence which confirms rather than

challenges one's beliefs, and to accept more readily the conclusion to a syllogism if it corresponds to one's beliefs than if it does not, irrespective of its actual logical validity"; (2) hindsight bias, which is "the tendency for people with the benefit of hindsight, to falsely believe that they could have predicted the outcome of an event"; and (3) "[t]he desire to show a high level of enforcement activity." Venit ¶18 n.12; *see also* ██████████ ¶14. He also admitted that "theoretical reasoning informed by insights from economics and psychology" identifies those risks, and "it cannot be excluded that even the most ethical [EC] professionals might not be immune from the first and second of the three possible sources of bias." Venit ¶18 n.12.

The actions of former EC Competition Commissioner Kroes, who oversaw the Intel case, confirm that she acted as an overzealous prosecutor, not a neutral adjudicator. For example, in announcing the decision, Ms. Kroes stated that Intel would have to change its advertising slogan from "sponsors of tomorrow" to "the sponsor of the European taxpayer." *Id.*; <http://www.youtube.com/watch?v=ReBN51NY2-A>. Such remarks are improper even for a prosecutor, and clearly refute any claim of neutral fact-finding.

2. Suspect motivation is also present when a decision's trustworthiness is "eroded by the [agency's] obvious disregard of" contrary evidence and by "numerous erroneous and obviously slanted statements." *Coleman*, 306 F.3d at 1342 (citation omitted). Here, the EC's decision against Intel is replete with such slanted, unreliable assessments.

For example, the EC disregarded (and for the most part refused even to obtain) internal AMD documents highly relevant to Intel's defense. EC staff controlled the creation of the record, and Intel had no ability to subpoena AMD documents for inclusion in the record. Venit ¶¶15, 30-36. The EC requested only a few documents from the Delaware litigation, those

identified in the parties' initial pre-trial statements (86 AMD and 114 Intel documents). *Id.* ¶32. The EC's decision prominently cites the Intel documents but ignores key AMD materials, which establish (among other things) that AMD's lack of greater success was attributable to its own failings rather than any allegedly exclusionary conduct. CFI-App. ¶¶195-196; *see id.* ¶¶569-89.

In its findings concerning Dell, the EC refused to consider (and usually did not even discuss) testimony supporting Intel's position from AMD's depositions of top Dell executives (which Intel was able to submit because of a limited waiver of the Delaware protective order negotiated with Dell), allegedly because the EC could not "follow the legal theory in US law that determined the selection of the specific contemporaneous documents by the AMD counsels carrying out the depositions" and because the testimony occurred "more than five years" after the underlying events. Decision ¶¶301-302; Venit ¶¶41-45. Belying its purported concerns, however, the EC elsewhere relied on its understanding of U.S. law (*e.g.* Decision ¶382 n.463), and made findings based on *ex parte* witness statements regarding more distant past events (Decision ¶¶744, 753). Moreover, the EC cited the Dell depositions themselves when expedient. *See* CFI-App. ¶152, n.115.

The only plausible reason for the EC's refusal to consider the exculpatory Dell testimony is that it contradicted the EC's predetermined findings. CFI-App. ¶¶198-210. For example, the EC found that Dell purchased microprocessors solely from Intel because Intel had "condition[ed]" its discounts to Dell on "exclusivity" and because Dell feared Intel would punish it for sourcing from AMD. Decision ¶¶323-24. Both claims were flatly contradicted by top Dell executives, including Chairman Michael Dell, who answered "No" when asked whether Intel's discounts to Dell "were conditioned upon Dell not using AMD or any other brand of microprocessors" and whether "anyone from Intel ever threaten[ed] that Intel would retaliate

against Dell if Dell were to purchase microprocessors from AMD.” CFI-App. ¶¶202-204 & n.178; *see also* Venit ¶42.

The EC also ignored compelling exculpatory evidence from Lenovo. It found that Intel’s discounts to Lenovo in the second half of 2006 were unlawful because they led Lenovo to “cancel[] the launch of its AMD-based products.” Decision ¶1664. In so finding, the EC disregarded Lenovo’s written statement and refused to consider the sworn testimony of Lenovo executives showing that the launch was cancelled because of AMD’s unresponsiveness to Lenovo’s pricing needs and insufficient demand for the AMD products. CFI-App. ¶¶277-92.

These are just a few examples of how the EC decision ignores authoritative record evidence supporting Intel. *See also, e.g.*, CFI-App. ¶¶ 239-256, 269-91, 296-98, 312-18, 330-34, 399-403, 428-51, 512-18. The EC’s slanted assessment of the one-sided record and its refusal to consider powerful third-party evidence supporting Intel confirms the EC decision’s unreliability.

3. An agency’s report is also infected by suspect motivation when it was ““compiled in anticipation of litigation.”” *Lewis v. Velez*, 149 F.R.D. 474, 488 (S.D.N.Y. 1993) (citation omitted). EC decisions are issued with the understanding that the EC will be the named respondent in any ensuing judicial challenge to the decision. Venit ¶28(h); *see In re Complaint of Nautilus Motor Tanker Co.*, 862 F. Supp. 1251, 1255 (D.N.J. 1994) (report not prepared “with a view to litigation” because “the [agency] was not a party to the action”). The EC has the same incentives as any other litigant to advance its interests in the anticipated litigation. Here, litigation was inevitable, given that the decision imposed an *unprecedented* fine. [REDACTED]

¶7. Accordingly, the decision was “compiled in anticipation of litigation,” and therefore reflects suspect motivation, rendering it inadmissible. *E.g.*, *United States v. Stone*, 604 F.2d 922, 926 (5th Cir. 1979).

4. Finally, the EC decision is also unreliable because it appears that the EC collaborated with Complaint Counsel (and perhaps FTC Commissioners) while preparing its decision. As the EC itself admitted, “[t]he Commission and the United States Federal Trade Commission have kept each other regularly and closely informed on the state of play of their respective Intel investigations. These discussions have been held in a co-operative and friendly atmosphere, and have been substantively fruitful in terms of sharing experiences on issues of common interest.” App. 3 at 2.

[REDACTED]

[REDACTED] it would be grossly unfair to admit the EC decision as independent agency fact-finding. Any such result would necessarily give Intel the right to conduct discovery regarding the FTC-EC contacts to ascertain the extent to which Complaint Counsel or any Commissioners may have influenced the EC’s analysis or conclusions.⁴

⁴ Complaint Counsel cite a handful of cases permitting introduction of allegedly analogous foreign agency findings, but those cases are inapposite. In *Ethylene Propylene Diene Monomer (EPDM) Antitrust Litig.*, 2009 WL 5218057, 2009-2 Trade Cases ¶76,855 (D. Conn. 2009), there was “no indication that the ... defendants objected to the [EC Statement of Objections’] factual

B. The EC Decision Rests On Unreliable Evidence

Courts analyzing the trustworthiness of public agency findings also consider “[t]he extent to which the agency findings are based upon or are the product of proceedings pervaded by receipts of substantial amounts of material which would not be admissible in evidence (e.g., hearsay, confidential communications, ex parte evidence), and the extent to which such material is supplied by persons with an interest in the outcome of the proceeding.” *Coleman*, 306 F.3d at 1342 n.4.

The EC’s record was compiled entirely by means of *ex parte* submissions, which the decision cites more than 800 times. *Venit* ¶35. Intel was even barred from seeing portions of third-party submissions for confidentiality reasons. *Id.* ¶51. And “persons with an interest in the outcome of the proceeding”—namely, AMD—not only supplied extensive information to the EC, but in fact instigated the investigation. *Id.* ¶¶22(a) n.19, 35. The EC decision relied on AMD’s assertions in place of actual evidence, even citing submissions by AMD’s lawyers as factual support. *Id.* ¶35. An agency’s reliance “in part[] on materials received ex parte tends towards a finding of untrustworthiness.” *Rambus*, 222 F.R.D. at 109.

findings, despite the opportunity to do so,” and no claim of “questionable motives or bias,” so the court had no occasion to address issues of untrustworthiness analogous to those present here. Likewise, in *In re Japanese Elec. Prods.*, 723 F.2d 238 (3d Cir. 1983), *rev’d sub nom.*, *Matsushita Elec. Indus. Co. v. Zenith-Radio Corp.*, 475 U.S. 574 (1986), the hearing examiner’s decision was the product of a formal evidentiary hearing with full procedural rights (723 F.2d at 273-74), and there was no substantial question of untrustworthiness since the defendant had subsequently *admitted the charged violations* (*id.* at 272, 274). Similarly, in *Information Resources, Inc. v. Dun & Bradstreet Corp.*, 1998 WL 851607 (S.D.N.Y. 1998), there was no discussion of any lack of trustworthiness factor except the absence of a hearing, which the court found insufficient *in itself* to require a finding of untrustworthiness; the court did not address any of the numerous other factors that are present here and that render the EC decision untrustworthy. *Id.* at *1.

The EC also relied at points on unreliable *ex parte* unsworn witness statements. Venit ¶35; see ██████████ ¶13. Witness statements contained in public reports are not admissible under Rule 803(8)(C), because they do not “constitute reports by officials.” *Melville v. Am. Home Assurance Co.*, 584 F.2d 1306, 1316 n.15 (3d Cir. 1978); see *United States v. Taylor*, 462 F.3d 1023, 1026 (8th Cir. 2006).

C. The EC Provided Neither An Evidentiary Hearing Nor An Ascertainable Record

Also relevant to trustworthiness is “whether a hearing was held” and “[t]he extent to which there is an ascertainable record on which the findings are based.” *Beech Aircraft v. Rainey*, 488 U.S. 153, 168 n.11 (1988); *Coleman*, 306 F.3d at 1342 n.4. The EC allows only a non-evidentiary “hearing” with no rules of evidence and no opportunity to confront witnesses. As the EC’s hearing officers acknowledge, EC hearings “are not a trial because their purpose is not to produce or systematically test evidence and counter-evidence. Moreover, the presiding Hearing Officer is not a judge who makes factual and legal determinations at the conclusion of a hearing.” Venit ¶¶22(b), 22(d) n.30; see ██████████ ¶18. Thus, there is no meaningful opportunity for respondents to make their case; as the Organisation for Economic Co-Operation and Development has observed, “No Commissioner, including even the Competition Commissioner, will have attended the hearing.” Venit ¶22(d). And the EC did not even afford Intel such a hearing regarding some of the violations asserted in the decision. CFI-App. ¶¶605-16. This factor therefore counsels against admission of the decision. *Denny*, 649 F.2d at 821; *Hines v. Brandon Steel Decks, Inc.*, 754 F. Supp. 199, 200-201 (M.D. Ga. 1991).

Moreover, much of the EC record—particularly evidence that the EC chose *not* to cite—is unavailable to this Court, and hence there is no “ascertainable record on which the [EC’s]

findings are based.” That factor likewise counsels against admission, because this Court is “unable to ascertain whether the [decision] is based on information and evidence that is trustworthy.” *Rambus*, 222 F.R.D. at 109. That concern is heightened here, given that Complaint Counsel seeks to use unredacted EC findings that Intel is barred from challenging with exculpatory evidence from the confidential EC file. Venit ¶¶51-52.

D. The EC’s Procedures Are Inadequate And Unfair

Another factor relevant to reliability is “the extent to which appropriate safeguards were used (Administrative Procedure Act, Due Process), and the extent to which the investigation complied with all applicable agency regulations and procedures.” *Coleman*, 306 F.3d at 1342 n.4. Here, of course, there was no independent adjudicator, no evidentiary hearing, and no right to cross-examine witnesses. [REDACTED] ¶15; Venit ¶¶15, 22(c); *see Hines*, 754 F. Supp. at 200-201 (excluding agency report where there was no “opportunity to cross-examine witness[es]”); *Denny*, 649 F.2d at 821.

In addition, Intel had no right to subpoena evidence (Venit ¶¶15, 22(a)), so the EC record consists primarily of material elicited by the EC investigator/prosecutors. A proper assessment of the reliability of the EC findings would therefore require cross-examination of the investigators, but no such opportunity exists. Venit ¶15, 22(c); *see Hines*, 886 F.2d at 303 (“inability to cross-examine the investigator” is “a proper factor to take into consideration when deciding trustworthiness”).

The EC’s decision regarding Intel is further tainted by the EC’s violations of its own minimal procedural obligations. Fully aware that Intel could not compel testimony from OEMs, the EC attempted to suppress its interview of Dell’s Senior Vice President Jeff Clarke. The European Ombudsman found that “it cannot be excluded that” the interview “concerned

[evidence] of a nature to be potentially exculpatory of Intel.” Ombudsman Decision ¶127 (July 14, 2009) (App. 5).⁵ Accordingly, the Ombudsman rebuked the EC for “maladministration” in violating its obligation to make a record of the interview and produce it to Intel. *Id.* ¶¶111-114. The EC also violated European law by refusing to obtain exculpatory material from AMD. CFI-App. ¶¶617-36.

CONCLUSION

For the foregoing reasons, the EC decision should be excluded. Admission would provide no benefit to the Court and lead only to delay and waste of time, necessitating a “trial within a trial” to test the reliability of the EC’s findings, which are infected by the EC’s different view of the law, unfair and inadequate procedures, one-sided record, and refusal to consider exculpatory evidence. This Court is fully capable of assessing the actual evidence for itself. Complaint Counsel’s motion should be denied.

⁵ Complaint Counsel obfuscates in claiming that the Ombudsman “allowed the decision to stand.” Mot. 5. The Ombudsman has no power to overturn an EC decision. Venit ¶38.

Respectfully submitted,

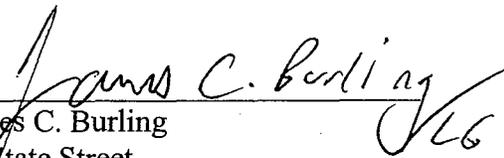
GIBSON DUNN & CRUTCHER LLP

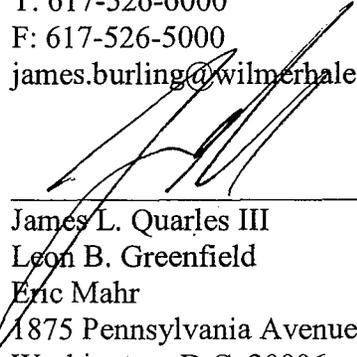
Robert E. Cooper
Daniel S. Floyd
333 South Grand Avenue
Los Angeles, CA 90071-3197
T: 213-229-7000
F: 213-229-7520
rcooper@gibsondunn.com
dfloyd@gibsondunn.com

Joseph Kattan, PC
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036-5306
T: 202-955-8500
F: 202-467-0539
jkattan@gibsondunn.com

HOWREY LLP
Darren B. Bernhard
Thomas Dillickrath
1299 Pennsylvania Ave, N.W.
Washington D.C. 20004
T: 202-383-0800
F: 202-383-6610
BernhardD@howrey.com
DillickrathT@howrey.com

WILMER CUTLER PICKERING
HALE AND DORR LLP

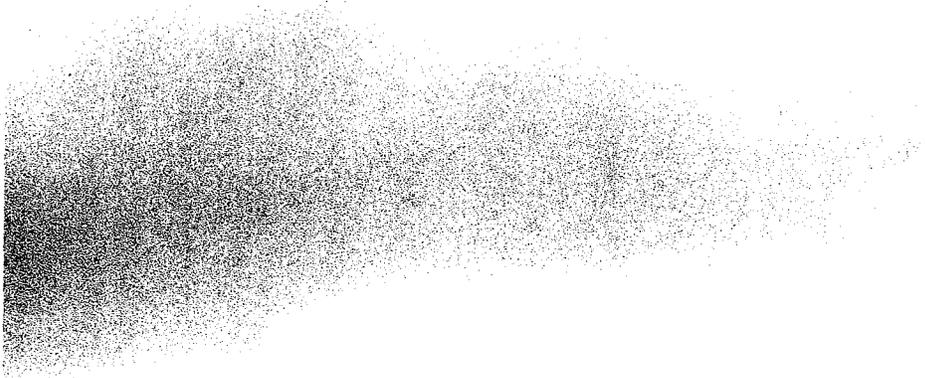

James C. Burling
60 State Street
Boston, MA 02109
T: 617-526-6000
F: 617-526-5000
james.burling@wilmerhale.com


James L. Quarles III
Leon B. Greenfield
Eric Mahr
1875 Pennsylvania Avenue, N.W.
Washington, D.C. 20006
T: 202-663-6000
F: 202-663-6363
james.quarles@wilmerhale.com
leon.greenfield@wilmerhale.com
eric.mahr@wilmerhale.com

Attorneys for Intel Corporation

Dated: April 12, 2010

PUBLIC



- No Public Version of Declaration -

UNITED STATES OF AMERICA

BEFORE FEDERAL TRADE COMMISSION

In the Matter of
INTEL CORPORATION,
a corporation

DOCKET NO. 9341

PUBLIC

DECLARATION OF JAMES S. VENIT

I, James S. Venit, make the following declaration.

1. I make this declaration upon personal knowledge and I am competent to testify to the facts and matters set forth herein. This declaration is based on my understanding of the European Commission's investigation of Intel Corporation ("Intel") and my background in, and understanding of, the competition law of the European Union and the rules and procedure of the European Commission (the "EC"). The statements and views expressed herein are made in good faith on the basis of my understanding of the relevant facts and law. A true and correct copy of any source cited herein is available upon request.
2. I am a partner at Skadden, Arps, Slate, Meagher & Flom and practice European Union ("EU") competition law out of the firm's Brussels office, which I joined in June 2000.
3. I received my JD from New York University in 1976 and am admitted to the Bar of New York and am registered on the "B" list of the Brussels Bar.
4. I have been practicing EU competition law in Brussels since October 1980, first as an associate at Cleary, Gottlieb, Steen & Hamilton from October 1980 until April 1984, then as an associate and later a partner at SG Archibald from April 1984 until December 1989, and then as a partner with Wilmer, Cutler and Pickering (now WilmerHale) from January 1990 until June 2000 when I joined Skadden Arps as a partner. During my nearly 30 years in Brussels, I have represented numerous firms before the EC in, *inter alia*, competition cases under both Articles 101 and 102 of the Treaty on the Functioning of

the European Union (“TFEU”).¹ I am familiar with the competition laws of the European Union and the procedural rules of the EC and have spoken extensively and written numerous articles on EU competition law and procedures,² including, most recently, a detailed analysis of the lack of adversarial confrontation in the procedures of the EC.³ In that article I sought to demonstrate the ways in which the EC’s exercise of both prosecutorial and judicial functions, its control over the evidence admitted to the record in its investigatory proceedings, and the absence of procedures for adversarial confrontation conducted or supervised by an independent finder of fact negatively impact the reliability and quality of EC decisions enforcing Articles 101 and 102.

5. Since February 2005 I have been representing Intel and assisting its legal team in the proceedings before the EC in Case 37990 (the “AMD complaint”). I also assisted Intel in Case 39493 (the “Retail Investigation”).
6. In this Declaration I will address the following:
 - (a) a basic background description of the European Union (¶¶ 7-8);
 - (b) an outline of the structure and functions of the EC, and the EU courts in which disputes with the EC are adjudicated (the Court of Justice and the Court of First Instance⁴ (¶¶ 9-14);
 - (c) an explanation of the procedure and powers of the EC in relation to competition law investigations under Articles 101 and/or 102 including an overview of the non-adversarial (and non-adjudicatory) nature of the EC’s procedures (¶¶ 15-28);

¹ Prior to the adoption of the TFEU on December 1, 2009, Articles 101 and 102 were Articles 81 and 82 of the previous treaty. In light of the recentness of the change, many sources cited herein continue to refer to the relevant provisions as Articles 81 and 82.

² See bibliography attached as App. 1.

³ See James Venit, “*Human All Too Human: The Gathering and Assessment of Evidence and the Appropriate Standard of Proof and Judicial Review in Commission Enforcement Proceedings Applying Articles 81 and 82,*” to be published in *European Competition Law Annual 2009: Evaluation of evidence and its judicial review in competition cases*, <http://www.eui.eu/Documents/RSCAS/Research/Competition/2009/2009-COMPETITION-Venit.pdf>.

⁴ The TFEU changed the name of the Court of First Instance to the General Court. To avoid confusion, the General Court is referred to as CFI herein.

- (d) examples from the *Intel* case of why the EC's proceedings provide an inadequate basis for collecting and testing evidence and why, as a result, its decisions lack the robustness and reliability of decisions adopted by a court or neutral finder of fact at the end of an adversarial procedure (¶¶ 29-45); and
- (e) a description of the EU's policy of confidential treatment of information in competition cases and the consequent prohibition against the defendant's disclosure, outside proceedings applying Articles 101 or 102, of evidence obtained through access to the EC's file (¶¶ 46-52).

The European Union Legal Structure

- 7. Twenty-seven nations, called Member States, comprise the European Union. A core aspect of the European Union is its oversight over the economic arrangements affecting trade between the Member States such as competition/anti-trust, internal trade and the free movement of goods, services, persons and capital.
- 8. There are a number of institutions of the European Union, including the EC, the Court of Justice (the "ECJ") and the Court of First Instance (the "CFI"). The EU legal system including its court system exists independently of the domestic legal systems of each Member State, although EU law is effectively part of the domestic law of each Member State and EU competition law can be applied directly by the domestic courts of the Member States.

The Structure and Function of the EC

- 9. The EC's role comprises three main functions:
 - (a) First, the EC, is charged with making proposals for new legislation.
 - (b) Second, the EC acts as the guardian of the EU treaties to ensure that EU legislation is applied correctly by the Member States and that all citizens and participants in the single market can benefit from the level playing field that has been created.
 - (c) Third, the EC is the executive body of the Union responsible for implementing and managing policy.⁵
- 10. EC Decisions are taken by the 27 Commissioners, who are appointed by the Member States. Member States typically appoint senior politicians to the EC. However, once

⁵ See Paul Craig and Grainne De Burca, *EU Law, Text, Cases and Materials*, 4th ed. 2008, 43 *et seq.* for a more detailed description of the powers of the EC.

appointed, the Commissioners are required to act independently of the Member States. The EC has been described as a political body that exercises administrative functions.⁶

11. Articles 101 and 102 prohibit, respectively, agreements which have as their object or effect the prevention, restriction or distortion of competition (Art. 101) and the abuse of a dominant position (Art. 102), in each case insofar as the agreement or conduct affects trade between Member States. Article 105 TFEU allocates responsibility for the enforcement of Articles 101 and 102 to the EC. The various areas of responsibility of the EC are divided into Directorates General (or 'DGs'). Each of these DGs has the responsibility for specific policy areas, such as economic and monetary policy, trade, budget, environment, taxation, transport and energy, agriculture, etc. One of these DGs, the Competition Directorate General (commonly referred to as DG COMP), is charged with responsibility for, *inter alia*, the enforcement of Articles 101 and 102. DG COMP is empowered to investigate companies for breaches of Articles 101 and 102 and to order companies to end agreements or conduct that it finds to be in breach of these Articles, pursuant to a process discussed in paragraphs 15 to 28 below. It can also impose substantial fines on firms that infringe Articles 101 or 102.⁷
12. The EC's enforcement actions applying Articles 101 and 102 are subject to judicial review (if such a review is launched) under Article 263 TFEU. Such reviews are made to the CFI, which acts as the court of original jurisdiction for direct actions pursuant to

⁶ See Ian S. Forrester, *Due Process in EC Competition Cases: A Distinguished Institution with Flawed Procedures*, 34 E. L. Rev. 817, 822, 831 (2009) ("it cannot be justified that a political body staffed by political figures takes administrative decisions which impose penalties of criminal severity"); Karl Hofstetter, *EU Cartel Fining Laws and Policies in Urgent Need of Reform: A Rebuttal to Philip Lowe's Article, Cartels, Fines, and Due Process*, GCP: THE ANTITRUST CHRONICLE, at 3, November 2009 ("The Commission, a purely political body, acts as both prosecutor and judge"); OECD, *European Commission – Peer Review of Competition Law and Policy*, at 63 (2005) ("No other jurisdiction in the OECD assigns decision-making responsibility in competition enforcement to a body like the Commission").

⁷ The level of fines has increased dramatically since the adoption of new fining guidelines in 2006. See Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003, Official Journal C 210, 1.09.2006, p. 2. The fines paid go directly to the EU and now constitute a not insignificant source of revenue. See Commissioner Neelie Kroes, Remarks at Press Conference on Car Glass Cartel Case, <http://europa.eu/rapid/pressReleasesAction.do?reference=SPEECH/08/604&format=HTML&aged=0&language=EN&guiLanguage=en> (November 12, 2008). ("Finally, I would like to touch upon where all this money from fines goes. In a nutshell, it goes to the EU budget. Every euro paid in fines is one euro less that the Member States have to pay, and so ultimately taxpayers benefit").

Article 263 TFEU under EU law (Art. 256(1) TFEU). The CFI consists of 27 members, usually appointed from the senior judiciary of the Member States. Any legal person which is affected directly and individually by an EC decision that is subject to review, which in some circumstances can include certain third parties, may seek review by the CFI (Art. 263(4) TFEU).

13. The ECJ is the ultimate reviewing court in actions under EU law including matters of EU competition law. The ECJ consists of 27 judges, assisted by eight Advocates-General who are also members of the Court (Art. 252 TFEU).
14. As discussed more fully below, the EC itself does not function as an independent judicial agent. Rather, the EU Courts ensure this function by exercising their power of judicial review.

The Procedure and Powers of the EC in Relation to Competition Law Investigations under Articles 101 and 102

15. The principal legislative measures setting out the procedural rules for the implementation of Articles 101 and 102 are Regulation 1/2003⁸ and Regulation 773/2004⁹. Under these regulations (i) it is only the EC that has the power to gather information (through search and seizure in so-called 'dawn raids'), written interrogatories and requests for the production of documents, and voluntary witness statements; (ii) defendants are permitted only to respond to the EC's allegations against them but may not subpoena evidence, cross-examine EC witnesses or conduct discovery; (iii) the EC controls the defendant's access to the case file, which is further constrained by confidentiality concerns; and (iv) EC decisions are prepared by the same officials who conduct the investigation and are adopted by a political body, the 27 member College of Commissioners, there being no provision in Community law for a trial before a neutral, independent judge or finder of fact prior to the adoption of an EC decision.
16. The EC exercises exclusive control over the content of the record and, during the investigatory and decision-making processes, acts as both prosecutor and judge. Courts

⁸ Council Regulation (EC) No 1/2003 of December 16, 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, Official Journal L 1, 04.01.2003, p.1.

⁹ EC Regulation No 773/2004 of April 7, 2004 relating to the conduct of proceedings by the EC pursuant to Articles 81 and 82 of the EC Treaty, Official Journal L 123, 27.04.2004, p. 18.

and scholars have found that the EC's dual role, its exclusive control over the evidence, and the absence of adversarial procedures give rise to two potential problems.¹⁰

17. First, the consolidation of investigative, prosecutorial and adjudicative functions in a single entity and the lack of adversarial confrontation can have an adverse impact on the *quality* of evidence relied on in EC decisions.¹¹

¹⁰ The ECJ has recognized the lack of impartiality in the EC's proceedings: "[T]he actual status of those authorities is not in general such as to guarantee that they have the same degree of independence and impartiality as that which . . . courts are recognized as having." *ABNA, Ltd. v. Sec'y of State for Health and Food Stds. Agency*, Cases C-453/03 et al, 2005 ECR I-10423, ¶ 109. Similarly, the European Parliament has expressed concerns about the EC's role, stating that "[t]he European Commission could not be regarded as a 'tribunal', and its procedures are not in public. In addition, it is open to question whether it could be considered 'independent' for this purpose, because essentially the same individuals are responsible both for making the case against a company and later for deciding whether that case has been sufficiently proved." European Parliament position, 1st reading or single reading, OJ [2002] C 72/236, March 21, 2002. *See also* Michael Albers & Karen Williams, *Oral Hearings—Neither a Trial Nor a State of Play Meeting*, CPI ANTITRUST J., March 2010 ("Another aspect of this administrative procedure is the investigative, prosecutorial, and adjudicative powers of the Commission. It has discretion whether to launch an investigation, how to conduct it, *i.e.*, which investigative tools are to be applied, which evidence it uses, and whether a case is developed on the basis of established administrative practice and jurisprudence or new theories of law").

¹¹ *See, e.g.*, Donald Slater, Sébastien Thomas, and Denis Waelbroeck, "Competition Law Proceedings Before the European Commission and the Right to Fair Trial: No Need for Reform?," 5 ECJ 97, 129 (2009); Wouter P.J. Wils, "The Combination of the Investigative and Prosecutorial Function and the Adjudicative Function in EC Antitrust Enforcement: A Legal and Economic Analysis", 27 WORLD CCOMP. (L. & ECON. REV.) 201 (2004) http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1319251, 12. Subsequent citations are to the online PDF version of article. The recent *Stolt Nielsen* litigation in the United States provides an instructive example of how adversarial fact-finding may lead to very different conclusions than those arrived at in one-sided, inquisitorial fact finding. *See Stolt-Nielsen S.A. v United States (Stolt-Nielsen I)*, 352 F. Supp. 2d 553 (E.D. Pa. 2005). For legal commentaries on the *Stolt Nielsen* litigation *see, e.g.*, J. Walden & K. Dawes, *The Curious Case of Stolt Nielsen S.A. v United States*, Antitrust Source, March 2005, <http://www.abanet.org/antitrust/at-source/05/03/02-mar05-walddawe323.pdf>; D. C. Klaviter & J. C. Everett, *The Legacy of Stolt-Nielsen: A New Approach to The Corporate Leniency Program?*, Antitrust Source, December 2006, <http://www.abanet.org/antitrust/at-source/06/12/Dec06-Klawiter12=19f.pdf>; and interview by D. Vascott, *Scott Hammond on Stolt Nielsen*, <http://www.usdoj.gov/atr/public/speeches/234840.htm>.

18. Second, the inquisitorial nature of the EC's proceedings coupled with the absence of neutral, external assessment prior to the adoption of decisions heightens the risk that the enforcement agency may fall prey to confirmation or prosecutorial bias.¹²
19. EU Courts have annulled, in part or in whole, a large number of EC decisions based on procedural or evidentiary concerns.¹³ Two of the more notable examples are *Italian Flat Glass*, a cartel case in which the CFI found that the EC had suppressed exculpatory evidence,¹⁴ and *Airtours*, in which the CFI found that the EC had seriously misread the

¹² Wils, *supra* n. 11, 16-18 (acknowledging that EC decisions are potentially subject to three types of bias: (i) "confirmation bias, *i.e.*, a tendency to search for evidence which confirms rather than challenges one's beliefs, and to accept more readily the conclusion to a syllogism if it corresponds to one's beliefs than if it does not, irrespective of its actual logical validity"; (ii) hindsight bias, which is "the tendency for people with the benefit of hindsight, to falsely believe that they could have predicted the outcome of an event"; and (iii) "[t]he desire to show a high level of enforcement activity."). Mr. Wils also cited evidence that the great majority of EC decisions imposing large fines that had been reviewed in the European courts at the time were overturned in whole or substantial part. *Id.* at 14-15. Although Mr. Wils nevertheless claims there is not "convincing empirical evidence" of bias, *id.* at 25, he has acknowledged that "theoretical reasoning informed by insights from economics and psychology" identifies the sources of prosecutorial bias discussed in his article, and that "it cannot be excluded that even the most ethical [EC] professionals might not be immune from the first and second of the three possible sources of bias." *Id.* Statements made by the Competition Commissioner, which called into question her objectivity and impartiality by openly acknowledging her hostility toward Intel, suggest that biases may also be of a personal nature. See Parmy Olson & Lionel Laurent, *Intel Balks at \$1.5B E.U. Fine*, FORBES, May 13, 2009, <http://www.forbes.com/2009/05/13/intel-europe-fine-markets-equities-antitrust.html>, ("Neelie Kroes joked Wednesday that Intel would now have to change its latest global campaign, 'sponsors of tomorrow,' to 'the sponsors of the European taxpayer.'").

¹³ See, e.g., Frank Montag, *The Case for a Radical Reform of the Infringement Procedure under Regulation 17*, [1996] ECLR, 428; Frank Montag, *The Case for a Reform of Regulation 17/62: Problems and Possible Solutions from a Practitioner's Point of View*, 22 FORDHAM INT'L L.J. 819 (1999); Veljanovski, *European Cartel Prosecutions and Fines, 1998-2009 - A Statistical Analysis of Fines Under the 1998 Penalty Guidelines*, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1016014.

¹⁴ See *Società Italiana Vetro SpA, Fabbrica Pisana SpA and PPG Vernante Pennitalia SpA v European Commission*, Joined cases T-68/89, T-77/89 and T-78/89, 1992 ECR II-1403. *Italian Flat Glass* concerned an alleged cartel affecting automotive glass in a three-firm oligopoly. The EC had found that three Italian manufactures operated a cartel in violation of both Articles 101 and 102 TFEU, citing direct evidence of agreements and competitor

[Footnote continued on next page]

FTC Docket No. 9341

evidence and, *inter alia*, had misrepresented the conclusions of a one-page extract from a longer report which it had not read.¹⁵

20. The EC's procedures have been frequently criticized by leading practitioners, scholars, and even EC officials on the grounds that they deprive defendants of due process and/or result in questionable decisions whose factual findings have not been subjected to sufficient testing in an impartial, adversarial process.¹⁶ The European Parliament has

[Footnote continued from previous page]

contacts. The CFI found that the EC had intentionally altered a file document by deleting (apparently with Tipp-ex) a passage from the documents that was exculpatory of defendant PPG. In its judgment the CFI concluded that: "It emerges from the inquiry carried out by the Court that when the EC prepared the documentary evidence with a view to communication to the undertakings, certain relevant passages were deliberately deleted or omitted, even though they did not relate to business secrets. In particular, nine words were deleted without trace in a handwritten note from [an undertaking]" (*id.* at ¶ 91); and that "[i]t is self-evident and indisputable that the tenor of the note is changed completely by the omission of those nine words. With those nine words the note could be taken as clear evidence of a competitive struggle between [competitors]" (*id.* at ¶ 93). As a result, the Court annulled the EC's decision in its entirety insofar as it affected PPG.

¹⁵ See *Airtours plc v European Commission*, Case T-342/99, 2002 ECR II-2585. In *Airtours*, the CFI annulled the EC's decision prohibiting Airtours' takeover of the travel company First Choice on the grounds that it would have led to the creation of a collective dominant position on the UK market for short-haul package holidays. The CFI found that the EC had committed a series of errors of assessment, some of which arose directly from a superficial reading of the evidentiary materials received during the merger review procedure. For example, (i) the EC relied for a key finding (annual growth rate in a market) on a single-page extract from a study which the EC had never seen the full version of and did not know the date of preparation; (ii) even regarding this single-page extract, the EC misrepresented its plain language in its decision; (iii) the decision was in fact internally inconsistent with certain data in the single-page extract; and (iv) the EC ignored key contradictory data from reliable sources regarding market growth for the two years preceding its decision (see *Airtours*, ¶¶ 125, et seq.).

¹⁶ See, *supra* n.11 and cases and articles cited therein; Venit, *supra* n.3; Wils, *supra* n.11, at 3 ("The Commission's final decision is drafted by officials from DG Competition, normally the same officials who conducted the investigation and drafted the statement of objections"); International Chamber of Commerce, *Due Process in EU Antitrust Proceedings: Comment on the European Commission's Draft Best Practices in Antitrust Proceedings and the Hearing Officer's Guidance Paper*, Doc. No. 225/667, at 1, March 8, 2010 ("ICC believes that the European Commission's procedures for enforcing antitrust law and the General Court's practices in reviewing antitrust decisions are currently inadequate to guarantee procedural fairness, and possibly may reduce the prestige of the institutions as antitrust

[Footnote continued on next page]

FTC Docket No. 9341

stated that the EC “could not be regarded as a ‘tribunal’, and its procedures are not in public. In addition, it is open to question whether it could be considered ‘independent’ for this purpose, because essentially the same individuals are responsible both for making the case against a company and later for deciding whether that case has been sufficiently proved.”¹⁷ Furthermore, Judge Jaeger, the President of the CFI, has suggested that following entry into force of the Lisbon Treaty on December 1, 2009, which applies the European Charter of Fundamental Rights (“ECFR”) to the EU, many of the current EC

[Footnote continued from previous page]

enforcers”); Hofstetter, *supra* n.6, at 2 (The DG COMP “pays only scant attention to the concept of due process. Important arguments against the insufficient legal basis under which the current EU cartel fining regime operates are being ignored or sidestepped”); Slater, et al., *supra* n.11 (“The current institutional system before the Commission ... is also problematic because the accumulation of investigative, prosecutorial and adjudicative powers by the Commission during the whole proceedings in antitrust cases leads naturally to what is called ‘prosecutorial bias’, i.e. a case handler will naturally tend to have a bias in favour of finding a violation once proceedings have been commenced”); Jürgen Schwarze, Rainer Bechtold & Wolfgang Bosch, *Deficiencies in European Community Competition Law: Critical analysis of the current practice and proposals for change*, September, 2008, 54, http://ec.europa.eu/competition/consultations/2008_regulation_1_2003/gleiss_lutz_en.pdf, (“In addition, there are deficiencies with regard to evidence. The undertakings are not granted the right to interrogate any ‘witnesses’, i.e. employees of the other undertakings under investigation, on whose declaration the Commission bases its decision”).

¹⁷ European Parliament position, 1st reading or single reading, OJ [2002] C 72/236, March 21, 2002. See Amendment 43 proposed by the Parliament. See also Organization for Economic Co-operation and Development, *European Commission - Peer Review of Competition Law and Policy* 40 (2005) (“[t]he draft decision is prepared by the DG Comp case-handler (or team of case-handlers) and reviewed by DG Comp management”). As the OECD noted, “[t]here is no initial adjudicator that is fully independent of the investigative function.” *Id.* at 64. In *Intel Corp. v. Advanced Micro Devices, Inc.*, 542 U.S. 241 (2004), the Court held that the EC was a “tribunal” within the meaning of 28 U.S.C. § 1782, a statute permitting certain discovery in aid of foreign proceedings. However, the Court made clear that the term “tribunal” for purposes of that statute broadly included not merely judicial and quasi-judicial bodies but also “investigating magistrates, [and] administrative . . . tribunals.” *Id.* at 258 (citation omitted). And the EC filed an *amicus curiae* brief in that case that confirmed the lack of separation between its investigative and decision-making functions. The EC’s brief stated: “[W]hen the Commission acts on DG Competition’s final recommendation . . . the investigative function blur[s] into decisionmaking.” *Id.* (quoting European Commission *Amicus Curiae* Br. 9).

procedures will have to be modified to comply with the due process rights guaranteed under the ECFR.¹⁸

21. In the discussion that follows I provide a more detailed description of the EC's procedures.
22. The EC's proceedings in a competition case pursuant to Regulation 1/2003 (such as the *Intel* case) may, in essence, be divided into three distinct phases. These are: (i) the investigatory phase; (ii) the defence/contentious phase; and (iii) the decision-making phase. A case team, composed of civil servants in DG COMP, is entrusted with the conduct of the investigatory and contentious phases described below and with the preparation and drafting of the EC's proposed decision. The same case team will also advocate the decision's adoption during the internal, non-public EC consultations that take place during the decision-making process.
 - (a) **Investigatory Phase.** During this phase, the EC uses its investigatory powers under Articles 17-21 of Regulation 1/2003 to gather information and documents by conducting on-site inspections and/or requesting the provision of documents and information. Only the EC exercises these powers and there is no provision in the investigatory phase for a bi- or multi-lateral discovery process. Similarly, as noted above, the EC's investigation does not involve an adversarial discovery process conducted between opposing litigants. Rather, subject to judicial review concerning issues relating to legal privilege, confidentiality and the right against self-incrimination, the EC has exclusive control over the collection and admission of evidence into the proceedings and there is no provision, at the investigatory stage, for challenging the reliability or credibility of the evidence gathered, nor any means by which the target of the investigation can compel the submission of evidence.¹⁹ Importantly, the Commission is not prevented from having *ex parte*

¹⁸ See MLex, *EU Court's Jaeger predicts tussle over fundamental rights, leniency policy under new EU Treaty*, March 5, 2010. While Judge Jaeger focused on a potential rights conflict between a leniency applicant and a claimant in private damages litigation requesting access to documents in respect of the protection of confidentiality of voluntary submissions to the EC by the leniency applicant, he made clear that the effect of the ECFR has broader implications and that "we are at a crossroads", in that there is a "window of opportunity to revisit old concepts under the new statutes of the charter. The new statutes of the charter truly demand a change of perspective", and it is likely that a "higher level of protection continues to be adopted in many areas." *Id.*

¹⁹ Venit, *supra* n.3.

communications with the complainant or other third parties.²⁰ In a recent response to the European Ombudsman's decision of July 14, 2009 (*see infra* at ¶ 39), the Commission defended its practice of

Under EU competition law, the Commission is not required to record on the file the fact that *ex parte* communications with complainants or third parties have even taken place (let alone their content) unless the Commission takes statements in a 'formal interview' pursuant to Article 19 of Regulation 1/2003. However, as the Commission itself has recently confirmed in its Best Practice Guidelines, the Commission has full discretion as to when to propose the formal interview procedure; and even then the interview will be recorded only "when it is specifically agreed between the interviewee and DG Competition."²² To the extent that the EC wishes to have a company comment on another company's assertions, it may, at its discretion, do so either by asking for answers to specific questions or by providing redacted, non-confidential versions of information provided to the EC. However, the EC is under no obligation to do so, and it is for the EC alone to decide what evidence and allegations to include in any Statement of Objections (the "SO"), a document containing the EC's draft allegations, it may eventually send to a defendant.

- (b) DG COMP's inquiries and investigations during the investigatory phase are conducted by case officers, who are career civil servants entrusted with conducting inquiries and investigations relating to the enforcement of Articles 101 and 102 TFEU. The same case officers also draft the EC's decision, including any remedies, and serve as advocates for the adoption of the decision during the consultative process with other members of DG COMP, the Legal Service and other Commissioners. Indeed, the EC has rejected proposals to use independent administrative law judges, asserting that "[t]he introduction of such an authority which, moreover, does not seem to have proved fully satisfactory, at any rate in the competition field, in the United States, does not seem compatible with the

²⁰ In fact, the Commission's investigation of Intel was instigated by AMD's complaints submitted to the Commission in October 2000 and November 2003. *See* EC decision, ¶¶ 5 *et seq.*

²¹ *See* MLex, *EC defends choice of antitrust interview procedures in Intel case*, March 19, 2010.

²² *See* DG Competition Best Practices on the conduct of proceedings concerning Articles 101 and 102 TFEU, January 6, 2010, at ¶ 45.

institutional scheme of the Treaty.”²³ As noted above, this fusion of the investigatory/prosecutorial and adjudicative functions has been criticized by academic and professional commentators over the years.²⁴

- (c) **Defence/Contentious Phase.** The investigatory phase concludes either with a determination not to proceed further, in which case the file is closed, or the issuance of an SO which is addressed to the defendant firm(s). Issuance of the SO initiates the defence (or contentious) phase of the EC’s proceedings. During this phase, the defendant(s) (otherwise known as the addressee(s) of the SO) are given access to the case file and an opportunity to respond in writing and orally to the allegations contained in the SO. However, the defendant is not permitted to compel the introduction of new evidence and the EC cannot introduce new evidence once the SO has been issued (unless it issues a new SO or a Letter of Facts).²⁵ The defence/contentious phase terminates with the oral hearing. The oral hearing is not a full evidentiary hearing, and is not subject to any rules of evidence. It is presided over by a Hearing Officer whose role, pursuant to the Hearing Officer’s mandate,²⁶ is limited to the efficient conduct of the hearing and ensuring procedural fairness. The Hearing Officer, who is an official of DG COMP with a direct reporting line to the Commissioner of Competition, is not empowered to introduce or reject evidence, make findings of fact, rule on substantive issues, or cross-examine witnesses, and the report on the hearing and the conduct of the investigation that the Hearing Officer is required to issue is limited to procedural issues.²⁷ Similarly, the defendant’s role at the oral hearing is limited to the presentation of its case. The defendant has no power to compel the production of evidence, to cross-examine the witnesses relied on by DG COMP staff, or to question DG COMP staff. In essence, the oral hearing is limited to the respective presentations of the case team of DG COMP and the

²³ 11th Report on Competition Policy ¶ 27 (1981).

²⁴ *See supra* at nn. 3, 6 and 11.

²⁵ If the new evidence results in a substantial alteration of the EC’s objections, the issuance of a new or supplementary SO will be required. If the new evidence merely corroborates the initial objections it may instead be set forth in a Letter of Facts.

²⁶ European Commission Decision 2001/462 of May 23, 2001 on the terms of reference of hearing officers in certain competition proceedings, Official Journal L 162, 19.06.2001, at 21.

²⁷ In addition to the Hearing Officer’s mandate, the function of the Hearing Officer has recently been summarized in Best Practice Guidelines issued on 6 January 2010, *see* Guidance on procedures of the Hearing Officers in proceedings relating to Articles 101 and 102 TFEU.

defendant.²⁸ The oral hearing is attended by Member State representatives who sit on the Advisory Committee. The oral hearing is not normally attended by the Commissioner for Competition nor by any of the other 26 Commissioners who will eventually adopt the EC's decision.²⁹

- (d) The OECD has described the decision-making process in the absence of an oral hearing before a final decision-maker as follows:

[W]hen the Commission decides a matter, it has typically not heard directly the case against the proposed decision. No Commissioner, including even the Competition Commissioner, will have attended the hearing. All depend on briefings from staff, and there is no *ex parte* rule or other control on contacts between investigating staff and the Commissioners who decide the matter. There is no initial adjudicator that is fully independent of the investigative function.³⁰

²⁸ See Venit, *supra* n.3, at 34: "While the oral hearing represents something of a 'quasi-adversarial' event . . . it falls far short of the type of adversarial confrontation that would occur in a trial or even a thorough administrative law hearing since the vast bulk of the hearing is taken up with uninterrupted 'set-piece' presentations that are not subject to cross-examination or, given time limitations, meaningful rebuttal"; see also Schwarze, et al., *supra* n.16, at 53 ("At no point during this long procedure (the written procedure and the hearing) are the undertakings concerned allowed to interrogate representatives of the other undertakings under investigation in order to challenge their respective declarations and testimonies"); Forrester, *supra* n.6 at 833; Albers & Williams, *supra* n.10 ("Defendants have no right to request the presence of a particular party, company, or even individual as witness or experts. Neither does the Hearing Officer dispose of the power to summon them or impose penalties, if they do not accept their invitation . . . Similarly, potential infringers cannot ask for the Commissioner responsible for competition, certain Commission officials, or national competition authorities to be present when they deliver their views or present their evidence at the hearing").

²⁹ See, e.g., Slater, et al., *supra* n.11, at 134 ("A proper hearing is not only necessary to ensure greater acceptance of the decision, but also allows opposing positions to be directly confronted and challenged, including the possibility for cross-examination and interactive exchanges. Obviously, this requires the presence at oral proceedings of the persons who are ultimately deciding the case").

³⁰ See OECD, *supra* n.6, at 64; see also Schwarze, et al., *supra* n.16, at 54 ("The description of the Commission's procedure . . . illustrates that the final decision . . . is made by up to 27 officials, i.e. the Commissioners, who – in most cases – never participated in the investigation, read the files or listened to the oral presentations of the undertakings concerned . . . [T]he decision is based exclusively on reports listing other people's impressions and

[Footnote continued on next page]
FTC Docket No. 9341

- (e) Another commentator concluded, “Many addressees complain that the entire hearing process, and not just the oral hearing, is a dialogue of the deaf. That reality is most stark in an oral hearing where the decision-makers are not present.”³¹
- (f) **Decision-Making Phase.** Following the oral hearing, the EC enters the decision-making phase during which the staff of DG COMP prepare the draft decision and advocate its adoption in consultation with the hierarchy of DG COMP, the Commissioner responsible for Competition, the EC’s Legal Service, other interested EC services, the other 26 Commissioners and the Member States represented through the Advisory Committee.³² This phase of the EC’s procedure is governed by Articles 14 and 30 of Regulation 1/2003 and the EC’s non-public internal regulations. Neither the addressee of the SO, *i.e.* the defendant, nor third parties have any statutory rights to make submissions during this phase of the proceedings and none of these proceedings is open to the public or recorded for public dissemination. At the end of this phase, the EC will either adopt a decision addressed to the defendant or formally decide to close the file and/or reject a complaint if the investigation was opened in response to a formal

[Footnote continued from previous page]

opinions. At no time do the undertakings to be fined have the chance to explain their point of view in person to the officials who will make the decision at the end of the day”); Albers & Williams, *supra* n.10 (oral hearings “are not a trial because their purpose is not to produce or systematically test evidence and counter-evidence. Moreover, the presiding Hearing Officer is not a judge who makes factual and legal determinations at the conclusion of a hearing . . . EU law does not sanction incorrect, incomplete, or misleading answers given at hearings”); Ulrich Soltész, *What (Not) to Expect From the Oral Hearing*, CPI ANTITRUST J., March 2010 (1)3 (“Under the current practice, oral hearings seem to be viewed by the Commission more as a mere formality (and possibly also as a burden) rather than an opportunity to elucidate the legal and factual background of the case. This is deplorable. It goes without saying that these officials are anything but impartial. Quite understandably, any antitrust official will develop a ‘hunting instinct’ when working on a file over a long period of time. What makes things worse is the fact that none of the actual decision makers, *i.e.*, the 27 commissioners, actually attend the oral hearings”).

³¹ Stephen Kinsella, *Is it a Hearing if Nobody is Listening*, CPI ANTITRUST J., March 2010 (1)3; *see also* James Modrall & Ruchit Patel, *Oral hearings and the Best Practices Guidelines*, CPI ANTITRUST J. 4, March 2010 (1)3 (“by the time the Oral Hearing takes place, the Case Team has adopted a position and sees its role in the Oral Hearing as defending its case from attack by the addressees”).

³² Within the last 30 years, the Advisory Committee has not once voted against the adoption of an EC decision. *See* Forrester, *supra* n.6, at 834.

complaint. The defendant has the right to appeal the EC's decision to the CFI within two months.

23. The EU Courts and the EC have both made it clear that the EU procedures are not adjudicative in nature.
24. In particular, the EC has stated that its "procedure relating to restrictive practices and abuse of a dominant position is administrative and not judicial; it must not be turned into a trial." (11th Report on Competition Policy (1981) at ¶ 27).
25. The EC neither adjudicates disputes between litigants nor acts as a neutral body for resolving disputes between a defendant and the EC's case officers. Rather, as a member of the EC Legal Service has acknowledged: "The Commission's final decision is drafted by officials from DG Competition, normally the same officials who conducted the investigation and drafted the statement of objections."³³
26. As noted above, the EC has rejected suggestions that autonomous administrative law judges should be appointed to undertake the decision-making role of DG COMP:

Mention has been made in some interested quarters of the introduction of administrative law judges who are autonomous and are appointed in particular to the Federal Trade Commission (FTC) and who in the United States hold, like the Commission, powers of investigation and decision in the field of competition. These administrative law judges are themselves empowered to carry out investigations and [p]ut forward decisions to the FTC. The introduction of such an authority which, moreover, does not seem to have proved fully satisfactory, at any rate in the competition field, in the United States, does not seem compatible with the institutional scheme of the Treaty. In addition, it could well make procedures in individual cases even more complicated and prolonged. (11th Report on Competition Policy (1981) at ¶ 27).

27. The ECJ has emphasized that the investigations of the EC are not adversarial, holding in relation to an investigation under Articles 101 and 102 TFEU:

Such an investigation . . . does not constitute adversary proceedings between the companies concerned; it is a procedure commenced by the EC upon its own initiative or upon application, in fulfillment of its duty to ensure that the rules on competition are observed." *BAT and Reynolds v European Commission*, Joined cases 142 and 156/84, [1987] ECR 4487, at ¶ 19.

28. By way of summary: the EC's procedures may be characterized as follows:

³³ Wils, *supra* n.11, at 3.

- (a) at all stages the EC retains the initiative in gathering facts and documents pursuant to its extensive powers to conduct on-site inspections and compel the submission of documents and responses to written interrogatories, and, subject to eventual control by the EU Courts, it has the discretion in deciding whether to take its inquiries further;
- (b) there is no process akin to discovery and the defendant cannot compel the production of documents, nor can it depose or cross examine witnesses. Where a formal investigation is launched, the defendant has a right of access to the EC's file but no right to view the facts and documents in the possession of a complainant or any other third party, no matter how relevant. Furthermore, in many instances, the information provided by the complainant or third parties to the EC may be withheld from the respondent as confidential under EU law. Neither the defendant nor any other person may seek documents or other information from another person;
- (c) the DG COMP case officers may ask questions of the participants at the oral hearing, and DG COMP may seek to verify information provided by a company by asking questions to other companies that are present at the hearing, or subsequently via written questions, but DG COMP is not required to do so. However, the process does not provide for taking evidence or testimony under oath at any stage of the process, including during the oral hearing and neither the defendant nor the Hearing Officer have the power to cross-examine EC witnesses or EC officials at the oral hearing, the Hearing Officer's powers being limited to procedural as opposed to substantive issues;
- (d) there are no rules of pleading; submissions are drafted in such form as the companies choose. There is no requirement that the EC share submissions from one person with another person, including the defendant, other than in the limited context of the process of access to the EC's file described above. But the EC cannot rely on inculpatory evidence that has not been made available to the defendant;
- (e) the EC does not have any rules of evidence applicable to its investigations, including oral hearings;
- (f) the EC does not make adjudications of the rights of litigants; it investigates and takes enforcement decisions in relation to the defendant;
- (g) there is no separation of functions within the EC between investigator, prosecutor and ultimate decision maker; the EC does not employ judges or any other independent person to decide disputes between its investigating case officers and defendants; and the investigating case officers in fact prepare and, during the internal consultation phase, actively advocate the adoption of the EC's decision; and

- (h) since a defendant is not in a position to challenge the EC's gathering of evidence and thus the determination of the relevant facts of the case prior to judicial review before the CFI, the EC's decisions are prepared with full knowledge that such judicial review is likely as it will be the first opportunity for an objective (albeit sometimes limited) review.³⁴

EC's Treatment of Exculpatory Evidence in the *Intel* Case

29. As counsel to Intel, I played an active role in the EC's *Intel* investigation. During that investigation, there were numerous occasions in which the EC exercised its exclusive control over the information to be admitted into the record in a manner that, in my view, excluded relevant and reliable exculpatory evidence. In the discussion that follows, I focus on three incidents—two in which the EC exercised its control over the evidence admitted into the record to exclude evidence favorable to Intel and one in which it simply ignored evidence that Intel had provided to it.³⁵

The EC's failure to seek and put on record additional AMD documents which were likely to be exculpatory of Intel

30.

31.

³⁴ See also OECD, *supra* n.6, at 64: "It is ... not surprising that courts are moving into what looks like a first-instance role".

³⁵ The EC's failure to consider evidence put forward by the defendant has been criticized in previous cases. See, e.g., Cases T-168/01, *GlaxoSmithKline Services v European Commission* [2006] ECR, II-2969, and C-501/06 P, *GlaxoSmithKline Services and others v European Commission and others*, not yet officially published, in which both the CFI and, on appeal, the ECJ criticized the EC for not considering evidence submitted by the defendant in a request for exemption pursuant to Article 101(3) TFEU, which both courts characterized as 'reliable, relevant and credible' (see Case T-168-01, at ¶ 263, and Case C-501/06, at ¶ 81).

32.

33. Against this background,

34. The EC, however, refused to obtain the remaining 80 documents.³⁶

35. At the same time, the final EC decision relies upon approximately 800 references to *ex parte*, and even unsworn submissions and documents from third-parties which were not subject to cross-examination by Intel.³⁷ The EC decision also cites

³⁶ Although the AMD Delaware documents are probative of certain issues in the SO and SSO, they by no means represent a complete set of relevant and exculpatory documents that are likely to exist in AMD's files. Because of the Delaware Protective Order, with the exception of the documents brought into the case file from the Delaware proceedings, Intel was not in the position to use any of the AMD documents from the Delaware litigation in the proceedings before the EC.

³⁷ See, e.g., Decision nn.197, 808, 862-863, 865, 962-66, 968-70, 1015-1016; see also nn. 119, 126, 135, 146, 167-70, 174-75, 183, 190-91, 194, 215-17, 221-23, 252-57, 259-75, 381-82, 385-94, 398-408, 423-32, 509-17, 560-64, 566-73, 602-08, 647-63, 673-91, 712-16, 718-21, 812-13, 816-21, 824-26, 860, 921-23, 930, 933, 935, 957-58, 967-68, 983-85, 990, 992,

[Footnote continued on next page]

FTC Docket No. 9341

36. The example demonstrates the way in which the EC's exclusive control over the production of documents can be used to limit the record and exclude potentially exculpatory evidence in competition cases.

The suppression of exculpatory evidence provided by an OEM witness to the EC

37. On August 23, 2006, the EC interviewed
During the period covered by the Decision,

As is evidenced by

38. During the EC's procedure,

Intel filed a complaint with the European Ombudsman. (Although the Ombudsman does not have the power to affirm or overturn an EC decision, he is empowered to comment on whether the Commission has adhered to the rules of good administration.)

- 39.

[Footnote continued from previous page]

1014, 1017, 1072-82, 1085-87, 1098-1103, 1121-24, 1135-43, 1173-76, 1178, 1180-81, 1196-97, 1200, 1202, 1253-56, 1313, 1317-19, 1321-33, 1335, 1497-1500, 1534, 1536, 1541-45, 1598-1600, 1605, 1620-23, 1754, 1759-60, 1810-14, 1964-68, 1970-71, 2019-21, 2026-27.

- ³⁸ *Id.* at ¶¶ 161 n.184; *see also* nn. 82-83, 85, 87-88, 90, 92-93, 95, 120, 122-23, 127-28, 130, 141-43, 184, 505, 524, 526, 532, 643, 664, 668-69, 711, 722, 743, 746, 1118-19, 1129-33, 1165-68, 1288-89, 1291, 1669-71, 1715-16, 1718, 1722-23, 1817, 1835, 1976, 2045-47.

- ³⁹ Decision of the European Ombudsman Closing His Inquiry into Complaint 1935/2008/FOR Against the European Commission ("Ombudsman Decision"), ¶ 134 (July 14, 2009),

[Footnote continued on next page]

FTC Docket No. 9341

40. It should be noted that during the proceedings before the European Ombudsman,

The EC's rejection of Delaware Deposition Material submitted by Intel

41.

42. For example,

[Footnote continued from previous page]

<http://www.ombudsman.europa.eu/cases/decision.faces/en/4164/html.bookmark>. The Ombudsman has no power to overturn or affirm a Commission decision. *See* Articles 6 - 8 European Ombudsman Implementing Provisions limiting the available remedies in Ombudsman proceedings to (i) friendly solutions; (ii) critical remarks (the remedy used in the Ombudsman decision of July 14, 2009 in Intel); and (iii) reports and recommendations.

⁴⁰ The EC has recently defended its treatment of evidence relating to the interview with

MLex, *supra* n. 21.

See

43. In the Decision,

44.

45. The examples from the Intel case I have just described demonstrate how the EC's control of the evidence and the lack of an adversarial procedure presided over by an independent finder of facts can lead to a one-sided or even biased presentation of the record. The risk that DG COMP staff may fall prey to prosecutorial or confirmation bias has already been discussed.⁴¹

Intel is Not Permitted to Disclose a Confidential Version of its Appeal Brief

46. The protection of business secrets and other confidential information is of paramount importance in EU law.

47. For example, Article 339 TFEU establishes that:

The members of the institutions of the Community, the members of committees, and the officials and other servants of the Community shall be required, even after their duties have ceased, not to disclose information of the kind covered by the obligation of professional secrecy, in particular information about undertakings, their business relations or their cost components.

⁴¹ See, e.g, Wils, *supra* n.11, at 16-18; Slater, et al, *supra* n.11, at 33 *et seq.*

48. The general obligation of professional secrecy as stipulated in Article 339 TFEU has been implemented in secondary legislation relating to the protection of business secrets and confidential information, including

(a) Article 30 of Regulation 1/2003 which reads:

(1) The Commission shall publish the decisions, which it takes pursuant to Articles 7 to 10, 23 and 24.

(2) The publication shall state the names of the parties and the main content of the decision, including any penalties imposed. It shall have regard to the legitimate interest of undertakings in the protection of their business secrets.

(b) Article 16(1) of Regulation 773/2004 which reads:

Information, including documents, shall not be communicated or made accessible by the Commission in so far as it contains business secrets or other confidential information of any person.

49. The rules on confidential treatment of business secrets and other confidential information are supplemented by rules prohibiting, *inter alia*, the disclosure of evidence obtained by a defendant through access to the Commission's case file in any proceedings other than for the purpose of applying Article 101 or 102, including:

(a) Article 15(4) of Regulation 773/2004 which stipulates:

Documents obtained through access to the file pursuant to this Article shall only be used for the purposes of judicial or administrative proceedings for the application of Articles 81 and 82 of the Treaty.

(b) Paragraph 48 of the Commission's Notice on Access to the File, which reads:

Access to the file in accordance with this notice is granted on the condition that the information thereby obtained may only be used for the purposes of judicial or administrative proceedings for the application of the Community competition rules at issue in the related administrative proceedings [citing to Article 15(4) of Regulation 773/2004]. Should the information be used for a different purpose, at any point in time, with the involvement of an outside counsel, the Commission may report the incident to the bar of that counsel, with a view to disciplinary action.

50. The EU rules limiting the use of the information obtained through access to the Commission's case file have recently been clarified in the Commission's Report on the Functioning of Regulation 1/2003. Paragraphs 295 and 296 of the Report read:

295. Article 15(4) of Regulation 773/2004 provides that documents obtained through access to the file shall only be used for the purposes of judicial or

FTC Docket No. 9341

administrative proceedings for the application of Articles 81 and 82 EC. Accordingly, they shall not be disclosed for any other purpose.

296. The Commission's statement of objections and the full confidential version of the decision are documents prepared specifically for the antitrust proceedings and contain confidential information received through investigative measures. Therefore, they and the information contained therein shall also be used only for the purpose of proceedings concerning the application of Articles 81 and 82 EC. [Footnotes omitted]

51. Thus, Article 15(4) of Regulation 773/2004 and Paragraph 48 of the EC's Notice on Access to the File explicitly prohibit the disclosure of information obtained by Intel through access to the EC's file for a purpose different than the application of Article 101 or 102 in judicial or administrative proceedings in the EU. The significance of these use restrictions is reinforced by paragraph 48 of the EC's Notice on Access to the File pursuant to which the EC may report any prohibited disclosure to the bar of the counsel assisting in the disclosure, with a view to disciplinary action.
52. These rules have operated to the prejudice of Intel in the following manner.
 - (a) Intel has submitted to this Court a redacted copy of its appeal brief to the CFI which addresses the evidence set out in the Decision and, in particular, discusses the evidence that the decision disregards. Intel was required to redact its own appeal brief because it is not permitted to cite the record compiled by the EC unless the evidence in question is independently available to Intel.
 - (b) EU rules bar Intel from using any of the third-party information in the EC files, except to the extent that Intel may have been able to obtain that information separately or obtain permission from the source to disclose it outside the EU proceedings.
 - (c) Although the EC has provided its full, un-redacted decision to the FTC, its rules prohibit Intel from even discussing the evidence in the EC's record that contradicts the Decision (including that cited in Intel's appeal brief), unless Intel had independent access to this evidence. If Intel were to produce the un-redacted confidential version of its appeal brief, it would risk violating its obligations under Article 15(4) of Regulation 773/2004 and paragraph 48 of the Notice on Access to the File.
 - (d) Intel was not permitted to see certain portions of submissions by third parties when those parties demanded confidentiality.

**The Substantive Standards of EU Competition Law Differ Substantially from U.S.
Antitrust Laws**

53. While I am not an expert in US antitrust law, there are at least two aspects of substantive EU competition law relevant to the EC's case against Intel that differ from

what I understand is the position under US law. First, the EC finds market power to exist at lower market share thresholds than in the US, and the EC's analysis of dominance is, in my view, mechanical and does not take into account all relevant market realities.⁴² Second, the EC takes the position that it need not consider the effects of potentially anticompetitive behavior.⁴³ Indeed, the EC acknowledges that even the “as efficient competitor test” is designed only to identify potential, but not actual, anti-competitive effects and is not intended to have any predictive value.⁴⁴

DG COMP and Legal Service Staff Involved in Intel Case 39.990

54. At the request of Intel's US counsel, the following lists staff from DG COMP and the EC's legal service involved in the *Intel* case (Case 39.990) from January 1, 2006:

⁴² Under the EC's view, a firm may be considered dominant—the equivalent of possessing monopoly power under U.S. law—when it has a market share of 40%, and dominance may be found in “specific cases below that threshold.” *Guidance on the Commission's Enforcement Priorities in Applying Article 82 of the EC Treaty to Abusive Exclusionary Conduct by Dominant Undertakings* ¶14 (2009).

⁴³ As an EC official admitted recently, “the [EC] found in *Intel* that the existence of fidelity rebates is in principle sufficient to establish an infringement of art. 82 EC without a need to examine the effects of the behaviour. Hence, the [EC] pursued a form-based approach according to which this type of rebate is as a rule in breach of art. 82.” Manuel Kellerbauer, *The Commission's New Enforcement Priorities in Applying Article 82 EC to Dominant Companies' Exclusionary Conduct: A Shift Towards a More Economic Approach?*, [2010] EUR. COMP. L. REV. 175, 178; see also *id.* (asserting that “fidelity rebates” are illegal “irrespective of the effects that the discount system can be shown to have in the individual case”); EC Decision ¶¶ 922-923.

⁴⁴ EC Decision ¶ 1004.

oo00oo

I declare under penalty of perjury under the laws of the United States of America that, to the best of my knowledge and belief, the foregoing is true and correct.

A handwritten signature in black ink, appearing to read 'James S. Venit', is written over a horizontal line.

James S. Venit

Dated: 12 April, 2010

**UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION**

In the Matter of)	
)	
INTEL CORPORATION,	)	DOCKET NO. 9341
a corporation	)	PUBLIC DOCUMENT
)	
)	

Intel's Memorandum in Support of Memorandum in Opposition to Complaint
Counsel's Motion to Admit European Commission Decision

APPENDIX 1

**To the President and the Members of the Court of First Instance of the European
Communities**

**Abridged version dated 4 September 2009 of the Application for Annulment
submitted on 22 July 2009 Pursuant to Articles 230 and 229 EC**

of Commission Decision C(2009) 3726 final of 13 May 2009 in Case COMP/C-3/37.990 Intel
brought by

INTEL CORPORATION

a company organised under the laws of Delaware, United States, and registered at Division of
Corporations, Secretary of State, State of Delaware, and with its registered office at 1209
Orange Street, Wilmington 19801, County of New Castle, Delaware, USA;

represented by Nicholas Green QC, Mark Hoskins QC, Kelyn Bacon, and Tony Singla,
barristers, Brick Court Chambers, 7-8 Essex Street, London WC2R 3LD; Ian Forrester, QC at
the Scots bar, of White & Case LLP, rue de la Loi 62, 1040 Brussels; and Nigel Parr and Ross
Mackenzie, solicitors, of Ashurst LLP, Broadwalk House, 5 Appold Street, London EC2A
2HA.

Applicant

against

COMMISSION OF THE EUROPEAN COMMUNITIES

Respondent

The Applicant consents to be served, in accordance with Article 44(2) of the Rules of
Procedure, by telefax at +44 (0)20 7638 1112 and by email to Nigel.Parr@ashurst.com and
Ross.Mackenzie@ashurst.com

TABLE OF CONTENTS

A. Introduction	1
B. Summary of grounds of appeal.....	4
Burden and standard of proof.....	4
Errors of law.....	4
Errors in the assessment of conditionality of the agreements.....	5
Errors in the assessment of the effects of the agreements.....	8
Failure to consider other important issues of fact.....	10
Single strategy to foreclose.....	11
Infringement of essential procedural requirements.....	11
Fines.....	12
C. Factual background.....	13
Products concerned by the Decision.....	13
Industry competitive dynamics.....	14
D. Procedural background.....	23
Complaint and SO.....	23
Request for further information.....	23
SSO and Letter of Facts.....	23
The Decision.....	25
The Ombudsman decision.....	26
E. Preliminary comments on errors of law and assessment.....	26
Conditional rebates.....	26
Naked restrictions.....	34
Comity / extra-territoriality.....	35
Burden and standard of proof.....	37
F. General errors of assessment.....	38
Errors in approaching the evidence.....	38
Errors in applying the AFC test.....	43

CONTENTS

G.	.....	52
Commission's findings on conditionality	.....	52
Errors in assessment of conditionality	.....	53
Errors in assessment of effects	.....	69
Comity / extra-territoriality	.....	77
Summary of conclusions	.....	78
H.	.....	78
Commission's findings on conditionality	.....	78
Commission's misinterpretation of	.....	80
The Commission cannot establish an abuse with respect to the	.....	87
The Commission errs in finding that the	.....	93
Errors in assessment of effects	.....	96
Comity / extra-territoriality	.....	101
Summary of conclusions	.....	102
I.	.....	103
Commission's findings on conditionality	.....	103
Conditional rebates: errors in assessment of conditionality	.....	104
Conditional rebates: errors in assessment of effects	.....	111
Conditional rebates: summary of conclusions	.....	121
Naked restrictions: Commission's findings and errors of assessment	.....	122
Naked restrictions: summary of conclusions	.....	125
Comity / extra-territoriality	.....	125
J.	.....	126
Commission's findings on conditionality	.....	126
Errors in assessment of conditionality	.....	126
Errors in assessment of effects	.....	133
Comity / extra-territoriality	.....	140
Summary of conclusions	.....	140

CONTENTS

K.	.....	140
	Commission's findings	140
	Errors in assessment.....	141
	Comity / extra-territoriality	147
	Summary of conclusions	147
L.	.....	148
	Commission's findings on conditionality	148
	Errors in assessment of conditionality	149
	Errors in assessment of effects	157
	Summary of conclusions	162
M.	Harm to competition and consumers.....	163
	No harm to consumers	163
	No harm to competition	165
N.	AMD's market performance.....	166
	AMD's lack of success in the commercial PC segment	167
	AMD's lack of success in the mobile (laptop/notebook) segment.....	169
	AMD's success in the consumer and server segments	170
	AMD's marketplace performance	171
	Supply problems	172
	Barcelona.....	172
	Intel's new microprocessor line-up	173
	The ATI misstep	173
	Conclusion regarding AMD's performance	173
O.	Single strategy to foreclose AMD.....	174
P.	Infringement of essential procedural requirements.....	176
	General principles.....	176
	Unlawful refusal to grant an oral hearing	178
	Unlawful failure to procure AMD documents	180
	Infringement of an essential procedural requirement	183
	interview.....	186

CONTENTS

Q. Level of fine.....188
The level of the fine is manifestly disproportionate 189
Intel did not intentionally or negligently infringe Article 82 EC 193
Misapplication of fining guidelines and irrelevant considerations..... 196

R. Form of order sought.....198

GLOSSARY OF TERMS

64-bit	Computer architecture that supports 64-bit data types and addresses
.....	
AEC test	As efficient competitor test
ASP	Average selling price
Athlon	Brand name applied to a series of different microprocessors designed and manufactured by AMD
Athlon 64	AMD 64-bit architecture desktop and mobile microprocessor
.....	
Celeron	Low cost Intel microprocessor for desktop and mobile PCs
Channel Partner	A distributor of computer products or an OEM that buys microprocessors from distributors
Chipset	A set of one or more semiconductor devices that control data flow in a computer
CPU	Microprocessor (the abbreviation refers to "central processing unit")
.....	
DT	Desktop
ECAP	A form of Intel discount (the abbreviation refers to "exception to customer authorized pricing")
EMEA	Europe, Middle East and Africa
Gartner	An information technology research and advisory company
GEM	Government, Education and Medical
Hammer	The pre-release code name for AMD's Opteron and Athlon 64 microprocessors
.....	
.....	

.....	
.....	
.....	
ICP	Intel Celeron Processor
IIP	Intel Inside Program
K8	An AMD microprocessor series also referred to by the code name Hammer and sold under the Opteron and Athlon 64 brands
.....	
MCP	Meet comp program
MDF	Market development fund
MMBP	Intel's Microprocessor and Business Planning Unit
MOU	Memorandum of Understanding
.....	
MSS	Market Segment Share
NB	Notebook
.....	
.....	
OEM	Original Equipment Manufacturer
P4	Intel Pentium 4 processor
RFQ	Request for quotation
SMB	Small and medium business
SOW	Statement of work
TAM	Total available market
TJ	A low-cost version of Intel's mobile microprocessor
VAR	Value added reseller
x86	A computer architecture developed by Intel and used by both Intel and AMD

KEY INDIVIDUALS AND RELEVANT POSITIONS HELD

Appendix I

A. INTRODUCTION

1. Intel Corporation (“Intel”) is a US-based company that designs, develops, manufactures, and markets microprocessors, chipsets, and other semiconductor components, as well as platform solutions for data processing and communications devices.

2. Intel makes this Application pursuant to Article 230 EC for the annulment of Commission Decision C(2009) 3726 final of 13 May 2009 in Case COMP/C-3/37.990 Intel (“the Decision”),¹ finding that Intel committed a single and continuous infringement of Article 82 EC and Article 54 of the EEA Agreement from October 2002 until December 2007 by implementing a strategy aimed at foreclosing a competitor, Advanced Micro Devices (“AMD”), from the market for x86 central processing units (“CPUs”).

3. In respect of these infringements, the European Commission (“the Commission”) imposed a fine of €1.06bn upon Intel. This is the largest fine ever imposed upon a single firm by the Commission, or indeed by any other competition authority so far as Intel knows. The Decision alleges that Intel implemented a strategy to foreclose AMD by engaging in two specific forms of anti-competitive conduct: (i) granting rebates² to four original equipment manufacturers (“OEMs”) on condition that they purchase all, or almost all, of their x86 CPU requirements from Intel, and granting rebates to the

on condition that it only sold computers containing Intel’s x86 CPUs; and (ii) imposing so-called “naked restrictions” upon three OEMs, by making payments to them to halt or delay the launch of, or limit the sales channels for, specific products containing AMD’s x86 CPUs.

4. Intel denies that it has infringed Article 82, and pursuant to Article 229 EC also challenges the level of the fine imposed upon it. The facts of this case are unlike other rebate cases that have come before the Court, where typically the supplier has enjoyed superior bargaining power vis-à-vis its customers, and the agreements in issue have been of long duration and in a formal style. A more detailed analysis of the dynamics of the market is set out in section C, but the following features of this case should be particularly noted:

- (a) The OEMs wield considerable leverage in the price negotiation process. Many of Intel’s customers are as large as or even larger than Intel. This is not a case where the

¹ The signed Decision is attached at **Annex A.1**.

² In this Application, Intel follows the Commission’s approach of using the terms “rebates” and “discounts” interchangeably.

alleged abuse flows from an inequality of bargaining power.

(b) The average duration of Intel's microprocessor supply contracts is extremely short. It is well established that the potential for foreclosure arising from rebate agreements is a function of duration, with longer contracts exerting greater potential adverse effects. Due to the rapid innovation in CPU products, the life cycle of a contract is frequently 3 months, meaning that even if Intel is successful in one quarter of a year, it is forced to compete anew for each subsequent quarter. Intel and AMD thus compete for OEMs' business at numerous points during the year.

(c) The agreements which Intel entered into with the OEMs were individually negotiated, reflecting the particular characteristics and different requirements of each OEM.

(d) By contrast with the principal fidelity rebate cases cited by the Commission, where the customer's promises of exclusivity or near-exclusivity appeared expressly on the face of the agreements at issue,³ the Decision does not claim that Intel reached formal or binding exclusivity agreements with its customers. Instead, the Decision rests upon a theory that Intel would retaliate against an OEM's switch to AMD by offering "disproportionately" reduced discounts. This is an entirely novel theory of conditionality which is not, in any event, supported by the evidence.

(e) OEMs operate in a fiercely competitive market and strive to reduce their input costs as they seek to sell computers. Competition between Intel and AMD has enabled OEMs to negotiate larger discounts from Intel. The Decision repeatedly alleges "consumer harm", but nowhere does it set out evidence to substantiate this. On the contrary, during the period covered by the Decision CPU prices fell faster than in any other comparable sector, by around 36% per year (see §§76-78 below). In addition, the rate and nature of innovation has been phenomenal. Nothing in the Decision casts doubt upon these facts.

(f) Finally, during the relevant period AMD's share of x86 CPU sales increased nearly (see §68 below). Where AMD successfully innovated and matched

³ See Case 85/76 *Hoffmann-La Roche v Commission* [1979] ECR 461, §89; Case C-62/86 *AKZO v Commission* [1991] ECR I-3359, §149; Case T-65/89 *BPB Industries and British Gypsum v Commission* [1993] ECR II-389, §71 and §120; Case C-393/92 *Municipality of Almelo and others* [1994] ECR I-1477, §44; and Joined Cases T-24/93, T-25/93, T-26/93 and T-28/93 *Compagnie Maritime Belge and others v Commission* [1996] ECR II-1201, §§182-186.

technical skill with commercial acumen, the market received its product offerings well. But where it did not, OEMs were sceptical and preferred to purchase from Intel. The Commission has simply ignored AMD's performance.

5. The burden is upon the Commission to prove with a firm, precise, and consistent body of evidence that Intel's conduct did not reflect normal competition and foreclosed AMD to the detriment of consumers (see §§134-137 below). The Commission does not meet this burden if there is a plausible alternative explanation of the evidence which rules out an infringement.

6. The Commission has not satisfied this standard of proof. In some respects, the Decision is based upon pure errors of law. For the most part, however, Intel challenges manifest errors of factual assessment by the Commission, which conducted a selective and one-sided exercise. Key aspects of the Decision are seriously flawed, including the Commission's application of the as efficient competitor ("AEC") test.

7. Intel also raises procedural objections to the Decision. In particular, the Commission unlawfully denied Intel an oral hearing in relation to entirely new claims regarding and Intel also raised objections to a number of issues during the course of the administrative procedure. These were uniformly rejected by the Commission and the Hearing Officer. Intel therefore complained to the European Ombudsman, who found that in relation to Intel's principal complaint the Commission was guilty of maladministration.⁴

8. The Application refers to and relies on the following expert reports:⁵ (i) a report by which considers the alleged exclusionary nature of Intel's rebates in light of the evidence relied upon by the Commission in the Decision;⁶ (ii) a joint report by which analyses the evidence relied upon by the Commission in its application of the AEC test;⁷ (iii) a report by which assesses the Commission's analysis of Intel's average avoidable cost ("AAC") when applying the AEC test;⁸ and (iv) a report by on US litigation and legal practice,

⁴ The Ombudsman's decision is attached at **Annex A.2**.

⁵ This Application also refers to and relies upon the expert reports of

⁶

⁷

⁸

and which is relevant to the assessment of certain categories of evidence.⁹

B. SUMMARY OF GROUNDS OF APPEAL

Burden and standard of proof

9. The Commission bears the burden of proof. The Court requires the Commission to prove findings to a high standard and demands “a firm, precise, and consistent body of evidence” and the absence of a plausible alternative explanation. The Court will review those findings to ensure that they are accurate, reliable, consistent and complete. It is settled law that the presumption of innocence (*in dubio pro reo*) applies to the assessment of evidence.

10. This burden is a particularly high one in circumstances where an astronomical fine has been imposed, which in law must be treated as penal and subject to all the requirements of Article 6 of the European Convention on Human Rights (“the Convention”). The Commission has fallen far short of these legal requirements.

11. The Decision routinely overlooks relevant evidence and cites documents selectively and inaccurately. When documents are equivocal or ambiguous, the Commission construes them in a manner adverse to Intel. When the Commission expresses uncertainty as to certain facts, it makes a finding against Intel. When documents do not suit the Commission’s case, it dismisses them as insufficiently clear or contradicted by less authoritative documents. When an OEM’s position is clarified (favourably to Intel) by direct testimony from key executives, the Commission finds a reason to ignore that evidence. The Commission interviewed one key executive but failed to take any proper notes even though his evidence was inherently likely to be exculpatory, causing the Ombudsman to find that the Commission was guilty of maladministration in failing to record the interview—which the Commission initially

The Commission also refused to obtain most of a set of documents requested by Intel that were relevant to its defence. These facts cast further doubt on the degree of objectivity with which the Commission has approached its investigation, and confirm that it has not proven the alleged abuses to the required standard.

Errors of law

12. **Conditional rebates.** The legality of rebates under Article 82 depends upon an assessment of all the surrounding circumstances to see whether they are capable of restricting

⁹

competition. The Decision purports not to have taken a *per se* approach to the law. Yet the Decision also states that a rebate agreement like those found here may be abusive by virtue *only* of its being conditional and without regard to its effects or capability to restrict competition. Case-law establishes, however, that before the Commission may find that a rebate agreement is contrary to Article 82 it must prove that the rebate had an actual capability to foreclose competition to the detriment ultimately of consumers (and where the conduct is historic, that it actually did so). The Decision fails to do so.

13. Naked restrictions. The Decision finds that certain “payments” were “naked restrictions”. However, case-law makes clear that there is no such category of “payments” which are abusive without any analysis of their effects or capability to restrict competition to the detriment of consumers. The Decision uses the pejorative phrase “naked restrictions” as a substitute for proper analysis.

14. Comity / extraterritoriality. Case-law establishes that when conduct occurring outside the Community is in issue, the Commission must prove to the requisite high standard that the conduct was implemented within the Community and that any effects within the Community were “immediate, substantial, direct and foreseeable”. However, the Decision contains no analysis of these matters even though the preponderant part of the conduct complained of occurred outside the Community.

Errors in the assessment of conditionality of the agreements

15. The Decision finds that Intel concluded *de facto* conditional agreements with each customer whereby the customer was given discounts conditional upon that customer purchasing all or a significant portion of its requirements from Intel. The Decision finds that these conditions were unwritten and operated through a customer’s “understanding” that if it purchased from AMD it might lose a disproportionate volume of discounts. This is a novel theory of conditionality that has not previously been found to constitute an infringement.

16. The Commission has made serious errors of assessment of evidence and failed to meet the required standard of proof. Intel sets out in sections G to K.501 the evidence demonstrating that the agreements were neither expressly nor *de facto* conditional.

17. Given these myriad errors, the Decision fails to prove that the agreements were conditional or to show that they were even remotely similar to the sorts of rebate agreements that the Court previously has found to be abusive.

18. The

19. The Decision finds that

The Decision also finds that

20. The Commission finds that

21. The Commission finds that

In fact,

The Commission

22. The Decision concludes that

. Although

23. The Decision finds that

Decision

The

The Commission also

Errors in the assessment of the effects of the agreements

24. The Decision correctly recognizes that a rebate cannot be abusive unless it is capable of restricting competition, and that the as efficient competitor test can be used to determine whether a rebate is capable of restricting competition. Under that test, a discount is deemed to be incapable of restricting competition if the dominant firm is selling above its average avoidable costs (“AAC”), because an “as efficient competitor” could profitably match the discount.

25. The AEC test allocates the entire “conditional” portion of a discount to only a portion of the customer’s purchases, called the “contestable share”. Because a disproportionately large share of the discount (as much as its entirety) is allocated to the contestable share, which in the Commission’s findings is always a very small share of the purchase, the discount is magnified on a per-unit basis, and the resulting “effective price” is significantly lower than the average price paid by the customer. In applying the test:

(a) A larger conditional portion of the discount decreases the effective price and makes it more difficult to pass the test, because a larger portion of the discount is attributed to just a fraction of the purchases.

(b) A smaller contestable share also decreases the effective price and makes it more difficult to pass the test, because the conditional portion of the discount is applied to a smaller number of purchased units and thereby magnifies the per-unit discount.

(c) A higher AAC makes it more difficult to pass the test, by increasing the cost level that the “effective price” must exceed to pass.

26. The Decision contains numerous serious errors in the analysis and assessment of the evidence relevant to the as efficient competitor test. In particular, the Decision systematically:

(a) (b)
and (c)

27. The Decision finds that

Moreover, the Commission makes

28. The Commission finds that

29. The Commission's as efficient competitor analysis in respect

The Decision incorrectly assumes that

The Decision also

30. The Commission's as efficient competitor analysis in respect of

The Commission also

31. The Commission's AEC analysis regarding

Decision also

The

Failure to consider other important issues of fact

32. The Decision also fails to address other categories of relevant evidence.

33. **Evidence pertaining to AMD.** The Decision fails to address meaningfully the evidence relating to AMD's performance. The Decision finds that AMD was foreclosed during 2002-2007, but during this period AMD substantially increased its market share and profitability. Indeed, AMD did so even more strongly in relation to the very OEMs from which the Decision finds it was foreclosed. The evidence also shows that AMD performed very well in certain areas but poorly in others, for reasons not attributable to Intel. Moreover, because of its success in certain areas, AMD became capacity constrained for a significant portion of the relevant period and thus could not have been foreclosed from selling more.

34. **Lack of causation.** The Commission has failed to establish a causal link between what it deems conditional rebates and the The Decision wrongly asserts that evidence of a causal link is irrelevant. In relation to , the Commission states

With respect to

And regarding

35. Evidence of impact upon consumers. The Decision acknowledges that the purpose of Article 82 is ultimately to protect consumers, not competitors. However, the Commission has failed to conduct any analysis of the evidence of the impact of Intel's discounts upon consumers. This is a serious failure, as the findings in the Decision that consumers have been harmed are counter-intuitive given the substantial body of evidence which establishes that over the period prices dropped substantially and product innovation was rapid.

Single strategy to foreclose

36. The Decision finds (at §1747) that Intel was engaged in a "long-term comprehensive strategy to foreclose AMD from the strategically most important sales channels in the market". The Commission uses this finding as the basis for its conclusion that Intel engaged in a single continuous abuse, which it uses in calculating the excessive fine imposed on Intel. This finding is erroneous, as the infringements found regarding the individual OEMs and are fragmented in relation to both products covered and time period, precluding a claim that there was a "single" "comprehensive strategy". Further, the Commission's position is inconsistent with the actual evidence of AMD's performance in the market over the 2002-2007 period covered by the Decision. The Commission does not provide *any* evidence of a consistent or coherent plan throughout that five and half year period.

Infringement of essential procedural requirements

37. The Commission has committed serious procedural errors. Indeed, on 14 July 2009 the European Ombudsman decided that the Commission was guilty of maladministration in relation to a key piece of evidence relating to The Commission also unlawfully refused to hold an oral hearing following the issuance of a Letter of Facts and a Supplementary Statement of Objections ("SSO") in 2008 that advanced entirely new allegations.

38. The Commission also refused to obtain numerous documents which Intel specifically

requested the Commission to obtain from AMD, which were of direct relevance to Intel's defence. These documents concerned

They
show, among other things, that

Under the Court's case-law, the Commission was bound to obtain this evidence. Its refusal so to do reflects its unwillingness to accept exculpatory evidence.

39. The Commission also suppressed evidence that was likely to be exculpatory in relation to

However, for wholly unsatisfactory reasons, the Commission failed to make any record of that

The Commission failed even to disclose as part of the case file, and Intel obtained it only as a result of U.S. litigation with AMD. The Ombudsman has decided that this failing by the Commission amounted to maladministration in the conduct of this case.

40. The Commission has acted unlawfully in relying upon documents which in material respects were not shown to Intel and upon material arguments which were not put to Intel during the administrative procedure, and in respect of which Intel had no opportunity to defend itself.

Fines

41. As Intel did not infringe Article 82, no fine should have been imposed. Alternatively, the fine of €1,060,000,000 (the largest ever single antitrust fine) was based on an erroneous assessment and was in any event manifestly disproportionate. The Court should

exercise its unlimited jurisdiction to annul or substantially to reduce the fine.

42. Despite basing this enormous fine on supposed consumer harm, the Commission has failed to establish any consumer harm or foreclosure of AMD. The evidence demonstrates that during the period covered by the Decision, consumers have benefited from the discounts given by Intel (with prices falling 36% annually from 2002-2007) and AMD enjoyed its best ever performance, growing its sales especially rapidly (by from at the OEMs from which the Commission finds it was foreclosed.

43. The finding that Intel intentionally or negligently infringed Article 82 cannot stand. The Commission based its analysis on information that Intel did not and could not know at the time it was setting its discounts. The Commission's finding of likely foreclosure is therefore contrary to the principle of legal certainty and is unlawful.

44. The Commission has also failed to apply its guidelines correctly in setting the level of fine as regards the involvement of The Commission's reliance upon its findings of concealment and single strategy in assessing the gravity of the fine is unsupported and/or based upon irrelevant considerations. The Commission has also unlawfully applied its 2006 guidelines with retroactive effect.

C. FACTUAL BACKGROUND

Products concerned by the Decision

45. The products concerned by the Decision are described at §§105-148. In summary, CPUs are semiconductor devices which perform computations and act as the "brain" of a computer. CPUs are used in desktop computers, laptop computers, and server computers.

46. The Decision (at §120) sub-divides CPUs into two categories: x86 and non-x86 architecture. The Decision is solely concerned with x86 CPUs. As set out in the Decision (at §§803-807 and §§821-823), Intel considers that the Commission's distinction between x86 and non-x86 CPUs is artificial and incorrect. However, for the purposes of this Application, Intel does not challenge the Commission's distinction.

47. CPUs are manufactured in large facilities called "fabs" that produce millions of CPUs per month. Fabs are extremely expensive, costing today in excess of \$3.5bn each. The equipment in a fab constitutes the largest share of the capital expenditure incurred in manufacturing CPUs. Accordingly, manufacturing CPUs involves significant economies of

scale, so it is highly desirable for manufacturers to maximise capacity utilisation at their fabs.

48. Intel and AMD are the main manufacturers of x86 CPUs. These CPUs are generally not sold directly to consumers, but rather to OEMs, who incorporate them into computers along with a variety of other hardware and software components. The OEMs then sell their computers to consumers, either directly or through retailers.

Industry competitive dynamics

49. The Commission's case hinges on a simplistic model of Intel's interactions with a few leading OEMs. The Commission finds that Intel harmed consumers by offering discounts conditioned on exclusivity (or near-exclusivity) which it enforced through an implicit threat to reduce discounts disproportionately if OEMs shifted purchases to AMD.

50. The Decision recognises, however, that the alleged exclusionary conduct is not contained in formal contractual agreements between Intel and the OEMs. Accordingly, the Decision rests on *inferences* concerning the OEMs' *understandings* of Intel's intentions, drawn from documentary fragments. Intel challenges these findings.

51. The actual behaviour of Intel and its counterparts in the market provides an essential empirical test of the soundness of those findings. To the extent that this behaviour differs materially from those findings, it necessarily calls into serious question the inferences upon which the Commission relies. In addition, the Commission does not cite any evidence of consumer harm, but finds nonetheless that the alleged conduct was harmful. The performance of the microprocessor industry, especially in respect of price and innovation, is an obvious starting point in testing the Commission's conclusion that consumers have been harmed.

52. The competitive dynamics of the CPU industry contradict the Commission's hypotheses. The OEMs at issue are powerful, multi-national corporations that are sophisticated negotiators with both Intel and AMD.¹⁰ They are well aware of the cost structure underlying the manufacture of CPUs and the resulting desire of both suppliers to maximise capacity utilisation at their fabs. The evidence shows

The absence of credible examples of disproportionate reductions of discounts by Intel in response to an OEM's shift of purchases to AMD is a telling indicator

¹⁰

that the Commission's reading of the evidence is not well-supported.

53. Overall trends in the CPU market during the relevant period also refute the Commission's predictions of competitive harm. CPU prices fell faster (on a quality-adjusted basis) over this period than those of any other product, including all other high-technology products. The pace of innovation, according to the Decision (at §140), was "rapid". AMD, far from being foreclosed by Intel's conduct, in fact grew rapidly, especially in sales to the very OEMs from which the Decision claims it was excluded.

Negotiating dynamics between Intel and its OEM customers

54. The CPU market is characterised by individual negotiations between suppliers and their major OEM customers. The Commission's theory that "loyalty" to Intel is rewarded and "dis-loyalty" (in the form of increasing purchases from AMD) is "punished" implies that OEMs should emphasise their "loyalty" in negotiations with Intel to maximise discounts conditioned on exclusivity or "near exclusivity". The reality, however, is different. OEMs instead threaten to shift purchases to AMD as a means for extracting more favourable discounts from Intel.

55. This point is recognised in the Decision itself. For example, the Decision finds

56. This observation holds true for For example, in sworn testimony in
civil proceedings between AMD and Intel in the US Federal District Court in Delaware ("the
US proceedings"). testified that

also explained

¹¹ Transcript

12

57. In sworn testimony, explained that

testified that

14

58. testified that

15

59. followed a similar strategy. In

explained in sworn testimony that

60.

12

13]

Transcript

Transcript,

15

Transcript

16

17

Transcript

18

61. In sworn testimony,

62.

25

63. This evidence directly contradicts the Commission's theory that OEMs feared "punishment" for not sourcing exclusively or "nearly exclusively" from Intel. The Commission seeks to get around this evidence by declaring it irrelevant. Thus, it states

The Decision thus operates upon the basis that there is an abuse even if the rebate in question exerted no causal effect upon OEMs' purchasing decisions. For reasons set out in section E, as a bare minimum, the law requires the Commission to prove causation between an allegedly abusive rebate and the conduct of the customer; otherwise there can be no impact upon competition.

64. Moreover, the evidence shows that when the OEMs did *in fact* purchase from AMD,

¹⁹ Decision §267; and

²⁰ Transcript,

²¹

²²

²³

²⁴

²⁵ Annex A.27, p.3.

there was no “punishment” or retaliation” by Intel such as that asserted by the Commission.

65. The evidence reveals that during the relevant period,

²⁸ The

Decision acknowledges this but claims

66. Equally, following

29

Market performance during the relevant period

67. The Commission asserts (at §1741) that Intel adopted a “comprehensive strategy” to foreclose AMD from competing for business with the leading OEMs. Market developments over the relevant period therefore offer a particularly apt “natural experiment” against which to test the validity of this assertion. If the Commission’s assessment were correct, AMD should have exhibited severe economic stress during the period, in particular with respect to the five OEMs at which Intel’s allegedly foreclosing conduct was directed. In fact, however,

²⁶ w Report 3.
²⁷
²⁸ Report,
²⁹ and Decision

69.

70. At the same time,

30 Report,

31

Indeed, AMD was so successful that its CPU *profits* during the fourth quarter of 2005, at the height of the relevant period, were higher than its CPU *revenues* in the last quarter before that period.³⁵

71. In October 2005, whilst Intel was allegedly “engaged in a single, continuous strategy aimed at foreclosing AMD” (Decision §917), AMD’s Chairman and CEO Hector Ruiz declared that AMD was performing “better than we ever have in the history of the company”.³⁶ In November 2005, when the Commission’s narrative would have AMD foreclosed from the market, AMD’s Chief Financial Officer described AMD as “a growth engine” that was achieving “profitable growth” and “not just growth for the sake of growth”.³⁷ And in early 2006, after Intel’s alleged strategy had been in effect for more than three years, Dr Ruiz declared that AMD had “more momentum and higher quality momentum than at any other time in our history”.³⁸

72.

40

73. AMD’s unparalleled success during the alleged foreclosure period resulted in severe capacity constraints. AMD’s executives repeatedly reported that AMD was facing manufacturing capacity constraints. For example, in January 2005, AMD’s CFO told financial analysts that “in the microprocessor business, we run every wafer we can run”.⁴¹ In November

³³ AMD’s share grew from _____ in the second quarter of 1997 to _____ in the fourth quarter of 2006: Decision 2

³⁴ AMD grew its share, from _____ to _____ % over a similar period: Decision §844.

³⁵ AMD’s microprocessor profits in 2005 were the highest in the company’s history: **Annex A.29**, p.7. The Commission makes no claims of infringement after 2005 in respect to four of the five OEMs discussed. **Annex A.30**, p.3; **Annex A.31**, p.2.

³⁶ **Annex A.32**, p.2.

³⁷ **Annex A.33**, p.22.

³⁸ **Annex A.34**, p.5.

³⁹ Report

⁴⁰ s Report

⁴¹ **Annex A.35**, p.18.

2006, AMD's Chairman told analysts that "right now we've been and we expect to continue to be very challenged by being able to meet the needs of our microprocessor customers, just from the capacity standpoint".⁴² And at the end of 2006, after AMD had allegedly suffered from Intel's foreclosure strategy for four entire years, AMD's CFO reported that "we're steadily growing that capacity, from the 60 to 65 million units which we've talked about in the past in '06, which we're selling all that out as we continue to increase our penetration in the microprocessor base and gain share. We're selling all of our capacity".⁴³

74.

75. Thus, during the relevant period,

Competition in the CPU market has delivered real benefits for consumers

76. The Decision concludes that Intel's conduct "had a direct and negative impact on those customers who would have had a wider price and quality choice" yet presents no evidence to support this assertion (§1603). In fact,

⁴² Annex A.36, p.14.

⁴³ Annex A.37, p.37.

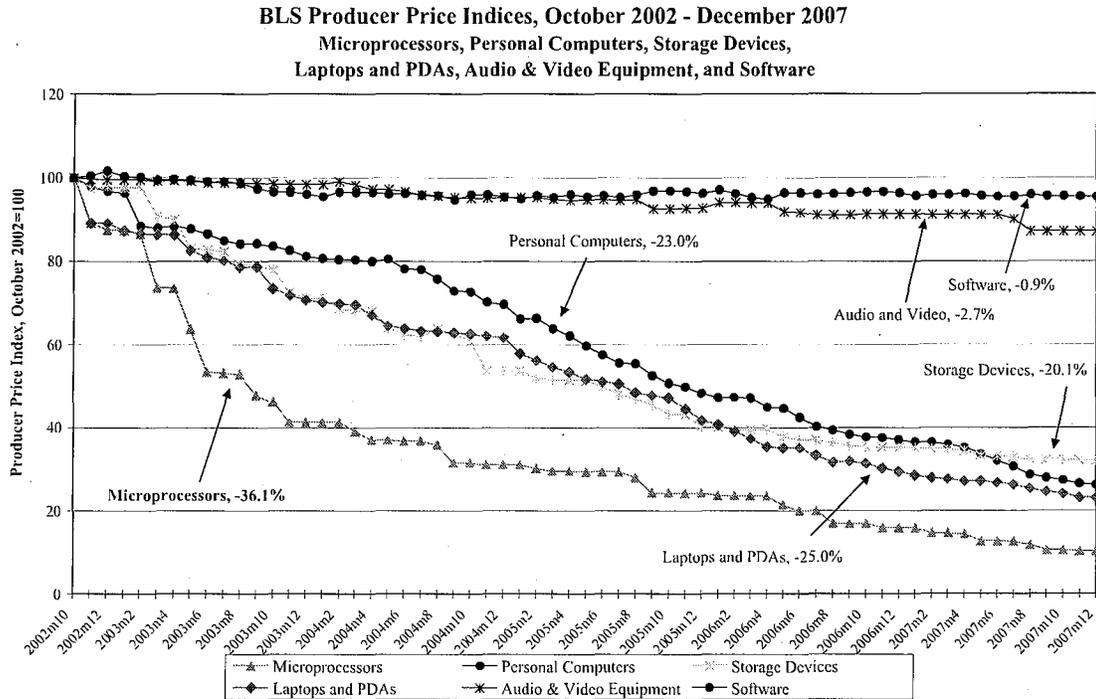
⁴⁴

⁴⁵

⁴⁶

⁴⁷

⁴⁸ As set out below, according to data published by US government's Bureau of Labor Statistics ("BLS"), the quality adjusted price of CPUs has fallen 36.1% *annually* over the period covered by the Decision.⁴⁹



77. The Commission dismisses the significance of this market performance by asserting that as a result of "Moore's law", "falling prices are an intrinsic feature of this industry given its technical characteristics irrespective of the state of competition in the market".⁵⁰ However, this claim entirely misses the point that quality-adjusted CPU prices have declined more rapidly than *any* of the 1,200 product categories monitored by the BLS, including all other high-technology products.⁵¹

78. Moreover, the Commission's reliance upon Moore's law misses the obvious point that it is only because of competition that Moore's law is transformed from a prediction into reality:

⁴⁸ Report 3.

⁴⁹ Report, 3.

⁵⁰ Decision §908. Moore's Law, named after a prediction made by Intel co-founder Gordon Moore in 1965, posits that the number of transistors on a semiconductor chip will double every two years.

⁵¹ The Commission also questions the data, claiming that the concept of quality adjusted prices is a subjective notion (Decision §909) but it has failed to point to any flaw in the methodology used by the US government to measure quality adjusted prices, which it uses as one of the elements for gauging inflation at the wholesale level.

“transistor density generally doubles every two years” (Decision §908) *because of* competition not in its absence. The fact that “[t]he pace of innovation is rapid” (Decision §140) is not a matter of fate; it is the result of continued and intensive competition-driven investment in R&D by both Intel and AMD over a number of years.

D. PROCEDURAL BACKGROUND

Complaint and SO

79. On 18 October 2000, and subsequently in November 2003, AMD complained to the Commission alleging that Intel had engaged in anti-competitive practices contrary to Article 82 EC and Article 54 of the EEA Agreement. The Commission commenced the investigation that gave rise to its decision in May 2004. On 26 July 2007, it issued an SO,⁵² in which it arrived at the preliminary conclusion that

(i)

and (iii)

The SO also alleged (at) that

Intel submitted its Reply to the SO on 7 January 2008,⁵³ and an oral hearing took place on 11-12 March 2008.

Request for further information

80. In June 2005 AMD commenced a civil action seeking damages against Intel in the US Federal District Court in Delaware. After the US Court ordered Intel and AMD to produce preliminary pre-trial briefs,⁵⁴ the Commission issued a request for further information (“RFI”) seeking the documents cited in those pre-trial briefs. Intel and AMD produced those documents in response to the RFI in May 2008.

SSO and Letter of Facts

81. On 16 July 2008, the Commission issued an SSO,⁵⁵ which (i)

and (ii) referred to new evidence concerning

52

53

54

55

The SSO substantially,

82. Intel then asked the Commission to request additional documents from AMD that were directly relevant to the SSO.⁵⁶ The existence of these additional documents was clearly demonstrated by the AMD Delaware Documents. Intel also informed the Commission that

83.

84.

85.

56

57

58

59

60

61

86.

65

87.

88.

The Decision

89. On 14 May 2009, Intel received a signed copy of the Decision at its premises in Ireland.⁷⁰ In the Decision,

but nevertheless found that Intel implemented
a single strategy to foreclose AMD from October 2002 until December 2007.

62

63

64

65

66

67

68

69

70

71

The Ombudsman decision

90. On 14 July 2009, the Ombudsman adopted a decision in which he found the Commission to be guilty of maladministration in failing to make a proper note of its meeting with a key witness from _____ As the Commission knew,

E. PRELIMINARY COMMENTS ON ERRORS OF LAW AND ASSESSMENT

91. The Decision finds two types of alleged abuse: conditional rebates and so-called “naked restrictions”. This section identifies (i) the errors in the Commission’s legal analysis, and (ii) the correct approach to the analysis of both forms of alleged abuse. Application of the correct legal approach to the individual alleged abuses is then addressed in sections G to K.501.

Conditional rebates

Case-law

92. The basic definition of abuse is set out in §91 of the judgment in *Hoffmann-La Roche v Commission*,⁷³ where the European Court of Justice (“ECJ”) held:

“The concept of abuse is an objective concept relating to the behaviour of an undertaking in a dominant position which is *such as to influence the structure of a market* where, as a result of the very presence of the undertaking in question, the degree of competition is weakened and which, through recourse to methods different from those which condition normal competition in products or services on the basis of the transactions of commercial operators, has *the effect* of hindering the maintenance of the degree of competition still existing in the market or the growth of that competition.” (emphasis added)

93. Abuse is therefore an objective concept based upon the *effect* on normal competition. This is confirmed by §237 of the Court’s judgment in *Michelin II*.⁷⁴

“The Court points out that Article 82 EC prohibits, in so far as it may affect trade between Member States, any abuse of a dominant position within the common market or in a substantial part thereof. Unlike Article 81(1) EC, Article 82 EC contains no reference to the anti-competitive aim or anti-competitive effect of the practice referred to. However, in the light of the context of Article 82 EC, conduct will be regarded as abusive *only if it restricts competition*.” (emphasis added)

94. Similarly, the recent judgment of the Court in *Microsoft* confirmed that “in principle, conduct will be regarded as abusive only if it is capable of restricting competition”.⁷⁵

⁷²

⁷³ Case 85/76 *Hoffmann-La Roche v Commission* [1979] ECR 461.

⁷⁴ Case T-203/01 *Michelin v Commission* [2003] ECR II-4071 (“*Michelin II*”).

⁷⁵ Case T 201/04 *Microsoft v Commission* [2007] ECR II-3601, §867.

Applying this to bundling, the Court agreed with the Commission that it was necessary to demonstrate that the practice in question “forecloses competition”.⁷⁶

95. In considering the effect of conduct on competition, it is necessary to show that the relevant conduct “tends to” have or “is capable of” having a restrictive (or foreclosing) effect on competition. Thus in *Michelin II*, the Court stated:

“The effect referred to in the case-law cited in the preceding paragraph does not necessarily relate to the actual effect of the abusive conduct complained of. For the purposes of establishing an infringement of Article 82 EC, it is sufficient to show that the abusive conduct of the undertaking in a dominant position tends to restrict competition or, in other words, that the conduct is capable of having that effect.”⁷⁷

96. Thus rebates offered by dominant undertakings may be abuses only if they “tend to” or are “capable of” foreclosing competitors from the market. As the ECJ held in *British Airways*, to determine whether a system of rebates or bonuses constitutes an abuse:

“... it first has to be determined whether those discounts or bonuses can produce an exclusionary effect, that is to say whether they are capable, first, of making market entry very difficult or impossible for competitors of the undertaking in a dominant position and, secondly, of making it more difficult or impossible for its co-contractors to choose between various sources of supply or commercial partners.”⁷⁸

97. It is also well-established that in deciding whether rebates offered by dominant undertakings tend to foreclose, or are capable of foreclosing, competitors from the market:

“... it is necessary to consider all the circumstances, particularly the criteria and rules governing the grant of the discount, and to investigate whether, in providing an advantage not based on any economic service justifying it, the discount tends to remove or restrict the buyer’s freedom to choose his sources of supply, to bar competitors from access to the market, to apply dissimilar conditions to equivalent transactions with other trading parties or to strengthen the dominant position by distorting competition (*Michelin*, paragraph 73).”⁷⁹

98. This line of cases also demonstrates that an essential part of considering “all the circumstances” is to analyse causality: in order to establish an abuse, the Commission must prove the nexus between the conduct and the effect on competition. For example: (a) in *Hoffmann-La Roche*, the ECJ found that the progressive nature of the rebate was “clearly a powerful incentive” for a purchaser to maximise the proportion of its requirements that it obtained from Roche; (b) in *BPB*, the Commission found that the payments by British

⁷⁶ *ibid*, §869 read together with §842.

⁷⁷ *Michelin II*, n.74 above, §239.

⁷⁸ Case C-95/04 P *British Airways v Commission* [2007] ECR I-2331, §68.

⁷⁹ *ibid*, §67. Similarly, in *Michelin II*, n.74 above, the Court emphasised (at §92) that “rebate system[s] cannot be assessed in isolation”.

Gypsum were “an immediate cause” of merchants’ decisions to cease trading in imported plasterboard; (c) in *Michelin I*, the ECJ referred to “the position of dependence” in which dealers found themselves and which was created by the rebate system; and (d) in *Michelin II*, the effect of the service bonus scheme was that dealers were “forced in most cases” to comply with the regional market share percentages set by Michelin.⁸⁰

The Commission’s Guidance

99. The application of these legal principles is analysed in the Commission’s Article 82 Guidance.⁸¹ In particular, the Guidance considers the type of analysis to be used in assessing alleged abusive exclusionary conduct, including rebates.⁸²

100. **Foreclosure effect.** In accordance with case-law, §20 of the Guidance states:

“The Commission will normally intervene under Article 82 where; on the basis of cogent and convincing evidence, the allegedly abusive conduct is *likely* to lead to anticompetitive foreclosure.” (emphasis added)

101. **Evidence of actual effects.** §20 of the Guidance then identifies the factors which are generally relevant to such an assessment, including the following:

“*possible evidence of actual foreclosure:* if the conduct has been in place for a sufficient period of time, the market performance of the dominant undertaking and its competitors may provide direct evidence of anticompetitive foreclosure. For reasons attributable to the allegedly abusive conduct, the market share of the dominant undertaking may have risen or a decline in market share may have been slowed. For similar reasons, actual competitors may have been marginalised or may have exited, or potential competitors may have tried to enter and failed ...”

102. Intel agrees that, where conduct has occurred over a period of time, it must be appropriate to take this into account. It would be illogical to assess whether conduct is “capable of” restricting competition, whilst ignoring what has actually occurred. In the present case, the alleged abuses took place from October 2002 until December 2007.⁸³

⁸⁰ *Hoffman La Roche*, n.73 above, §99; Decision in Case IV.31900 *BPB Industries plc* (5 December 1988), §128; Case 322/81 *Michelin v Commission* [1983] ECR 3461, §85; Decision in COMP/E-2/36.041/PO *Michelin* (20 June 2001), §254.

⁸¹ Guidance on the Commission’s enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings, [2009] OJ C45/7 (the “Guidance” or “Article 82 Guidance”).

⁸² §22 of the Guidance identifies some limited exceptions to the assessment described above. The rebates in the present case do not fall within those exceptions.

⁸³

103. Causation. As to causation, §21 of the Guidance states:

“When pursuing a case the Commission will develop the analysis of the general factors mentioned in paragraph 20, together with the more specific factors described in the sections dealing with certain types of exclusionary conduct, and any other factors which it may consider to be appropriate. This assessment will usually be made by comparing the actual or likely future situation in the relevant market (with the dominant undertaking’s conduct in place) with an appropriate counterfactual, such as the simple absence of the conduct in question or with another realistic alternative scenario, having regard to established business practices.”

104. Again, Intel agrees with the Commission that, when considering whether conduct is capable of restricting competition, it is necessary to assess the causal effect of that conduct.

105. As efficient competitor analysis. In relation to price-based exclusionary conduct, the Guidance states:

“With a view to preventing anticompetitive foreclosure, the Commission will normally only intervene where the conduct concerned has already been or is capable of hampering competition from competitors which are considered to be as efficient as the dominant undertaking.”⁸⁴

“In order to determine whether even a hypothetical competitor as efficient as the dominant undertaking would be likely to be foreclosed by the conduct in question, the Commission will examine economic data relating to cost and sales prices, and in particular whether the dominant undertaking is engaging in below-cost pricing.”⁸⁵

“If the data clearly suggests that an equally efficient competitor can compete effectively with the pricing conduct of the dominant undertaking, the Commission will, in principle, infer that the dominant undertaking’s pricing conduct is not likely to have an adverse impact on effective competition, and thus, on consumers, and will therefore be unlikely to intervene.”⁸⁶

106. The Guidance therefore identifies the AEC test as the normal means of assessing whether pricing conduct is capable of foreclosure. Since the Commission asserts (at §916) that the Decision is “in line with orientations set out in the guidance paper”, it appears to regard the AEC analysis as a pivotal part of the analysis. However, as explained in sections G to K.501, whilst the Decision does contain an AEC analysis for some of the deals in question, that analysis contains fundamental flaws in the evidence used to apply the test.

107. Conclusion. The Guidance therefore recognises that, in assessing whether conduct is abusive: (a) it is necessary to consider whether, on the basis of cogent and convincing evidence, the challenged conduct is likely to lead to anti-competitive foreclosure; (b) where conduct has already occurred for some time, the actual operation of the market should be taken into account; (c) it is necessary to assess the causal effect of the conduct; and (d) if an

⁸⁴ Guidance §23.

⁸⁵ *ibid*, §25.

⁸⁶ *ibid*, §27.

equally efficient competitor can compete profitably with the dominant undertaking's prices, this will indicate that the latter's pricing practices are not likely to be abusive.

Approach adopted in the Decision

108. At various points in the Decision, the Commission states that the existence of an abuse is proved solely by the structure of the rebate. Thus the Decision cites (at §920) from §89 of *Hoffmann-La Roche*, and asserts (at §926) that to establish an abuse it need only be shown:

“that the level of the Intel rebates granted to Dell, HP, NEC and Lenovo was *de facto* conditional upon those companies purchasing all or nearly all of their x86 CPUs (at least in a certain segment) from Intel and thereby restricting those companies' freedom to choose.”

109. Thus, one approach adopted in the Decision (at §§925-926) is that an abuse is shown whenever the level of a rebate is *de facto* conditional upon a company purchasing all or nearly all of its supplies from a dominant supplier, and it is not legally necessary to consider whether the discounts (i) were capable of foreclosing competitors from the market or (ii) had a causal effect on the purchasing decisions of the company. However, there is a significant degree of tension and inconsistency in the Commission's position. Elsewhere in the Decision (fn 1231), the Commission states that “In terms of labelling, at no point has the Commission stated that it has employed a *per se* approach”. This statement is apparently a reference to the Commission's attempt to prove through its AEC analysis that the discounts had an actual capability to foreclose the market and thereby to restrict competition.

110. Indeed, the Decision (in Section 4.2.3) dedicates 156 pages to its as efficient competitor analysis. As set out above, the AEC test is precisely the sort of analysis which the Guidance identifies as appropriate for analysing foreclosure. The inclusion of the AEC analysis in the Decision provides a strong indication that the Commission recognises that a *per se* approach is inappropriate and that a rebate cannot constitute an abuse unless it is capable of foreclosing competition. In light of the relevant case law and the Guidance, it is clear that any approach which condemns as an abuse a rebate *regardless* of its effect is wrong.

111. **Foreclosure.** On the facts of this case, it is not possible merely to assume, without analysing the relevant circumstances, that Intel's discounts were capable of foreclosing the market. First, the shorter the duration of any period covered by the rebates, the less the ability of such rebates to foreclose competitors.⁸⁷ As is apparent from §86 of the judgment in

⁸⁷ *Michelin II*, n.74 above, §§85 and §88; Decision in Case COMP/E 1/38.113 *Prokent Tomra* (29 March 2006), §287.

Hoffmann-La Roche, the duration of most of the contracts there was for an indefinite period, and they were clearly designed to establish trading relations for several years.⁸⁸

112. In contrast, the rebates granted by Intel generally

The business of the OEMs was consistently open for bids from both Intel and AMD, which is a normal aspect of competition. This aspect of competition was further heightened by the fact that, unlike in previous cases considered by the Community Courts, this was not a case in which a dominant supplier offered rebates to far weaker counter-parties (e.g. the position of British Airways in relation to travel agents, or Michelin in relation to tyre dealers). As explained in section C, the OEMs are powerful, multi-national corporations that are sophisticated negotiators, able to exert considerable pressure on both Intel and AMD to offer attractive terms.

113. A second weakness in the Commission's legal approach is highlighted by §1630 of the Decision, where it states:

"Thus, the abuse in this case is not determined by the size of the rebate but by the conditions attached to the payment of the rebate, namely the exclusivity and quasi-exclusivity conditions."

114. This suggests that, if Intel had offered a very small (e.g. \$1) rebate in return for an exclusive or quasi-exclusive purchasing agreement, the Commission would have found such an offer to be abusive, even if AMD was prepared to offer a far larger rebate. This is illogical.

115. Thirdly, in analysing whether the offer of a rebate to a particular customer is capable of foreclosing the market, the capability to foreclose must be viewed in its overall market context. As the table below

⁸⁸ See also *British Airways*, n.78 above, §63.

⁸⁹

116. Fourthly, given that foreclosure must be viewed in the overall market context, the Commission's assertion at §921 that "to the extent that a rebate prevents customers from obtaining supplies from competitors of the dominant firm, the same legal assessment may apply if the rebate applies only to a segment of the identified market" cannot be accepted. The legal authority cited in footnote 1237 of the Decision does not support the novel proposition set out in §921. Moreover, the Commission has found that there is likely to be supply-side substitutability between x86 CPUs for desktops, laptops and servers. Accordingly, the Commission cannot simply consider one segment of the market in isolation. For example, if Intel offered an OEM a rebate relating solely to commercial desktops, AMD would still have been able to compete to supply CPUs to that same OEM for servers, consumer desktops and laptops (and it would also be able to compete to supply other OEMs). It therefore cannot simply be assumed that an offer from Intel in respect of a particular segment of a customer's business would have the capability of foreclosing AMD from the market.

117. This is particularly material because the contested Intel rebates related to quite different segments of the market for different OEMs at different times. Moreover, many leading OEMs (e.g., _____) are not alleged to be recipients of abusive rebates. In these circumstances, foreclosure is very far from obvious and cannot simply be assumed.

118. Finally, §20 of the Guidance recognises that, "if the conduct has been in place for a sufficient period of time, the market performance of the dominant undertaking *and its competitors* may provide direct evidence of anticompetitive foreclosure" (emphasis added). Over the period at issue here, AMD significantly increased its CPU revenues, profitability, and market share. At the same time, quality adjusted CPU prices declined substantially, and Intel and AMD both increased their investments in R&D. These facts are inconsistent with the expected features of a market supposedly characterised by foreclosure of one of the two main competitors, further indicating that it cannot simply be assumed that conduct by Intel

⁹⁰

Report,

foreclosed, or was capable of foreclosing, the market.

119.

Issues for consideration by the Court

120. In respect of each alleged abuse, the Court must consider whether, on the facts, the Commission has established the matters set out in §926 of the Decision, namely: (i) Did Intel grant rebates to _____ the level of which were *de facto* conditional upon those companies purchasing all or nearly all of their x86 CPUs (at least in a certain segment) from Intel? (ii) Did Intel grant rebates to _____ which were *de facto* conditional upon that company selling exclusively Intel-based PCs?

121. If the Court finds that the Commission has not proved these facts, it follows that the Decision must be annulled, because the facts necessary to support the Commission's most basic contention (that there were conditional agreements) will not have been made out.

122. Secondly, even if the Court finds that the Commission has accurately assessed the nature of the rebates offered by Intel, because foreclosure cannot be assumed in the particular circumstances of this case, it will be, at a minimum, necessary to ask whether the Commission has proved that the rebates were capable of restricting competition. In particular, the Court must consider whether the as efficient competitor analysis in the Decision has been properly carried out. As set out below, the Commission's AEC analysis is materially flawed.

⁹¹ Report
⁹²

Naked restrictions

Approach adopted in the Decision

123. The second category of alleged abuse is what the Decision (at §1641) refers to as “naked restrictions”. The provenance of the concept of “naked restrictions” is not clear. The Decision’s legal analysis is cursory and extends to only four recitals (§§1641-1644). The Commission suggests at §1643 that the concept of “naked restrictions” derives from *Irish Sugar v Commission*.⁹³ But *Irish Sugar* does not anywhere refer to “naked restrictions”. §§232-233 of the Court’s judgment in *Irish Sugar* simply state that Article 82 covers practices which are capable of harming consumers indirectly by undermining effective competition, and that the conduct in that case “undermined the competition structure which the Irish retail sugar market might have acquired through the entry of a new product”. There is no suggestion that the Court recognised a new category of abuse known as “naked restrictions”.

124. The Commission is not entitled to hide behind semantics in order to establish a breach of Article 82. The use of pejorative terminology cannot conceal that the Commission wishes to create a novel category of exclusionary abuse for which, the Commission claims, no analysis of foreclosure (even a capability or likelihood to foreclose) is required. This attempt to circumvent the requirements of Article 82 should be rejected by the Court. As set out at §§92-93 above, the case-law establishes that abuse of a dominant position is an objective concept based upon the effect on competition. Alleged exclusionary conduct can amount to an abuse only if it “tends to” or is “capable of” foreclosing competitors.

125. The Commission further attempts to avoid its burden of showing capability of foreclosure by suggesting at §1643 that an infringement of Article 82 “may also result from the anticompetitive object of the practices pursued by a dominant undertaking”. In support of this proposition, footnote 1963 of the Decision cites various paragraphs from the case-law, but none supports the Commission’s proposition. Rather, they simply illustrate the Court’s view that *actual* elimination or foreclosure of a competitor need not be shown where, on the facts of the case, the practice is (in economic terms) such that it is *likely* to have that effect.

126. That analysis is confirmed by the Commission’s contribution to the *2008 OECD Policy Roundtable on Fidelity and Bundled Rebates and Discounts*, where the Commission stated that (at page 48):

⁹³ Case T-228/97 *Irish Sugar v Commission* [1999] ECR II-2969.

“Under EC competition law, the concept of abuse is an objective one: there cannot be any finding of abuse based on intent only. However, the Commission may look at internal documents or business plans of the dominant undertaking that suggest that there is a strategy whereby the discounts or rebates are used to foreclose competitors. This may be relevant for the assessment of the likely effects of the discount or rebate scheme.”

Issues for consideration by the Court

127. Intel therefore submits that the following issues arise for consideration by the Court in relation to the purported “naked restrictions”. First, the Court must consider whether the Commission has proved that Intel offered payments to _____ in order for the OEM to delay, cancel, or restrict the commercialisation of specific AMD-based products. Secondly, even if the Court finds that the Commission accurately found that such payments existed, it must then ask whether the Commission properly analysed the capability of the conduct to foreclose competitors. The Commission cannot avoid analysis of the economic impact of the conduct by asserting that “Customers were ... deprived of a choice which they would have otherwise had” (§1670). In *Microsoft*, the Court concluded that customers had been deprived of a choice which they would otherwise have had, namely the choice to obtain the tying product without the tied product.⁹⁴ Nevertheless, the Court held that it was also necessary to consider whether in economic terms the conduct foreclosed competition.⁹⁵

Comity / extra-territoriality

128. The Commission has in effect assumed worldwide jurisdiction to regulate conduct occurring in and directed at distant parts of the world. However, Articles 81 and 82 EC do not have unlimited territorial scope. To assume jurisdiction over conduct occurring outside the European Community, the Commission must, within the Decision, establish a direct causal connection with the territory of the Community, by adducing strong evidence of the actual implementation of the conduct in issue leading to a substantial effect on competition within the Community. In *Woodpulp*, the ECJ established that where the parties to an allegedly anti-competitive agreement are located outside the Community, Article 81 will apply only if the parties make direct sales to purchasers in the Community:

“It should be noted that the main sources of supply of wood pulp are outside the Community, in Canada, the United States, Sweden and Finland and that the market therefore has global dimensions. Where wood pulp producers established in those countries *sell directly to purchasers established in the Community* and engage in price competition in order to win orders

⁹⁴ *Microsoft*, n. 75, above, §869 read together with §842.

⁹⁵ *ibid.*, §1058.

from those customers, that constitutes competition within the common market.”⁹⁶ (emphasis added)

129. The ECJ went on to find that Community law applies when an agreement is implemented within the Community:

“the conclusion of an agreement which has had the effect of restricting competition within the common market, consists of conduct made up of two elements, the formation of the agreement, decision or concerted practice and the implementation thereof ... *The decisive factor is therefore the place where it is implemented.*” (ibid §16, emphasis added)

130. In *Gencor*⁹⁷, the Court found that a concentration was within the territorial scope of the merger regulation,⁹⁸ as the parties’ direct sales into the Community would be affected:

“... the criterion as to the *implementation* of an agreement is satisfied by mere *sale within the Community*, irrespective of the location of the sources of supply and the production plant. It is not disputed that Gencor and Lonrho carried out sales in the Community before the concentration and would have continued to do so thereafter.” (§87, emphasis added)

131. Moreover, even where implementation within the Community is established because products are sold directly to customers in the Community, the Community Courts have held that, for sales made from outside the Community, a *substantial effect* on competition in the Community and on trade between Member States must be shown. In *Haladjian*, the Court specifically considered the applicability of Community law in relation to products sold to purchasers outside the Community for import into the Community:

“... in order to justify the application of the competition rules to an agreement concerning products *purchased in the United States for sale in the Community*, that agreement must, on the basis of a range of elements of fact and of law, make it possible to envisage with a sufficient degree of probability that it is capable of having a more than insignificant influence on competition in the Community and on trade between Member States (see, to that effect, *Javico*, paragraphs 16 and 18). *The mere fact that conduct produces certain effects, no matter what they may be, on the Community economy does not in itself constitute a sufficiently close link to be able to found Community competence.* In order to be capable of being taken into account, *that effect must be substantial*, that is to say, appreciable and not negligible.”⁹⁹ (emphasis added)

132. It is also established that where trade with third countries is involved, *even where implementation takes place within the Community*, the Commission must also prove “immediate, substantial, direct and foreseeable” effects within the Community:

“It will be for the Court at a later stage to ascertain whether the effects of the conduct alleged by

⁹⁶ Joined Cases 89, 104, 114, 116, 117, and 125 to 129/85 *Ahlstrom and others (Woodpulp)* [1988] ECR 5193, §12.

⁹⁷ Case T-102/96 *Gencor Ltd v Commission* [1999] ECR II-753

⁹⁸ Council Regulation (EEC) No 4064/89 of 21 December 1989 on the control of concentrations between undertakings.

⁹⁹ Case T-204/03 *Haladjian Frères v Commission* [2006] ECR II-3779, §167.

the Commission were substantial, direct and foreseeable in order to determine whether the Commission was right in exercising jurisdiction over the applicants.”¹⁰⁰

“Application of the Regulation is justified under public international law when it is foreseeable that a proposed concentration will have an immediate and substantial effect in the Community ... It is therefore necessary to verify whether the three criteria of immediate, substantial and foreseeable effect are satisfied in this case.”¹⁰¹

133. By way of example, the Decision

Moreover, in relation to

In particular, the Commission has failed to consider necessary questions such as: (i) Were those agreements implemented in the EC? (ii) Did those agreements concern or affect sales made within the EC? and (iii) Were any effects in the EC substantial, direct and foreseeable? This is a particularly significant failing in circumstances where the Commission states (at §1685) that it does not need “to prove the actual effects of an abuse under Article 82” at all.

Burden and standard of proof

134. The Commission must prove the existence of an infringement of Article 82:

“Where there is a dispute as to the existence of an infringement of the competition rules, it is incumbent on the Commission to prove the infringements which it has found and to adduce evidence capable of demonstrating to the requisite legal standard the existence of circumstances constituting an infringement ... In doing this, the Commission must establish in particular all the facts enabling the conclusion to be drawn that an undertaking participated in such an infringement and that it was responsible for the various aspects of it.”¹⁰²

135. It is also well established that considerable importance must be attached to the fact that competition cases of this nature are in reality of a penal nature, which means that a high standard of proof¹⁰³ and the presumption of innocence apply.¹⁰⁴ The Decision imposes upon Intel the highest fine ever imposed upon an individual undertaking: €1.06bn. In these circumstances, the standard of proof that must be met by the Commission is a high one.

¹⁰⁰ Joined Cases 89, 104, 114, 116, 117 and 125 to 129/85 *Woodpulp*, n.96 above, opinion, §82.

¹⁰¹ *Gencor*, n. 97 above, §90 and §92.

¹⁰² Case C-49/92P *Commission v Anic Partecipazioni SpA* [1999] ECR I-4125, §86. See also Case 27/76 *United Brands v Commission* [1978] ECR 207, §§265-267; Article 2 of Regulation 1/2003, [2003] OJ L 1/1.

¹⁰³ Joined Cases T-1/89 etc *Rhône Poulenc SA and others v Commission* [1991] ECR II-867, opinion, section II.A. See also Case T-67/01 *JCB Service v Commission* [2004] ECR II-49, §§130-133 where the CFI referred to the need for “unequivocal evidence”.

¹⁰⁴ Case C-199/92P *Huls AG v Commission* [1999] ECR I-4287, §150.

136. Community Courts have established that the Commission must demonstrate a firm, precise, and consistent body of evidence supporting its findings. This requirement is not satisfied where there is a “plausible explanation ... for those alleged infringements which rules out an infringement”.¹⁰⁵ In this respect, it is also clear that the Court has an active role in determining whether the Commission has conducted a legitimate factual and economic assessment:

“While it is not for the Court to substitute its economic appraisal for the Commission’s, it is under a duty not only to establish whether the evidence relied on is factually accurate, reliable and consistent but also to examine whether that evidence contains all the information which must be taken into account in order to assess a complex situation and whether it is capable of substantiating the conclusions drawn from it (Case C-12/03 P Commission v Tetra Laval [2005] ECR I-987, paragraph 39).”¹⁰⁶

“However, while the Community Courts recognise that the Commission has a margin of appreciation in economic or technical matters, that does not mean that they must decline to review the Commission’s interpretation of economic or technical data. The Community Courts must not only establish whether the evidence put forward is factually accurate, reliable and consistent but must also determine whether that evidence contains all the relevant data that must be taken into consideration in appraising a complex situation and whether it is capable of substantiating the conclusions drawn from it.”¹⁰⁷

137. Thus (i) the Court is entitled and required to engage in an intensive review of the Commission’s factual and economic analysis, and (ii) where there is doubt in the Court’s mind, it must be exercised in favour of the applicant.

F. GENERAL ERRORS OF ASSESSMENT

138. This section identifies “general” errors of assessment that affect all the Commission’s key findings, including errors in (i) the Commission’s approach to the evidence, and (ii) the Commission’s application of the as efficient competitor test. Sections G to K.501 set out specific criticisms of the Commission’s findings in relation to each OEM and

Errors in approaching the evidence

The Commission’s inconsistent and selective approach

139. The Commission has failed to support its findings with a firm, precise and consistent body of evidence or to accord Intel the presumption of innocence. In particular, the Commission has failed to consider *all* of the relevant evidence and/or to make consistent

¹⁰⁵ Case T-36/05 *Coats Holdings Ltd and J&P Coats Ltd v Commission* [2007] ECR II-110, §71.

¹⁰⁶ Joined Cases T 44/02 OP etc *Dresdner Bank v Commission* [2006] ECR II-3567, §67.

¹⁰⁷ *Microsoft*, n. 75 above, §89.

assessments of the relative weight and value of particular pieces of evidence. Rather, the Commission has “cherry picked” those pieces of evidence that support its case, and ignored or attributed little weight to evidence which does not.

140. For example, the Commission repeatedly adopts the approach of preferring particular *categories* of evidence. Rather than looking at individual pieces of evidence and weighing them in a fair and objective manner, the Commission rejects an entire body of evidence without regard to its individual merit simply because, for example (at §301), it was oral testimony given in the course of the US proceedings.

141. The Commission’s inconsistent approach to evidence can be observed in its treatment of formal responses to Article 18 requests. In some cases, the Commission accords decisive significance to these submissions. Thus, the Commission refuses to consider deposition testimony of [redacted] and other [redacted] executives on the ground that it is better to rely upon one of the company’s Article 18 responses.

142. The Commission also prefers [redacted] to contemporaneous evidence. For example, the Commission refuses to take account of a contemporaneous internal document in which, according to the Decision

[redacted] This is an illogical rejection of material evidence.

143. In contrast, in the case of [redacted] the Commission

144. Even in its review of individual Article 18 responses, the Commission adopts a selective approach, relying only on portions that it considers to support its allegations, while rejecting exculpatory parts. For example, the Commission relies heavily upon

response in finding

At the same

time, the Commission asserts

¹⁰⁸ The

Commission does not even attempt to explain why it chooses to adopt without question one minor portion of response whilst ignoring the most significant parts.

Rejection of the Delaware testimony

145. The Commission rejects, essentially as an entire category of evidence, sworn testimony that was provided in the course of the US proceedings by very senior industry participants under oath and on pain of punishment for perjury. The Commission says (at §301) that it (i) cannot follow the “legal theory” of US law that governs the deposition proceedings, and (ii) cannot assess how useful such testimony is under EC law.

146. However, the US testimony is both relevant and important evidence. Not only were the witnesses top OEM executives, but they are also the very persons who (i) have the most immediate and direct knowledge of the negotiations with Intel and (ii) were responsible for taking the actual decisions which are at the centre of this case.

147. To assist the Court in understanding the circumstances in which the Delaware testimony was generated, Intel has attached at Annex

In particular,

110

¹⁰⁸ See, e.g.,

¹⁰⁹ Report

¹¹⁰ Many of the depositions submitted by Intel were conducted over multiple days. For example, was questioned over three days, and the questioning time totalled nearly 21 hours. The transcript of deposition consumed 842 pages:

111

148. From a Community law perspective, the Court has already made clear that very considerable weight should be accorded to evidence of this nature.¹¹² This testimony – which is largely inconsistent with the Commission’s preconceptions – is either ignored or dismissed by the Commission, which gives woefully inadequate reasons for doing so. For example, the Commission refuses to consider the deposition testimony of [redacted] and other [redacted] executives, stating that it is better to rely upon documents that [redacted]. The Commission justifies this by claiming that it [redacted].

[redacted] But [redacted] testimony is not only very relevant in its own right, it is also consistent with both the contemporaneous documents and formal response to the Commission’s Article 18 request. Moreover, [redacted] testimony is much more thorough and detailed than [redacted] Article 18 response,¹¹³ and it expands on and clarifies the key issues in this case. [redacted] was deposed by AMD’s counsel over two days, on videotape, about the very same issues as those which are addressed in the Decision.

149. The Commission also rejects [redacted] the sworn and highly relevant testimony of other executives on the extraordinary ground that it [redacted].

But it is plain from the deposition transcripts that AMD’s counsel in the US [redacted].

¹¹¹ In addition to written transcripts, the relevant oral testimony given in the US proceedings was also videotaped. Passages from these videotapes are routinely used at trial in U.S. proceedings.

[redacted] contains a list of these excerpts which, in addition to providing relevant evidence, illustrate how the deposition testimony is taken in a thorough, probing and formal manner.

¹¹² Cases T-1/89 *Rhone-Poulenc v Commission* [1991] ECR II-867, opinion, sections I.E.2, E.3, E 4; Case T-67/00 *JFF Engineering v Commission* [2004] ECR II-2501, §§206-207 and §312.

¹¹³ As the Commission acknowledges, [redacted] made clear that [redacted].

proceedings were attempting to establish that Intel had provided [redacted] with discounts conditioned upon exclusivity, which is precisely what the Commission alleges in the Decision.¹¹⁴ Moreover, the Commission's claim that ignorance of US law renders the depositions useless cannot be taken seriously given that the Commission itself describes US legal theories when it suits its purposes to do so (at §381, fn 464.). If the Commission were truly concerned about the US legal process it could have asked [redacted] about the accuracy of the [redacted] executives' testimony as well as the circumstances pursuant to which their depositions were taken. Given the nature of the testimony, the Commission's failure to accept it was clearly wrong.

150. The Commission further claims (at §302) that deposition testimony should be disregarded because some witnesses were questioned "more than five years after such documents were authored", even though it does not cite *any* actual example of a discrepancy in the witnesses' recollections. Moreover, the events being discussed are not trivial matters that witnesses might forget, but major issues that by their nature witnesses would recall. In contrast, the Commission has no hesitation in relying [redacted] upon a statement by an [redacted] executive about events that occurred more than *ten years* earlier.

151. The Commission also refuses to take account of US testimony that it says is inconsistent with an Article 18 response submitted by a witness's company. But it is in precisely these situations that it is most important for the Commission to examine all the evidence and to form an impartial view of its overall weight. A sworn statement by [redacted] for example, must surely be given very great weight in light of [redacted] and [redacted] of the issues in this case. If there were inconsistency between his direct evidence in the US proceedings and the odd sentence in a formal response from [redacted] (which has not been shown), common sense indicates that the actual, explicit statement of [redacted] should carry the greatest weight. At the very least, the Commission should conclude that if [redacted] directly contradicts the Commission's allegations against Intel, then it cannot discharge its burden of proof. If, however, the Commission considers that [redacted] is lying (which it does not), then it should say so and provide a cogent explanation why it rejects his sworn testimony.

152. Finally, despite its stated reservations about the US deposition testimony, the Commission relies upon such testimony to support its own case whenever convenient. For example, the Commission relies upon (but in fact misrepresents) the [redacted] deposition of [redacted]

¹¹⁴

even though elsewhere in the Decision it rejects exculpatory testimony in this deposition.¹¹⁵

Errors in applying the AEC test

153. The Decision's as efficient competitor analysis (at §§1002-1576), which comprises more than 150 pages of the Decision, is the only evidence that the Commission offers to show that Intel's discounts were "capable or likely to cause anticompetitive foreclosure" (§1002). The AEC test "attempts to analyse whether a [hypothetical] competitor which is as efficient as Intel" but "which would not have as broad a sales base as Intel, would be foreclosed" from competing as a result of Intel's allegedly conditional discounts (§1004). The Commission's application of the AEC test to Intel's discounts is characterised by a selective, inaccurate, unreliable, and inconsistent approach to evidence. Proper assessment of the evidence shows that Intel's conduct was not capable of causing anti-competitive foreclosure.

Overview of AEC analysis

154. The Decision uses two different (but conceptually identical) forms of the AEC test: the "effective price" form (at §1006), and the "required share" form (at §§1003-1005). Both forms attempt to determine the relationship of a dominant firm's pricing to its incremental, or avoidable, costs. Under both approaches, the portion of the seller's discounts that are deemed to be conditional on the attainment of a minimum volume or share of business is allocated to only a portion of the buyer's purchases, called the "contestable share". The contestable share is the percentage of the customer's purchases that can "realistically be switched" from the dominant undertaking to the as efficient competitor over a relevant time period (§1009). The test presumes that an "as efficient competitor" which seeks to win business away from the dominant firm will have to match the conditional discount that the customer would lose if it buys less than the minimum volume or share (§1003), and seeks to determine whether the competitor can recover its costs if it matches the conditional discount.

155. By allocating a disproportionate share of the discount to only a fraction of the buyer's purchases (the contestable share), the

¹¹⁵ Decision §§183, 294, 307-310. To support its claim that Intel foreclosed AMD from a viable business opportunity at the Commission quotes testimony that

The Decision omits further testimony that

¹¹⁶ On a per-unit basis, allocating the entire “conditional” discount to the contestable share results in imputed per-unit discounts that are far larger than the total discount averaged across all units purchased. Thus,

¹¹⁷

156. The “effective price” form of the test is the simpler of the two forms used in the Decision. In this version, the effective price is compared to the seller’s average avoidable cost (“AAC”), the measure of cost adopted in the Decision (at §1037). If the effective price is above AAC, an as efficient competitor can recover its costs if it sells the contestable share of the buyer’s purchases while matching the conditional discount. Thus, if the price is above AAC, the discount passes the test. If, on the other hand, the effective price is below AAC, the discount fails the test.

¹¹⁸ Fixed costs are not relevant to determining the profitability of a transaction because they must be incurred whether or not the sale is made.¹¹⁹

157. The “required share” form of the test is equivalent to the effective price test (Decision §1266 and §1458), but its expression is more complex. The required share test calculates the percentage of a customer’s purchases that the as efficient competitor would have to sell in order to recover its AAC after matching the conditional discount. This share is called the minimum required share. If the contestable share is greater than this required share, the test is passed, because the as efficient competitor is able to compete for more business than it requires to recover its costs while matching the conditional discount. Conversely, if the required share is greater than the contestable share, the as efficient competitor would not be able to sell enough to the purchaser to recover its costs.

116

Report

117

118

Report

¹¹⁹ Forgoing a sale at a price above AAC but below total cost (because the sale price would not recover the fixed costs) would reduce rather than enhance profits.

Significance of AEC analysis for assessing capability to foreclose

158. The Commission's Article 82 Guidance (at §27) indicates that a dominant undertaking should not be charged with abuse if its discounts pass the AEC test: "If the data clearly suggest that an equally efficient competitor can compete effectively with the pricing conduct of the dominant undertaking, the Commission will, in principle, infer that the dominant undertaking's pricing conduct is not likely to have an adverse impact on effective competition, and thus on consumers, and will therefore be unlikely to intervene". The Commission thus recognises that if a rebate lacks the capacity to foreclose an as efficient competitor, the dominant firm can only win the contestable sales on the basis of superior efficiency. Prohibiting even a dominant a firm from winning on that basis would be contrary to the goals of Article 82.¹²⁰

159. Conditional discounts are common and often beneficial to competition. As the Commission has recognised in its Guidance (at §37), "[c]onditional rebates are not an uncommon practice" and may "stimulate demand and benefit consumers". Price competition is an affirmative good, and generally benefits consumers in the form of lower prices.

160. If the dominant undertaking's rebates do not satisfy the as efficient competitor test, that is not the end of the inquiry. Instead, "the Commission will integrate this in the general assessment of anti-competitive foreclosure ..., taking into account other relevant quantitative and/or qualitative evidence"¹²¹ such as the "extent of the allegedly abusive conduct" and "possible evidence of actual foreclosure".¹²²

123

161. Although the Commission affirms the importance of the AEC test in its Guidance, insists (at §916) that its "Decision is in line with the orientations set out in the guidance", and dedicates more than 150 pages to the test, the Decision asserts that this AEC analysis is merely optional and not essential to a finding of abuse. That assertion is mistaken, as shown in Section E. The Commission cannot establish an infringement unless it discharges its burden of proving, by firm, precise and consistent evidence, that Intel's conditional discounts were in fact capable of causing, or likely to cause, anti-competitive foreclosure. Because the AEC test

¹²⁰ Case C-7/97 *Oscar Bronner v Mediaprint* [1998] ECR I-7791, opinion, §58; see also DG Competition discussion paper on the application of Article 82 of the Treaty to exclusionary abuses (December 2005) §4.

¹²¹ Article 82 Guidance §27.

¹²² Article 82 Guidance §20.

Report

123

is the Commission's sole evidence on capability of foreclosure, the Decision must be annulled unless the Commission has proven that the conclusions drawn from the AEC analysis are substantiated by factually accurate, reliable, and consistent evidence, which it has failed to do.

The Commission's misapplication of the AEC test

162. The Commission commits a series of manifest errors of assessment in relation to the AEC test. First, the Decision finds that Intel infringed Article 82 even in respect of discounts that the Commission itself concludes pass the AEC test, such as Intel's discounts to between

163. A second source of error is the Commission's use of a highly selective approach of "cherry picking" data from inconsistent sources to slant the results against Intel. This is demonstrated by comparing the results of the Commission's analysis to what actually happened when The Commission's as efficient competitor analysis predicts that

¹²⁵ The Commission's calculations yielded the wrong answer because the Commission used manifestly incorrect data to produce a desired result.

164.

"This episode indicates that the Commission's test was unable to predict AMD's actual

¹²⁴ The Commission asserts that the contestable share at

¹²⁵ Report

Overview of the Commission's factual errors in connection with the AEC test

165. To produce accurate results, the as efficient competitor test requires correct assessment of three factual inputs: (i) the contestable share; (ii) the portion of the discount that is conditional; and (iii) the dominant undertaking's AAC of producing the contestable units

The Commission's

166. In respect to each of these key factual inputs, the Commission disregarded highly authoritative evidence and instead selected strands of evidence from documents, from which it then made unwarranted assumptions. This selectivity infected the Commission's analysis of each of the parameters in a manner that was unfavourable to Intel.

¹²⁷ In most instances, correcting just one of the Commission's erroneous assumptions

167. **The contestable share.** As a preliminary matter, it is important to stress that the Commission's approach of basing its determination of the contestable share on internal documents of Intel's customers is entirely inappropriate. An undertaking can only conduct business based upon information that is knowable to it.

From a legal standpoint, it is settled that the general principle of legal certainty requires that the lawfulness of parties' conduct be based upon information that is knowable to them. As the ECJ stated in *Deutsche Telekom*: "[i]f the lawfulness of the pricing practices of a dominant undertaking depended on ... information which is generally not known to the dominant undertaking the latter would not be in a position to assess the lawfulness of its own

¹²⁶ Report

¹²⁷ Report

¹²⁸ Report

activities".¹²⁹

168. The Commission repeatedly contends that the contestable share is smaller than shown by the contemporaneous evidence. For example, Intel assessed contestable share at and contemporaneous is consistent with this estimate, which was validated by the sworn testimony of ¹³⁰ Nevertheless, in contravention of the principle of legal certainty, the Commission rejects all this evidence and selects a much lower contestable share

169. In rejecting the views of senior management he Commission criticises Intel for allegedly misrepresenting the relevant

¹³¹ The Commission thus had no basis for rejecting the authoritative evidence that

e.¹³²

170. The Commission's selective approach can also be seen with . The Commission rejects

The Commission also rejects

Instead, to derive the lowest possible contestable share, the Commission chooses to rely solely

¹²⁹ Case T 271/03 *Deutsche Telekom AG v Commission* [2008] ECR II-477, §192.

¹³⁰

Deposition Transcript,

¹³¹

¹³²

Report

¹³³ Decision §

171. Similar defects infect the Commission's entire implementation of the contestable share or volume component of the AEC test. These defects are discussed in sections G to K.501.

172. **Conditional portion of discount.** The Commission's assessment of the allegedly conditional portion of Intel's discounts is similarly flawed. For example, the Commission disregards the testimony of _____ that

This

testimony suggests that

The Commission

173. Even more extraordinary is the fact that

Although the Decision elsewhere

137

174. The Commission also asserts that clearly unconditional discounts to OEMs were

¹³⁴ At the very least, before rejecting highly probative contemporaneous evidence in favor of more dubious and outdated evidence, the Commission had the duty (and ample opportunity) to conduct its investigation in a fair and even-handed manner by asking

¹³⁵ Deposition Transcript

¹³⁶ Deposition Transcript

testified

Transcript

¹³⁷ Report

For example, the Commission insists

The Commission reaches this

conclusion even though (i)

(ii)

139

(iii)

¹⁴⁰ (iv) the

Commission accepted

and

(v)

175. Treatment of costs. The Commission's

These include (i)

¹⁴¹ (ii)

(iii)

(iv)

and (v)

176. The

The Commission states in its Decision that sales incentives (commissions and bonuses) are "directed towards rewarding in particular incremental sales" and thus vary with

¹³⁸

¹³⁹

¹⁴⁰ Decision Report,

¹⁴¹

¹⁴² Report

such sales (§1134). In fact, the Commission assumed that

Furthermore, the Decision states that

177. The Commission

178. This mistake results in

The Commission

179.

¹⁴³

Report

ibid, §§152-153, discussing Decision §

Conclusions regarding the AEC test

180. The examples above are merely illustrative of the manifest errors of factual assessment that pervade the Commission's implementation of the test. Because of the Commission's

181.

G.

Commission's findings on conditionality

182. The essence of the Decision in relation to is as follows:

The Decision is based upon inferences and not upon formal terms and conditions

183. The finding of conditionality

146

147

148

149

(emphasis added).

184. For its theory of conditionality to be sustainable, therefore, the Commission must prove that if

Errors in assessment of conditionality

185. The evidence set out in the Decision falls far short of establishing the Commission's novel theory of conditionality. There is no evidence that

The evidence shows instead that

186. The Commission's finding of conditionality rests on
key decision-makers

For these reasons, the Decision's conclusion regarding conditionality cannot be sustained.

chose to buy from Intel for independent business reasons

187. The evidence on the file shows that until

First,

⁰ Secondly,

¹⁵¹ Thirdly,

150

151

¹⁵² Fourthly,

153

188. Fifthly,

testified under oath in the US proceedings that

¹⁵⁵ Sixthly,

189.

152

153

154

¹⁵⁵ See also

(stating tha

156

email stating

email stating

157

email stating

testified under oath that

155

As

explained,

160

testified that

161

is inconsistent with the

Decision's theory that

190. Although

191. The Commission acknowledges that

This is inconsistent with the Commission's assertion that

¹⁵⁸ Indeed,

159

160

161

162

192. The evidence on the file demonstrates that

or example,

As a result of

193.

In

170

194. In response to the contemporaneous evidence

163

164

165

166

167

168

169

170

But the Decision cites no evidence to justify its attempt to

195.

196.

197. In short,

The Commission ignores overwhelming exculpatory testimony from

198. The file contains extensive deposition testimony from

The Commission

This is manifestly incorrect,

Such
depositions are conducted as wide-ranging inquisitions with exhaustive examinations of all
pertinent evidence. The testimony is given under oath and on pain of civil and criminal
sanctions for any material falsification.

173

Moreover, case-law makes clear that a high level of probative value should be attributed to

171

172

173

evidence from senior corporate officers directly connected with the events in issue. In particular, the Court has made the common sense point that evidence from a senior executive with direct knowledge is of greater weight than hypotheses put forward by others.¹⁷⁴

199. Furthermore,

The Commission repeatedly cites

This is normal competition

and very far from proof that

200. The Commission falls back on

On its face,

201. The Commission similarly misrepresents the deposition testimony given by the most senior executives in the US proceedings. In particular, the Commission asserts that this deposition testimony by and other executives is with the Commission's findings, and at hat its findings on conditionality are not contradicted by testimony given by Those assertions are manifestly incorrect.

202. testimony is especially probative, because as evidence, given under penalty of perjury,

¹⁷⁴ Cases T-1/89 *Rhone-Poulenc v Commission* [1991] II ECR-0867, opinion, sections I.E.2, E.3, E 4; *JFE Engineering*, n.103 above, §§206-207, §312; and Report

¹⁷⁵

203. When asked

answered that

⁷⁹ Pressed whether there was

answered

204. Most significantly, testified that

¹⁸⁰ also

answered

205. The testimony given by

The Commission dismisses this testimony on the basis that it was given at an early stage of the That argument is entirely unpersuasive, as the Commission itself relies *extensively* upon documents dating from and as

¹⁷⁷

¹⁷⁸

testified

¹⁷⁹

¹⁸⁰ *ibid.*

¹⁸¹

¹⁸²

206. The Commission also claims that

That is hardly evidence that
Moreover, the Commission overlooks the context of
that testimony,

Viewed in context,

207. The Commission also refers to

As pointed out above,

208. All of this evidence directly contradicts the Commission's findings that Intel's rebates to were in some way *de facto* conditional upon exclusivity.

The Commission erred in failing to record exculpatory evidence relating to

209.

¹⁸³ In addition, the Commission itself relies (by quoting selectively and disregarding testimony that contradicts its findings) upon deposition given at an equally early stage of that of

before deposition. *two weeks*

184

185

186

210. It is apparent from

In a decision dated 14 July 2009, the Ombudsman concluded that the failure to take a proper note of this meeting constituted maladministration by the Commission. He further concluded that it could not be excluded that the meeting of _____ concerned potentially exculpatory evidence.¹⁹⁰ Intel submits that _____ was highly likely to have given evidence exculpatory of Intel at the meeting. As such, the Commission's failure to take a proper record of that meeting, and take due account of that evidence, constitutes a flagrant breach of Intel's rights of defence.

Erroneous conclusions about the uncertainty of prices during negotiations

211. The Decision also erroneously suggests (at §§942-945) that the lack of "transparent and objective criteria" with respect to future discounts from Intel is somehow probative of an abuse by Intel. That suggestion is mistaken, for three reasons. First, there is no claim that in any given quarter

Rather, the claim is that the lack of transparency as to the level of rebates in *future* periods, during which the volume and mix of CPUs that _____ would source from Intel was unknown, is itself evidence of "conditionality". Secondly, as demonstrated at §167 above, there is no basis in law for the Commission's attempt to impose liability on Intel for the alleged internal expectations or uncertainties of its powerful customers.

187

188

189

¹⁹⁰ Ombudsman decision §127.

212. Thirdly, the Commission's suggestion that two large undertakings would pre-disclose the terms of future sales transactions that exceed \$1bn per quarter, without any knowledge of what and how much will be purchased and without engaging in negotiations of any kind, shows a basic ignorance of business realities. Uncertainty regarding the other party's plans and expectations is integral to any negotiation over price, particularly between such major organisations as Intel and the OEMs. It appears as if the Commission expected Intel to place a best and final offer on the table at the outset and eschew all attempt at serious negotiations. That is absurd.

Erroneous interpretation of other evidence on the Commission's file

213. The remaining evidence relied upon and considered by the Commission falls into three categories: (i) internal documents, (ii) internal Intel documents, and (iii) evidence regarding None of this evidence corroborates the Commission's propositions set out at §182; indeed, it actually contradicts those propositions.

214. **Internal documents.** The Commission relies heavily upon various internal

215. Secondly, the documents do not address

Rather,

216. Thirdly, these documents reflect

¹⁹¹

¹⁹² See, e.g., the documents cited at Decision

¹⁹³ Decision This is the case for th

217. As the Commission was aware,¹⁹⁵ gave sworn testimony in the US proceedings to the effect that: (i) was

¹⁹⁶ (ii)

(iii)

¹⁹⁸ (iv)

¹⁹⁹ and (v)

200

218. The Commission thus

For example, the Commission bases much of its case on

Nor does it

address

219. An example of the Commission's selectivity is highlighted by the Decision's treatment of an

This is cited no less than four times in the

¹⁹⁴

¹⁹⁵ From deposition before the US District Court of Delaware on provided to the Commission by

¹⁹⁶ Transcript

¹⁹⁷ Transcript

¹⁹⁸ *ibid*,

¹⁹⁹ *ibid*.

200 Transcript

Decision On each occasion, the Commission fails to
 mention testimony that
 Rather,

In this particular instance,
 testified,

220. The Commission similarly ignored sworn testimony that

221. The Decision also omits to mention that

and that only

also explained that

explained that

It

follows that not only are these

222. **Internal Intel documents.** The Commission also relies at

In fact, however,

201 Transcript

202 *ibid*,

203 *ibid*,

204 Transcript

205

206

207

223.

This does not remotely suggest that
and thus does nothing to meet the Commission's burden of proof. The Commission's
contrary assumption ignores the fact that

224. The Decision also cites

Indeed, as elaborated below,

In any event,

225. **Intel's reaction to the**
referred to by the Commission

conclusion that

The final category of evidence

This evidence further refutes Commission's

226.

208

Indeed,

In a contemporaneous

227. The Commission attempts to dismiss this evidence as

In fact, however, as set out above,

Furthermore, the

documents relied upon by the Commission

²¹¹ The

Commission does not have *any* contemporaneous documents that it even claims as support for its allegations of conditional rebates. Attaching decisive weight to highly dubious interpretations of speculative evidence taken from is arbitrary and unlawful.²¹²

228. In any event, the evidence before the Commission demonstrated that:

- (a) In
- (b)
- (c)

When asked,

testified. Similarly, when asked,

²¹⁰

²¹¹

²¹² See by analogy Cases T-127, 129 and 148/99 *Diputación Foral de Álava v Commission* [2002] ECR II-1275, §§63-92.

²¹³

and Transcript

again
 responded testified that

⁴ Similarly, when was asked,

replied ²¹⁵

(d)

as testimony
 quoted in subparagraph (c) above confirmed.²¹⁶

229. The Decision entirely ignores the evidence referred to at sub-paragraphs 228 (b) and (c) above, but these were relevant factors that could not lawfully be omitted by the Commission in evaluating Intel's Intel's agreement to cannot constitute retaliation

230. As for the evidence referred to at sub-paragraph (d) above concerning the reasons for

That response is unpersuasive. First, the Commission fails to take into account

Secondly, the Commission fails to account for

231. Thirdly, the Commission's position rests upon a flawed assumption,

²¹⁴ Transcript

²¹⁵ Transcript

²¹⁶ Transcript

That assumption is, however, demonstrably incorrect. The Commission's own data show that

The Commission offers no basis for assuming that On the contrary, as testified at deposition,

²¹⁷ Given that

232. The Commission's alternative response is to claim that

The Commission also concedes

Instead, the Commission asserts that

This assertion is

233. Fourthly, the Commission concedes that but concludes that

The Commission ignores, however, that

This fundamentally undermines the Commission's case on conditionality. Finally, it is plainly antithetical to competition law policy to condemn an

²¹⁷ Transcript Exhibit

²¹⁸ testified that,

pp.783-785: Annex A.17.

²¹⁹ Transcript

234. For these reasons, it is clear that Intel did not

This evidence of what *actually*

occurred further undermines the Commission's findings of conditionality, which are based upon inferences as to how Intel

Errors in assessment of effects

235. The foregoing discussion demonstrates that the Commission has failed to prove that Intel's so the findings regarding should be annulled without further analysis. If, however, the Court concludes that the next issue would be whether

The Decision attempts to

demonstrate this through the AEC test, but its application of that test to is fatally flawed.

The Commission's as efficient competitor allegations

236. The Decision makes findings regarding the key factual inputs to the as efficient competitor analysis for

It concludes

that

20

237. Notwithstanding its admission that satisfied the AEC test between the Decision inexplicably concludes that

The Decision does not even

attempt to explain or justify that inconsistency in reasoning.

238. The Commission also errs in assessing each of the three key factual inputs to the AEC test. The Decision grossly underestimates

Moreover, as discussed, the Decision

²²⁰ Decisio

Error 1: The Commission uses an incorrect contestable share

239. Based upon _____ the Commission concludes _____
The Decision errs in rejecting
evidence from _____

240. The Decision indefensibly rejects the most probative evidence _____ of the
contestable share. That evidence consists of _____

_____ hat view under oath, testifying that _____

And _____

241. The Commission claims that _____
That claim is, quite simply,
false.

But _____

_____ nstead,

The only conclusion that can be drawn from these documents and testimony
is that _____

242. The Commission also claims _____ that _____
That _____

221 Transcript

222 ibid,

223 Transcript

224

225

is not correct. statement that

243.

In particular,

244. The Commission rejects evidence

245. The Commission also claims that

However,

246. Therefore, the Commission manifestly errs in rejecting

²²⁶ Transcript

²²⁷ *ibid*,

²²⁸ Transcript explained,

²²⁹ Transcript

231

247. The Commission also errs in
As Intel explained to the Commission,

248. The Commission attempts to discredit

There is no contradiction.
as shown by testimony that

Similarly, testified about

249. Moreover, the evidence of
Thus, the fact that

230

231

232 Decision

233

234

235 Transcript of J

250. The Commission's reasons for using a contestable share figure of

As the demonstrates,
however,

251. The Commission's use of the
The Commission relies

Yet as discussed below, the Commission refuses to utilise

This inconsistency deprives the
Commission's conclusions of any credibility.

Error 2: Assessment of the conditional portion of the rebates

252. The Decision concludes that
That conclusion is not supported by the evidence.

253. In the first place, the Decision is inconsistent in its use of the documentary evidence.

254. The Commission, however,

²³⁶ Decision

²³⁷ Report

he Commission rejoins

²³⁸ Report and Report

²³⁹ Report

That assertion is demonstrably false,

The Commission also claims that the

The Commission's explanations are thus mere pretexts for its selective and implausible use of evidence.

255. Even leaving aside this

The Decision relies at

In particular,

relied upon by the Commission

And as detailed in §§202-

204 above,

256. Apart from the unreliability of the Commission's evidence, it consists entirely of material that was not known and could not have been known by Intel. As shown at §167 above, an undertaking cannot be expected to comply with a legal rule that depends on the undisclosed internal ruminations of the undertaking's customers.

Error 3: Assessment of sales and marketing costs

257. The Commission concluded

240

Report

241

242

Transcript

See also

Transcript

Transcript

But even leaving those errors aside, the Decision also suffers from a basic computational mistake pertaining to Intel's sales and marketing costs. As explained above in section F at §§176-179, the Decision's own reasoning establishes that

Standing alone,

244

Error 4: The Commission's "alternative" calculation

258. The Commission also puts forward an "alternative" method of calculation based upon the premise that

As Intel demonstrated

Indeed,

. As

discussed above, however, the Commission's

The Commission's

²⁴³ Report

²⁴⁴ Report Report

²⁴⁵ Decision §1272. In presenting this "alternative" approach the Commission

246

247 Report Report

248 Report

The Commission's analysis cannot predict reality

259. Actual outcomes further undermine the Commission's analysis. As explains, the Commission's conclusions

249

According to the Commission's calculations,

Yet

Thus

This should have caused the Commission to re-examine its analysis. The Commission's failure even to consider the significance of this failing should impel the Court to scrutinise the Commission's findings with special rigour and scepticism.

Materiality of the Commission's errors

260. When the foregoing errors in the Commission's factual inputs are corrected, Indeed,

Accordingly,

²⁴⁹ Decision see also Report §34:

²⁵⁰ To the contrary,

²⁵¹ Report

Reinforcing factors

261. The Commission attempts

show that

But the Decision does not

262. Moreover, as explained,

The Commission fails to explain

54

263. The Commission's second allegedly "reinforcing" factor

elsewhere recognises:

But this is incorrect, as the Decision

Far from reinforcing the Decision's conclusions, therefore, this factor further undercuts them, because the Decision fails to credit

Comity / extra-territoriality

264. Both and Intel are non-EC companies, and it is clear that Articles 81 and 82 do not have unlimited territorial scope (see section E). The Commission was therefore required to demonstrate that the rebate arrangements between Intel and had a substantial effect on the Community economy. It has not even attempted to do so, and has therefore failed to meet its burden of establishing that it was entitled to assume jurisdiction in this case.

²⁵² Report

²⁵³ *ibid.*

²⁵⁴

Summary of conclusions

265. Intel's (i) no evidence
that

and (ii) no evidence that

The Commission also

Moreover, as the Commission accepts,

Insofar as the Commission concludes that Intel's discounts would be abusive even if "other reasons might have eventually outweighed the effect of the Intel rebates",²⁵⁵ this constitutes an error of law.

H.

Commission's findings on conditionality

266. The Commission makes two findings of abuse in relation to (i) that Intel

and (ii) that

267. The Decision finds that
and concluded that

The Decision states that

and that

²⁵⁵ Decision See section E for analysis of the legal issue of causation.

which according to the Decision at

The Decision states at

The Decision asserts that

268. The Decision finds at

The Decision concludes

Commission's mistreatment of the evidence

269. The Decision

In particular, the Decision

The Decision also

270. The Decision is irreconcilable with the testimony of the who were personally involved in each of whom testified in the US proceedings, and with the decision-makers' contemporaneous documents.²⁵⁶ Instead of crediting the evidence of the decision-makers, the Decision relies upon

²⁵⁶ Where a witness is "a direct witness of the circumstances ... described", their testimony carries higher evidential value and is entitled to greater weight. Joined Cases T-67/00, T-68/00, T-71/00 and T-78/00 *JFE Engineering v Commission* [2004] ECR II-2501, §207 and §312.

271. Prior to the Commission's adoption of its Decision,

The Commission

summarily rejected

After the Decision

was adopted.

The Court should bear in mind that (i) the depositions constitute the sworn testimony of the key players (ii) as set out

and (iii) under the Protective Order in the Delaware case, Intel can only submit to the Court what authorises Intel to submit.²⁵⁸

Commission's misinterpretation of

with regard to

272. The Decision makes

The first relates to

The Decision suggests

However,

²⁵⁷ Transcript and Transcript
Transcript and Transcript

²⁵⁸ The Commission had the power to obtain access to the complete transcript of the deposition. It could equally have waited the short period of time needed to obtain transcripts of the other witnesses, but it chose not to do so.

²⁵⁹ See, e.g.,

273. The Decision

As a result,

274. explained to the Commission that

275.

260 Transcript
261 Decision
262
263
264

In fact,

According to

The Commission

276. The Decision finds that

The Decision relies

277. The evidence shows that

This is conclusive

evidence that

265

266

267

268

269

Transcript

270 *ibid,*

271

278. After

The evidence shows that,

279.

explained that

testified that:

Similarly,

272 Transcript

273 See, e.g., Transcript, Transcript

Transcript

274 Transcript

275

276

277 Transcript

278 *ibid*,

testified that

Transcript

279 Transcript

280 Transcript

281

280. o also recognised that

explained that

281.

85

282. The Commission

283. In sum,

As stated

281

282

283

284

285

286

Transcript

287

The Commission

284.

285. The Commission concludes that

286.

It further provided that

287.

explained that

²⁸⁸ Decision

²⁸⁹

²⁹⁰ Transcript

²⁹¹ *ibid.*

288.

explained that

explained that

289.

testified that

290.

291.

testified that,

292

Transcript

293

ibid,

294

ibid,

295

Transcript

explained,

296

Transcript

297

292. testified that

As a result,

The Commission

The Commission errs in

293. The Decision finds that

But the Decision does not identify any evidence of either
The evidence shows instead that

298 Transcript
299 Transcript
of

There is considerable additional evidence
For example,

300 Transcript
301 Exhibit Transcript:

294. The Decision disregards this evidence and instead asserts that

The Decision cites

And, as shown above,

295.

testified that,

6

302

304

305 Decision

306 Transcript

296.

The Decision

sworn testimony and
acknowledged that

297.

310

298. At deposition,

307 Exhibit Transcript:

308

309 Transcript

310

explained that

311

Transcript

testified

that

299. The above evidence shows that

The alleged

300. The Decision incorrectly finds that

301.

302. This is confirmed by deposition testimony and

explained at deposition that

312

313

314

Transcript

315

303.

In deposition, that

304. The Decision finds that

305. In sum, the evidence shows,

“Despite the pricing change [i.e. Intel closing the price gap vs. AMD], having AMD in our product lines

316

317

318

Transcript

Intel's 2006 discounts pass the AEC test

306. The Decision concludes that

evidence makes it clear, however, that

The

307. The Decision

308.

The Decision does not
However, the Decision

319

320

321

309. The Commission's findings conflict with
stated:

310. testified that

³²³ Thus,

explain,

311.

The Commission

312. The Decision states that

That finding is contrary to the evidence.

³²² **Annex A.126.** Numerous other documents

³²³ Transcript

³²⁴

313. The Commission's position is that

314. Further,

was by the sworn testimony of This response
who testified under oath that
confirmed that

315. The Decision

316.

Similarly, testified that

326

327

Transcript

328

329

330

331

317. summarised

318. The Decision

explained to the Commission,

319. For example, the Commission

event,

In any

332 Transcript

333 Transcript

334

335

confirmed at deposition that

320. The Commission also cites

321. At of the Decision, the Commission cites

testified that

Errors in assessment of effects

322. The Commission's as efficient competitor analysis makes the same errors in relation to the

336

337 Transcript,

338

339

340

341 Transcript also testified

342 Transcript.

The Commission's allegations

323.

324. With respect to

343

344

345

346

325.

Error 1:

326. The Decision asserts

327.

328. The Decision incorrectly finds at

348

Report

349

Report

testified that:

329.

Error 2:

330. The Decision

331.

332. Contrary to this central element of the Decision,

Transcript

350 s Report

351 Report

352

353 Decision

354 Report,

(a)

356

(b)

For example,

(c) of the Decision cites

The Commission itself quotes a document showing that

(d) testified that

333. Based on

the Decision at

The Decision

unjustifiably asserts at

355

356

357

358

Transcript

334. These findings are wholly groundless. First, as shown below at §§380-387, the Commission's claims regarding

Secondly, the Commission

Thirdly,

335.

Thus

On that basis,

336.

Comity / extra-territoriality

337. As set out at §§128-132 above, agreements between entities located outside the Community are only subject to the jurisdiction of Community law where they are "implemented" within the Community through "direct sales" into the Community, and such jurisdiction is consistent with the requirements of public international law where the effects

359

360

s Report Exhibit

361

Report Exhibit

362

363

Report,

The Commission's case in respect fails to satisfy these criteria. Accordingly, the Decision's findings about are beyond the territorial scope of Community law and must be annulled.

338. The

339. The Commission's position on the other alleged abuses involving

Commission presents no evidence as to

The

Summary of conclusions

340. The Decision incorrectly finds

341. The Decision's finding

The testimony of the senior executives
involved in

342. With respect to the as efficient competitor test, as shown in the

I.

Commission's findings on conditionality

343. The Decision makes the following findings about agreements between

344. The Commission's finding of conditionality rests on

(emphasis added).

According to the Commission,

Decision finds

The

345. The Commission concludes

Conditional rebates: errors in assessment of conditionality

346. As explained below,

Moreover, the Commission failed
to meet its burden of proving that

347. In any event,

348.

349.

350.

The Commission

351. The Decision

A brief overview of the relevant evidence suffices to establish these points.

352.

353.

354.

369

367

368

369

355.

370

356.

357.

After further discussions,

358. The Commission's evidence

The Commission argues that

There is no basis in law for

370

371

372

373

Under US law, which governed terms that are discussed but which do not appear in the signed agreement are not part of the contract and are unenforceable.³⁷⁴

359. The Commission also

360.

On the contrary,

The Commission errs in

361.

³⁷⁴ US law follows the parol evidence rule, a rule of contract law that once a written agreement has been duly executed (i.e. signed by all parties), it cannot be altered or annulled by any oral or other extrinsic evidence regarding earlier negotiations: see Black's Law Dictionary (7th edition) at p.1139, **Annex A.160**.

³⁷⁵

³⁷⁶

³⁷⁷

As the ECJ recognised in *Hoffmann-La Roche*, Article 82 is not infringed by rebates that constitute “normal competition” in the particular market setting at issue.³⁷⁸ The Commission erroneously overlooks the fact that “normal competition” among microprocessor suppliers is characterised by the type of conduct exhibited by : powerful OEMs create bidding contests to extract lower prices from the two major suppliers, in which they offer some portion of their business for a short duration in exchange for lower prices. This OEM strategy of playing the suppliers off against each other constitutes the “normal competition” that is the antithesis of abuse under Article 82.

362. The Commission incorrectly seeks to

The evidence instead demonstrates that

³⁷⁹ As discussed above,

363.

On the contrary.

364.

³⁷⁸ *Hoffman-La-Roche v Commission* (fn 104 supra) §91.

³⁷⁹

380

381

382

In other words,

365. Thus, the evidence shows that

The Commission's suggestion

Particularly where the agreements are not characterised by inequality of bargaining power like that in *Hoffmann-La Roche*, it cannot be deemed unlawful conditionality for the seller to comply with the buyer's request for a bid on the buyer's own terms.

366. To conclude otherwise would put suppliers at risk of engaging in unlawful "conditionality" merely for complying with customer's requests. If the customer cannot request a bid based on purchasing a specified volume or share, it will lose a powerful tool for eliciting lower prices. Moreover, where,

labelling the agreement as "conditional" is entirely unrealistic.

The discounts did not

367. The allegedly conditional nature of the discounts also cannot be abusive because, unlike the loyalty rebates deemed unlawful in previous Article 82 cases, "capable, first, of making market entry very difficult or impossible for competitors of the

383

384

385

386

undertaking in a dominant position and, secondly, of making it more difficult or impossible for its co-contractors to choose between various sources of supply or commercial partners".³⁸⁷ The Commission erred in failing to evaluate the evidence in these respects.

368.

369. As explained in section E above, agreements of short duration are less likely to produce anti-competitive foreclosure effects than are long-term agreements.

370. The Commission attempts to

This argument simply does not withstand scrutiny.

371. It is no answer to say, as the Commission does, that

as this is nothing more than a way to describe discounts that, as the Commission's Article 82 Guidance recognises, "stimulate demand and benefit consumers".³⁸⁸ It is plain that

³⁸⁷ *British Airways*, n.78 above, §68.

³⁸⁸ Article 82 Guidance §57.

372. As long as Intel's effective price was above cost, so that an as efficient competitor could compete for the sales, Intel's discounts to cannot be viewed as abusive.

Conditional rebates: errors in assessment of effects

373. A properly conducted as efficient competitor test shows that
The Decision

Moreover, although the Decision

Error 1: Conclusion regarding contestable share

374. The Decision finds

375. The Commission

As a matter of law (see §167 above, citing *Deutsche Telekom*) and economics, Intel's perception of how much business was contestable is the appropriate basis for estimating the contestable share.

389

376. Even leaving that error aside, the Commission

377. Intel's contemporaneous assessment of contestable share.

378.

379.

395

380. The Commission's groundless claim of collusion to inflate the contestable share.
The main basis for the Commission's rejection of Intel's contemporaneous estimate is the Commission's assertion that

The Commis-

390

392

393

394

Report

Report

395

sion's conclusion is groundless.

381.

382. As part of that

383.

396

397

398

399

384. The Commission claims that

that

As a result, the Commission concludes at

385.

386. In any event,

387.

Accordingly

400

Report,

388. Intel has annexed the

Accordingly,

389.

405 states that

402

403

404

406

390. **Additional errors of assessment regarding contestable share.** The Commission's other reasons for rejecting Intel's assessment of the contestable share are not based on firm, precise and consistent evidence.

391. First, the Commission

392. The Commission also rejects this evidence because

⁴¹⁰ Moreover,

393. The Commission also rejects the contestable share assessment in

407

408 By way of contrast.

409

410 Report.

411 Accordingly, as states,
communications from the documents

The Commission first asserts, based on

that
shown above,

The Commission has no evidence whatsoever

As

394. The Commission also questions

confirms, however, that

The Decision

412

395. The Commission also argues at that

396. The Commission also claims that

The document states

But the Commission

As explains,

412

413

In short, the evidence regarding

397.

Once again, the Commission fails to offer even a shred of evidence to support its position that

398. Using the correct measure of the contestable share –

– Intel passes the

AEC test in every period.

416

399. **Assessment of Conditional Share.** Even putting aside Intel's understanding of the contestable share, the Commission's assessment of

400. The Commission asserts that it is

414

415

416

Report

417

418

Report

401.

Error 2: Conclusion regarding the amount of the conditional rebate

402. The Decision offers three reasons for assuming that

The Commission claims that: (i)

(ii)

and (iii)

403.

those three reasons

⁴¹⁹ The Commission points to

⁴²⁰ Report.

⁴²¹ Report

⁴²³ The Commission's conjectures are therefore inconsistent with the contemporaneous evidence.

404.

Error 3: Conclusion regarding Intel's AAC

405. The Decision's errors regarding the appropriate cost measure are discussed at §§F.176-179 above. The Commission made the same errors in applying the AEC test to

Error 4: Failure to perform a test for

406.

As the Commission admits,

This is a manifest error of assessment.

Error 5: Allegedly reinforcing factors

407. The Commission incorrectly asserts that "reinforcing factors" support its as efficient competitor analysis. First, the Commission suggests

The Commission refers at

422

423

Report

Report.

424

Report

425

408. Secondly, the Commission claims that

409. Indeed,

The Decision claims that the

429

Conditional rebates: summary of conclusions

410. Intel's rebates to were not conditional, as alleged in the Decision, because

For the same reasons,

The Commission

425

426

Report, Exhibit

427

428

429

also

Thus, Intel's rebates to were not capable of foreclosing an as efficient competitor and cannot have been abusive.

Naked restrictions: Commission's findings and errors of assessment

411. According to the Commission, the

(i)

(ii)

and (iii)

412. As to each of the purported "naked restrictions", the Commission's evidence relates principally to

testified that

413. The Commission concludes that

contrary to the evidence on the file. First,

This conclusion is

430

431

414. Secondly, the Commission

For instance, the

Commission cites at

415.

Direct sales channel

416. The Commission wrongly concludes,

⁴³⁶ In other words,

417. In sworn testimony,

confirmed

433

434

435

436

Alleged "EMEA delay" constraint

418. The Commission incorrectly finds that Intel rebates were conditional on

The Commission acknowledges at

Nonetheless, the

Commission concludes that

419. For example, the Commission relies

420.

437

438

439

440

441

421. The first mention of

The Commission cites

422.

1

Naked restrictions: summary of conclusions

423. In conclusion, the Commission's three allegations of "naked restrictions" involving are entirely baseless, and are contradicted by both

Comity / extra-territoriality

424. A final point arises concerning the territorial scope of Article 82, since both Intel and are non-EC companies. The relevant case law summarised at section E confirms that the Commission was required to demonstrate a substantial effect on the Community economy of the rebate arrangements agreed between Intel and It has not even attempted to do so.

442

444

J.

Commission's findings on conditionality

425. The Decision finds at _____ that: (a)

(b)

and (c)

Errors in assessment of conditionality

426. Intel has never disputed that

However, Intel denies that

427. The Commission has

conditionality finding is

First, the Commission's

Secondly, the Commission

Thirdly, the Commission

Finally, the Commission

The Decision errs in overlooking evidence showing the absence of conditionality

428. The evidence refutes the Commission's finding that

The Commission claims that

Under the Commission's own definition of conditionality, this complete absence of " necessarily means that there was no conditionality.

429. The evidence available to the Commission clearly demonstrates that

For

example,

430. Similarly, an

431. The Commission responds that

But the Commission, not Intel,

bears the burden of proof. In any event,

432. The Decision states at

433. Further, the only evidence of

446

447

448

449

450

434. Under the Commission's theory of conditionality,

A purported "condition" that is never enforced – despite repeated breaches – is no condition at all.

435. The Commission's conditionality finding is further

Similarly,

The Commission

does not explain why

The Commission's finding that

The Decision errs in asserting that ECAP rebates were conditional

436. The Decision finds at

That finding is not supported by the evidence.

437.

441. The Decision also

442. The Commission also relies on

443.

The Decision errs in assessing

444. The Decision also errs in finding at

⁴⁶⁰ Decision

⁴⁶¹ Decision.

model to 80% volume share basis (need \$6M MDF to hit 80%

N

⁴⁶⁴

force

The Decision relies principally

However,

467

445. Secondly, the Decision

But the Commission

In other words, the

document

446. The Commission states that the

447. Thirdly, the Commission relies

The Decision errs in assessing the

448. The Commission also errs in inferring at

449. Intel does not dispute that

There is nothing uncommon or improper about this practice, as
is a useful tool for suppliers to assess the competitiveness of their offerings. The
inference that the Commission draws from the mere presentation of is
therefore unfounded.

The Decision errs in overlooking the significance of

450.

Intel, however,

451.

Errors in assessment of effects

The Commission's as efficient competitor allegations

452. The Commission assesses

453. The Commission's calculations

First, the Commission's own data show

Secondly, the Commission

Thirdly,

Fourthly, the Commission

And fifthly,

Error 1:

454. The data used by the Commission

⁴⁷⁵ Decision

455. In performing that analysis, the Decision concludes at

456.

Error 2:

457. The Decision assumes at

⁴⁷⁶ Report

⁴⁷⁷ Decision: Report

Report

⁴⁷⁸ Report

458.

459. The Decision suggests that

First,

460. Secondly,

Nonetheless, the Commission states that

461. The Commission's

⁴⁷⁹ Decision

480

481

Error 3:

462. The Decision

463.

The Decision explains that

In fact,

⁴⁸⁴ This is significant because

464. The Commission's approach

As a matter of simple logic and economics,

⁴⁸³

465. The Commission relies on

⁴⁸⁵ This document shows that

466. In order to calculate

the Decision recites

Accordingly,

467. the Decision states that

In fact,

468. This document shows that

469. The Decision cites

470. Thus,

Accordingly,

471. Accordingly,

⁴⁸⁸ Decision

⁴⁸⁹

⁴⁹⁰ The Commission applies

⁴⁹¹ As noted above, the Commission's analysis with respect to

By contrast,

This further confirms that

Error 4:

472. The Decision

Error 5:

473. The Decision exacerbates the foregoing errors by

The assumption is wrong.

474. Most saliently,

475. More generally, the Commission

492

493

Report

494

Decision in which the Commission also asserts that

495

The Commission effectively seeks to shift the burden of proof to Intel with respect to but there is no legal basis for such an approach. Thus, the Commission has failed to meet its burden.

Comity / extra-territoriality

476. As discussed at section E, Articles 81 and 82 EC do not have unlimited territorial scope, and the fact that conduct may produce certain effects, no matter what they may be, on the Community economy does not in itself suffice to establish Community competence. Rather, such effects must be shown to be “substantial, that is to say, appreciable and not negligible”.⁴⁹⁷ In the present case, therefore, the Commission was required to demonstrate a substantial effect on the Community economy of the rebate arrangements between Intel and . It has not even attempted to do so.

477. In particular, as the Decision states at

. The Commission has entirely failed to consider whether the arrangements in issue had a “substantial” effect on the Community economy.

Summary of conclusions

478. The following conclusions arise from the above: (i) the Commission
(ii) the
(iii) there is no evidence that

and

(iv) the Commission’s

K.

Commission’s findings

479. The Decision concludes that

⁴⁹⁷ Case T-204/03 *Haladjian Frères v Commission* [2006] ECR II-3779, §167. See also *Woodpulp*, n.96 above, opinion, §82 and *Gencor*, n.97 above, §90 and §92.

The Decision asserts that

480. The Decision

Errors in assessment

481. The Decision relies upon

⁴⁹⁹ It is, of course, perfectly legitimate for any supplier (including Intel) to urge a customer to choose its product over a competitor's product; such requests are a part of normal competition.

482.

sworn testimony was given in the US proceedings on after the Decision was issued, and is crucial in assessing the accuracy of the Commission's factual assertions. testimony

⁴⁹⁸

483. When questioned by counsel

testified that

⁵⁰⁰ This testimony

484. One of the Decision's critical errors is in

The Decision quotes

485. testimony

testified under oath that

⁵⁰⁰ Transcript

⁵⁰²

486. testimony regarding

487. testimony also reveals that

testified that

⁵⁰⁶ Moreover,

488. also testified that,

489.

490. The Decision also cites

testimony, however, shows

491. The Decision cites at

492. The Decision also relies upon

The Decision cites

this

and testimony confirms that

493.

The testimony of

confirms that

494.

the Decision relies upon

The Decision does not address the

set out in testimony.

495. The Decision also relies upon

and again sworn deposition

testimony confirms that

496.

497. The Decision also relies upon

498. The Decision

499. Finally, the Commission's conclusions are

Comity / extra-territoriality

500. Finally, as summarised at section E, the Commission was required to demonstrate a substantial effect on the Community economy of the rebate arrangements between Intel and

However, it has not even attempted to do so.

Summary of conclusions

501.

The Commission has failed to prove that

L.

Commission's findings on conditionality

502. The Decision finds that

503.

504.

505. The Decision hinges on the findings that: (i)

and (ii)

Both aspects of this finding are unfounded. The evidence cited in the Decision establishes

Errors in assessment of conditionality

506. The finding that

However, the Decision

(i) the Commission

(ii) the Commission

(iii)

(iv) the Commission

Absence of

507. The

508.

The Commission

509. The Decision's

510. The Commission's reliance upon

First,

Secondly,

511. Furthermore,

Similarly,

The evidence demonstrates that

512.

513. The documents in question

In other words,

514.

515. First, the Commission's

516. Secondly,

517. Thirdly,

518. Fourthly,

519. Equally,

The Commission wrongly relies upon information that was withheld from Intel

520. At the Commission relies upon documents the full text of which it has refused to produce to Intel. Intel is unable to plead to these documents and reserves all of its rights in respect thereof. Settled law bars the Commission from relying on documents not put to a defendant during the administrative procedure.⁵³⁸

521. In any event, these documents do not support the inferences that the Commission seeks to draw from them. For example,

522. The Decision

It thus suggests that

523.

⁵³⁸ Case T-4/89 *BASF v Commission* [1991] ECR II-1523, §36. Case T-36/91 *ICI v Commission* [1995] ECR II-1847, §§ 91-93.

524.

The evidence

525. The Decision cites

Furthermore,

526. For example, the Decision's citation at

Similarly,

However,

527. The Commission's reliance upon

The Commission

528. The Decision also asserts in

The Decision concludes at

This assessment is erroneous.

529. First,

The Commission claims at

545

546

Annex A.206.

530.

531. Secondly, the evidence shows that

532. Thirdly, the Decision relies primarily upon

533. Whilst the Decision acknowledges

acknowledges this change at

The Decision

Errors in assessment of effects

534. The Decision's as efficient competitor analysis for

(i)

(ii)

and (iii)

Correcting

either the first or second of these errors would, by itself, reverse the Decision's conclusion that Intel's were capable of foreclosing an as efficient competitor.

Error 1: Application of a double conditional rebate standard without evidentiary support

535. The Decision acknowledges at

But the

Commission then states at

536. The Decision calculates the amount of this "double conditional discount" by assuming that

537.

First, the Commission assumes at

⁰ Thus the Commission has

538. In fact, the evidence concerning

539. Even if the Commission's allegations concerning

540. Secondly, the Commission's analysis assumes that

541. Thirdly, the Decision performs its

542. Fourthly, the Decision

543. Finally, the Commission's

Error 2:

544. At the Decision evaluates

545. The Commission's conclusion that

Commission initially finds that

The

During the period in question.

555

546. The Commission's analysis generalises

547. More directly, there is no evidence that

For example,

Similarly, the Commission has

identified

To the contrary,

548. The Commission's reasoning is

The Commission

acknowledges

⁵⁵⁴ Decision

⁵⁵⁵ Supplemental Report.

⁵⁵⁶

549.

550.
show that

The data cited by the Commission

551.

552. The Report demonstrated that

553.

Error 3: Conclusion regarding Intel's AAC

554. The Decision's errors concerning the appropriate measure of costs are reviewed above at §§175-179. Those errors affect the as efficient competitor test for in the same manner.

Summary of conclusions

555. Intel's were not conditional in the way alleged in the Decision. There is no evidence that

The Commission's conclusions are based on a selective and inaccurate reading of the evidence, as well as information withheld from Intel in breach of Intel's rights of defence.

556. In addition, the Commission made two serious errors in applying the AEC test to

M. HARM TO COMPETITION AND CONSUMERS

557. It is common ground between Intel and the Commission that an AEC analysis is an important factor in assessing whether an allegedly exclusionary pricing practice is capable of causing anti-competitive foreclosure and thereby constituting an abuse under Article 82. However, for the reasons explained above, the AEC analysis carried out by the Commission is flawed and therefore cannot be relied upon to establish foreclosure. Presumably in order to address this issue, section 4.2.5 of the Decision entitled “Harm to competition and consumers” purports to set out an analysis of such harm as a result of Intel’s pricing practices. However, this section merely asserts anti-competitive foreclosure effects, without actually analysing whether such effects existed. It is clear from *GlaxoSmithKline* that the Commission cannot simply presume that Intel’s discounts caused harm to consumers; it must have regard to their legal and economic context.⁵⁶³ It is not entitled to presume consumer harm on the theory that the conditional discounts and payments in this case somehow “resemble” those in other cases, as the legal and economic context is materially different.⁵⁶⁴

558. The Decision claims that Intel’s conduct has operated to the “detriment of consumers and competition both in the short and in the long term, in terms of price, choice and innovation” (§1612). It offers no evidentiary support for this claim, and none exists.

No harm to consumers

559. **Price.** The evidence is incontrovertible that CPU prices have declined during the relevant period at a faster rate than the prices of any other product. As discussed in Section C, during the relevant period CPU prices declined significantly, at an annually compounded rate of 36.1%. The Commission cannot credibly claim that consumers paid higher prices because of Intel’s conduct.

560. **Innovation.** The Decision states that “it is not questioned that there have been positive innovations in Intel’s x86 CPU products” (§1697), and admits that the “[t]he pace of

⁵⁶³ Case T-168/01 *GlaxoSmithKline v Commission* [2006] ECR-II 2969, §122: “if account is taken of the legal and economic context in which GSK’s General Sales Conditions are applied, it cannot be presumed that those conditions deprive the final consumers of such advantages.” See also Joined Cases C-501/06 P, C-513/06 P, C-515/06 P and C-519/06 P *GlaxoSmithKline v Commission*, opinion, §98: “... it is, however, as explained above, always necessary to take into account the legal and economic context of an agreement”.

⁵⁶⁴ *GlaxoSmithKline v Commission*, §138: “In particular, the Commission is not entitled, as it did at recitals 118 and 119 to the Decision and in its written submissions, merely to draw parallels with the agreements which it has had occasion to examine in its previous practice in taking decisions and take the view that Clause 4 of the General Sales Conditions resembles those agreements or can be treated in the same way as them. Such an approach ultimately ignores the elements of legal and economic context described above, which are not present in the decisions adopted pursuant to Article 81(1) EC to which the Commission referred.”

innovation is rapid” in the CPU market (§140). It cites no evidence of harm to innovation. Indeed, both Intel and AMD increased their investment in R&D during the relevant period, with Intel’s R&D expenditure rising from \$4.03bn to \$5.76bn and AMD’s from \$852m to \$1.77bn. The evidence and the Commission’s own statements thus show that consumers have benefited from rapid innovation and that the pace of investment in future innovation has increased.

561. *Choice.* The Decision asserts that Intel’s conduct “excluded, limited or delayed AMD x86 CPUs in the market” and therefore had “a direct and immediate negative impact” on customers who would otherwise “have had a wider price and quality choice” (§1603). The Commission’s assertion at §1598 that Intel’s discounting practices “limit[ed] consumer choice” is factually flawed for at least five reasons.

562. First,

During the

relevant period,

Secondly,

563. Thirdly, the Decision looks at the issue of consumer choice simply in terms of but that is not a valid measure of choice.

⁵⁶⁵ Report

⁵⁶⁶ Report

564. Fourthly, the idea of “choice” expressed in the Decision is completely unprincipled and result-oriented. The Decision assumes that offering more AMD-based PCs increases choice, but that offering more Intel-based PCs decreases choice, even when no AMD models are displaced. Under the heading “Reduction of consumer choice”, the Decision criticises Intel for persuading As the Commission describes this episode,

Apparently the

Commission views AMD as the only *legitimate* “choice”.

565. Fifthly, the Decision errs in asserting that

This assertion is not supported by any relevant market analysis. The closest the Commission comes to such analysis is its suggestion at

What the Commission does not say (and cannot say) is that consumers who wanted to buy AMD-based computers lacked choices. In fact,

⁵⁶⁹ Since anti-competitive

foreclosure cannot be assumed in it certainly cannot be assumed in other European countries in which had much smaller shares

No harm to competition

566. In relation to the alleged “Longer term impact due to the weakening of Intel’s main competitor”, the flaw in the Commission approach is apparent from §1612, which states:

“As regards conditional rebates by a dominant company, the fact that a “rebate” can be leveraged by the dominant company from its non contestable share into the contestable share *may* allow that company to foreclose as efficient, or even more efficient rivals, even if its overall average price is higher than that of its rivals. This is therefore to the detriment of

consumers and competition both in the short and in the long term, in terms of price, choice and innovation" (emphasis added).

567. This clearly indicates that the Commission's "findings" of detriment to consumers and competition are dependent on an assumption of foreclosure. As explained above, however, there is no foreclosure because all of Intel's challenged discounts pass the AEC test. Further,

570

Moreover, any claim of foreclosure is undermined by evidence

Without any basis for finding foreclosure, the Decision's "findings" of harm (including _____ cannot be sustained. More fundamentally, in the absence of harm to consumers and competition in the form of higher prices, reduced innovation, or reduced choice, the Commission's claims are empty.

568. Indeed, the Commission is unable to muster even a claim of harm to AMD.

Thus there is no

evidence of harm to consumers, harm to competition, or even harm to the complainant, AMD.

N. AMD'S MARKET PERFORMANCE

569. Section 4.4 of the Decision purports to address "Intel's general arguments as regards AMD's performance", although it is clear that the Commission does not consider such an analysis to be relevant because it states that "abuse is an objective concept, which does not depend on the actual situation of the competitor of the dominant company" (§1719) and that "the performance of rivals in the market is not relevant for the application of Article 82" (§1733). Section E demonstrates that the Commission's interpretation is not supported by

case-law and is inconsistent with the position adopted in the Article 82 Guidance.

570. The Commission's position regarding evidence of AMD's performance is as follows:

"It is possible that AMD might have had shortcomings in certain performance areas and/or in certain segments, and that there are documents which specify that on the file. In the same vein, however, there is significant evidence on the file that OEMs and Intel considered that AMD products also had many positive and innovative attributes" (§1696).

571. The Commission fails to explore whether these observations might *both* be true. Rather, the Commission simply asserts that "it has not been shown that AMD's lack of significant penetration with the major OEMs covered by this Decision cannot (at least partly) be imputed to Intel's conduct or that AMD's performance in the market would not have been better in the absence of Intel's conduct" (§1734). This wrongly reverses the burden of proof. Moreover, the Commission fails to consider the actual evidence

The Commission at §1698 claims to rely upon the "OEMs [who] are the best-placed to come to the soundest judgment as regards their supply needs", but the Commission conspicuously fails properly to analyse the

As a consequence, the Commission has failed to consider its foreclosure theory in light of the actual evidence relating to the performance of AMD during the period of the alleged infringement.

572. The reality is that, as explained in section C, AMD's CPU business experienced greater success during the relevant period than at any other period in its history. AMD gained market share at Intel's expense and experienced capacity constraints as demand for its products grew faster than its capacity to supply them. AMD's success reflected its effective business execution in addressing the needs of the consumer and high-performance server segments of the market. AMD was much less successful in the commercial (business) PC and mobile (notebook) PC segments of the market. AMD's level of success in each segment mirrored the quality of its offerings for the segment.

573

AMD's lack of success in the commercial PC segment

573. AMD's sales in the commercial PC segment were hampered by its inability to offer reliable platforms to meet the needs of commercial customers.

573

⁵⁷⁴ Reliability and stability depend not only on the CPU but also on the "chipset," a device that directs the data flow on the computer.

A single supplier of platforms is better situated to optimise the CPU and chipset to work with each other, and can guarantee that the platform for these components will remain stable for at least a year, which is a key requirement of commercial end users.⁵⁷⁶

574. AMD's Chairman publicly acknowledged in July 2006 that AMD had

575. described

576.

Because of

577. Evidence on the file shows that

AMD's lack of success in the mobile (laptop/notebook) segment

578. The mobile segment has been the fastest growing segment of the computer industry.⁵⁸⁸ Part of the credit for the growth is due to the Centrino mobile technology platform that Intel introduced in 2003. This platform included the first mobile CPU that not only delivered performance comparable to that of desktop CPUs, but also offered extended battery life coupled with wireless connectivity. An industry analyst credited Intel with "fueling growth in

⁵⁸⁸ According to Mercury Research, mobile CPU sales first exceeded desktop CPU sales in the fourth quarter of 2008, between 2002 and 2008, mobile CPU sales grew by 423%, from 28.3m to 148.1m, while desktop CPU sales grew by only 19.5%, from 135.8m to 162.3m.

the notebook segment", and AMD agreed.⁵⁸⁹

579. AMD has acknowledged that it neglected this important segment.

580.

AMD's success in the consumer and server segments

581. AMD performed much better in the consumer segment, its traditional area of strength, and particularly the consumer desktop segment. Individual consumers do not place a value on

the platform elements that hampered AMD's competitiveness in the commercial segment, and even AMD's weak mobile offerings could appeal to price-sensitive consumers who were less concerned with battery life and mobility.

582. AMD also experienced successful growth in the server segment based upon the success of its Opteron microprocessor.

. The Decision itself recognises at §§850-851, that AMD grew from a share in servers at the end of 2000 to ^R unit share and revenue share in the second quarter of 2006. According to ^E DRuiz, AMD was ^A ^C ^T ^D

583. The Decision fails to recognise the significance of AMD's rapid growth in this segment. AMD's Opteron success shows that: (i) when AMD had a competitive product it could succeed even at the highest (and highest margin) segment of the microprocessor market, and (ii) Opteron enjoyed explosive growth in the face of sizeable discounts granted by Intel to its customers. Thus, it should be apparent that AMD's performance matched the company's business execution: AMD offered competitive products for the consumer (especially consumer desktop) and server segments and was rewarded with success. In segments in which its own executives recognised that the company's offerings were deficient, AMD performed less well – precisely what would be expected in a well functioning competitive market.

AMD's marketplace performance

584. During most of the relevant period, AMD enjoyed strong growth and registered record profits, as discussed in section C. AMD's CPU turnover in 2007, the last year of the relevant period, was its turnover in 2002, the first year of that period. From mid-2003,

⁵⁹⁶ Annex A.36, p.10.

⁵⁹⁷ Annex A.242, p.1.

⁵⁹⁸

⁵⁹⁹

⁶⁰⁰ Annex A.245, p.2.

shortly after the April 2003 launch of its Opteron CPU, through the end of 2006, AMD experienced very rapid growth and broke CPU turnover and profit records repeatedly.

is attributable to four factors: (i) (ii)
iii)
(iv)

585.

586.

Intel's new microprocessor line-up

587. In the second half of 2006, Intel introduced a new CPU line-up that gave it a significant performance edge across all volume market segments, in addition to the other product advantages that Intel already enjoyed.⁶¹¹ The combination of Intel's solid execution and AMD's execution problems resulted in a small market share shift from AMD back to Intel. AMD's share, however, remained materially higher than it was at the beginning of the relevant period.

588.

Conclusion regarding AMD's performance

589.

The only Intel-related factor that adversely affected AMD's performance is Intel's delivery of a compelling set of products. Article 82 should not hold Intel responsible for AMD's mistakes, and it should not punish Intel for delivering products that consumers wanted. AMD alone must bear responsibility for its execution errors.

O. SINGLE STRATEGY TO FORECLOSE AMD

590. The Decision concludes that “it would not be appropriate to only view each of the respective conducts of Intel in isolation ... Intel has engaged in a long-term comprehensive strategy to foreclose AMD from the strategically most important sales channels in the market” (§1747). According to the Decision, the measures adopted “complement[ed] each other” and “[t]aken together [the] practices were capable of having or likely to have had an even greater negative impact overall on the market ...” (ibid).

591. Based on these assertions, the Commission finds at §1748 that Intel committed a single infringement of Article 82 from October 2002 until December 2007. Intel does not understand this to be an allegation of a separate abuse, but rather a finding that goes to the duration of the abuses identified in the Decision. The result is that, in assessing the fine, the Commission at §§1787-1788 takes the duration of the infringement to be 5 years and 3 months, and applies a multiplier of . The Commission also relies at §1785 upon its finding that Intel engaged in a single infringement when assessing the gravity of the infringement.

592. For the reasons set out in sections G to K.501, Intel denies that it engaged in any anti-competitive behaviour. Even if the Court upholds the Commission’s findings of abuse, however, the allegation of a single strategy is untenable and impossible to reconcile with the fragmented nature of the different allegations in respect of the various OEMs.

593. In particular, the Commission cannot credibly maintain that from October 2002 until December 2007 Intel engaged in a “long-term comprehensive strategy to foreclose AMD from the strategically most important sales channels” (§1747). No allegations are made in

⁶¹⁵ Here and below, the ranking of OEMs is as set out at Decision §133.

⁶¹⁶ Decision Article 1(g).

594. Intel's conduct in respect of

595. Thus, the factual allegations in relation to each of the OEMs and

596.

Furthermore,

These realities include (i)

(ii)

(iii)

597. Indeed, the only evidence cited in the Decision in support of Intel's alleged strategy consists of

The second is

598.

First,

599. Secondly,

In the Article 82 Guidance, the Commission states that it will rely upon “direct evidence of an exclusionary strategy”, including:

“internal documents which contain direct evidence of a strategy to exclude competitors, such as a detailed plan to engage in certain conduct in order to exclude a competitor, to prevent entry or to pre-empt the emergence of a market, or evidence of concrete threats of exclusionary action.”⁶²⁰

600.

P. INFRINGEMENT OF ESSENTIAL PROCEDURAL REQUIREMENTS

601. The Commission infringed essential procedural requirements by failing to: (i) grant an opportunity to Intel to make oral submissions in respect of the new allegations and evidence raised in the SSO and the Letter of Facts; (ii) procure relevant and potentially exculpatory documents from AMD for the case file when requested to do so by Intel; and (iii) make a proper note of its meeting with a key witness, who had previously provided highly relevant exculpatory testimony to

General principles

⁶²⁰ Article 82 Guidance, n.81 above, §20.

⁶²¹

602. Respect for the rights of the defence is a fundamental principle of Community law which must be guaranteed in all proceedings, including proceedings before the Commission.⁶²² This is reflected for example in the preamble to Commission Decision of 23 May 2001 on the terms of reference of Hearing Officers in certain competition proceedings⁶²³ which provides for the observance of the Charter of Fundamental Rights of the European Union (“the Charter”).⁶²⁴ It is also now settled law that the Court is both entitled and required to secure respect for the rights recognised by the Convention.⁶²⁵ Fundamental rights can only be secured if the Court is vigilant to ensure that the Commission adheres to the highest administrative standards.⁶²⁶

603. There are important reasons why in a case such as the present the Court must enforce high administrative standards. First, the Commission is an administrative body that is not and cannot be independent and impartial.⁶²⁷ Secondly, the Court is not a substitute for a properly constituted administrative procedure.⁶²⁸ As the Court pointed out in *Solvay*⁶²⁹:

“... any infringement of the rights of the defence which occurred during the administrative procedure cannot be regularised during the procedure before the Court of First Instance, which carries out a review solely in relation to the pleas raised and which cannot therefore be a substitute for a thorough investigation of the case in the course of the administrative procedure.”

⁶²² Case T-348/94 *Enso Española SA v Commission* [1998] ECR II-1875, §80, citing Case 85/76 *Hoffmann-La Roche v Commission* [1979] ECR 461, §9.

⁶²³ Commission Decision 2001/462/EC, ECSC on terms of reference for hearing officers in certain competition proceedings, [2001] OJ L162/21.

⁶²⁴ [2007] OJ C303/1. Article 52(3) of the Charter provides that “in so far as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention”.

⁶²⁵ Case C-260/89 *ERT* [1991] ECR I-2925, §41; opinion 2/94 of 28 March 1996 [1996] ECR I-1759, §33; and Case C-185/95P *Baustahlgewebe GmbH v Commission* [1998] ECR I-3187, opinion, §24.

⁶²⁶ Case T-305-307, 313-316, 328-329, and 335/94 *Re the PVC Cartel II Limburgse Maatschappij NV and other v Commission* [1999] ECR II-0931.

⁶²⁷ In *McGonnell v United Kingdom* (2000) 30 EHRR 289, 8 February 2000, the European Court of Human Rights held that the mere fact that the same person presided over the body that adopted the legislation was capable of casting doubt on his impartiality when he subsequently determined, as judge of the law, the applicant’s appeal in the case concerning interpretation of that same legislation. The Court considered that the applicant had legitimate grounds for fearing that the judge may have been influenced by his previous participation in the adoption of the relevant legislation (see §§55-57). The Commission held at §61 of its opinion that “it is incompatible with the requisite appearance of independence and impartiality for a judge to have legislative and executive functions as those [held by the Bailiff in Guernsey].” Similarly, in *Procola v Luxembourg* (1995) 22 EHRR 193 the European Court of Human Rights held (at §33) that where members of the Judicial Committee of the Conseil d’Etat had previously ruled on the lawfulness of a regulation, which they themselves had previously scrutinised in their advisory capacity, the Judicial Committee could not be considered structurally impartial in determining a dispute relating to the same legislation.

⁶²⁸ Case T-167/94 *Detlef Noëlle v Council of the European Union and Commission* [1995] ECR II-2589, §73, citing Case C-269/90 *Hauptzollamt Muenchen-Mitte v Technische Universitaet Muenchen* [1991] ECR I-5469.

⁶²⁹ Case T-30/91 *Solvay SA v Commission* [1995] ECR II-1775, §98.

604. Thirdly, the Commission has assumed worldwide jurisdiction and imposed truly vast penalties.

Unlawful refusal to grant an oral hearing

605. As set out in section D above, the Commission refused Intel an oral hearing in relation to the SSO and the Letter of Facts, even though the SSO raised entirely new allegations concerning

Prior to the SSO, the Commission had not advanced any case at all in relation to either An undertaking under investigation must be afforded the opportunity during the administrative procedure *effectively* to make known its view on the truth and relevance of the facts, charges, and circumstances relied upon by the Commission.⁶³¹

606. The right to an oral hearing is a mandatory procedural safeguard designed to ensure effective exercise of the right to be heard and constitutes a general principle of Community law codified in Regulation 773/2004.⁶³² Recital 10 and Article 12 of the Regulation provide:

“In order to respect the rights of defence of undertakings, the Commission should give the parties concerned the right to be heard before it takes a decision.”

“The Commission *shall* give the parties to *whom it has* addressed a statement of objections the *opportunity* to develop their arguments at an oral hearing, if they so request in their written submissions” (emphasis added).

607. This wording is unequivocal: if an undertaking requests an oral hearing in its written submissions, then the Commission must grant one: it is not a matter of discretion. The Commission itself recognised this

608. The imposition of the obligation to grant an oral hearing reflects the central importance of an undertaking’s ability to make oral submissions. In particular, an oral hearing provides an undertaking with the unique opportunity to: clarify and/or elaborate upon its written

⁶³⁰ The Letter of Facts was a one-sided presentation by the Commission based upon documents cited by AMD in the US proceedings; accordingly, Intel submits that it should have been granted the right to make oral submissions in respect of the Letter of Facts, for the same reasons that apply to the SSO.

⁶³¹ Case T-37/91 *ICI v Commission* [1995] ECR II-1901, §49.

⁶³² Commission Regulation of 7 April 2004 relating to the conduct of proceedings by the Commission pursuant to Articles 81 and 82 of the EC Treaty.

⁶³³

submissions; tender persons to give oral evidence who may corroborate, explain, or enlarge upon, the facts set out in its written submissions;⁶³⁴ make submissions to Commission officials other than the immediate case team, including the legal service and the chief economist and his staff; pose and answer questions;⁶³⁵ and make submissions directly to the Advisory Committee on Restrictive Practices and Dominant Positions, which the Commission will subsequently have to consult prior to adopting an infringement decision.⁶³⁶

609. The Commission states that Intel was not entitled to an oral hearing as a matter of right, because its Reply to the SSO did not fall within the meaning of Article 10(2) of Regulation 773/2004, “due to the fact that Intel chose not to reply to the 17 July 2008 SSO by the extended deadline of 17 October 2008” (§86). Article 10(2) provides that:

“The Commission shall, when notifying the statement of objections to the parties concerned, set a time-limit within which these parties may inform it in writing of their views. The Commission shall not be obliged to take into account written submissions received after the expiry of that time-limit.”

610. The same argument, *mutatis mutandis*, is made in relation to the Letter of Facts. The reasoning is flawed.

611. Article 12 provides that the Commission *shall* grant an oral hearing to parties “if they so request in their written submissions”. Intel did request an oral hearing in submissions filed before the 5 February deadline, which the Commission accepted and acknowledged.

612. Further, the refusal was unreasonable and Nothing in Commission Decision of 23 May 2001 (terms of reference of Hearing Officers) permits the Hearing Officer to refuse an oral hearing.⁶³⁷ Moreover, the Commission would not have been in any way prejudiced by holding an oral hearing.

⁶³⁴ This is expressly envisaged by Article 10(3) of Regulation 773/2004.

⁶³⁵ Emphasised in recital 12 of Regulation 773/2004.

⁶³⁶ Under Article 14 of Regulation 1/2003.

⁶³⁷ Commission Decision 2001/462/EC, ECSC on terms of reference for hearing officers in certain competition proceedings [2001] OJ L162/21.

613. Intel did not serve its Reply to the SSO and to the Letter of Facts before 5 February 2009 because it was at that time applying to the Court for (i) annulment of the Hearing Officer's decision not to grant an extension of time and (ii) an interim order suspending the expiry of the time-limit. If the Commission were entitled to refuse an oral hearing in these circumstances, then the effect would be to punish Intel for having the temerity to exercise its right of access to the Court under Article 6 of the Convention. No person should be denied a procedural right of such importance whilst they are invoking a right of access to the Court.

614. Put simply, Regulation 773/2004 provides all undertakings that serve written submissions in respect of a statement of objections with the right to have an oral hearing. This is consistent with a main objective of an oral hearing, viz., that an undertaking subject to astronomical levels of fine should be able to make oral submissions directly to an Advisory Committee consisting of representatives of the various Member States. The Commission must consult the Advisory Committee before adopting an infringement decision; the right of an undertaking to address the Advisory Committee directly at an oral hearing is a fundamental procedural safeguard, which the Commission failed to afford to Intel in this case.

615. The failure to grant an oral hearing was material to the conclusions reached in the Decision. It is striking that following the oral hearing which took place after the SO, the Commission abandoned key allegations in the SO. At that oral hearing, Intel made detailed submissions about the SO's allegations in respect of _____ and the

The Commission dropped these allegations in the Decision.⁶³⁸ It is clear that the evidence given by Intel at the hearing was highly relevant to the abandonment of these allegations.

616. The effect of the SSO and the Letter of Facts was to raise *entirely new allegations* in respect of _____ and to refer to *new evidence* in respect of the Commission's allegations concerning _____ which the Commission cited prominently in the Decision. The failure to grant an oral hearing was therefore highly material.

Unlawful failure to procure AMD documents

Intel's requests to the Commission

617. As set out at §80 above, on 21 May 2008, the Commission issued an RFI to Intel and AMD in respect of the documents which they had cited in their pre-trial briefs in the US proceedings. The AMD Delaware Documents demonstrated the existence of additional AMD

⁶³⁸ Decision §164 and §§1738-1739.

documents that were (i) directly relevant to the allegations in the SO and SSO, and (ii) potentially exculpatory of Intel. Accordingly, on 6 August 2008, Intel wrote to the Commission asking it to request AMD to submit such additional documents, and on 12 August 2008 the Commission rejected that request.⁶³⁹

618. On 4 September 2008, Intel wrote to the Commission concerning the incompleteness of the case file.⁶⁴⁰ Annexed to that letter was a schedule (“the Schedule”) identifying 87 documents or categories of documents that could be proven to exist because they were specifically referred to in an AMD document which was already on the Commission’s file, and/or could be inferred necessarily to exist because of the inherent nature of another document to which Intel had access. Intel asked the Commission to procure and provide access to these documents.

619. On 6 October 2008, _____ wrote to Intel stating that the Commission had decided to ask AMD for only 7 of the documents listed in the Schedule.⁶⁴¹ These represented a small portion of the documents referred to by Intel in the Schedule.

The significance of the AMD Delaware Documents

620. The missing documents were very relevant to Intel’s defence. AMD asserted to the Commission, inter alia, that OEMs such as

621. For example, in relation to

asserts that Intel excluded AMD.⁶⁴³

622. In relation to manufacturing capacity,

In recent testimony in the US proceedings,

623. The 7 AMD documents disclosed to Intel on 8 October 2008 (which the Commission says are irrelevant) show why the AMD Delaware documents that Intel asked the Commission to obtain would have been relevant and potentially exculpatory. For example, the Decision alleges at

⁸ Other disclosed documents also indicate that the documents the Commission refused to obtain would in all likelihood have been very relevant to Intel's defence. For example,

624. The Commission has acted unfairly in relation to the use of these documents. In the SSO, the Commission referred to the Intel Delaware Documents more than 30 times in support of its allegations in respect of However, the
Commission

Infringement of an essential procedural requirement

625. Where an undertaking under investigation requests the Commission to obtain potentially exculpatory documents, rights of defence may be infringed if the Commission fails to request these documents:

“It must be borne in mind that, regarding exculpatory documents, the case-law states that, in adversarial proceedings established by the regulations for the application of Articles 81 EC and 82 EC, *it cannot be for the Commission alone to decide which documents are of use for the defence of undertakings in proceedings involving infringement of the competition rules* (Case T-30/91 Solvay v Commission [1995] ECR II-1775, paragraph 81) ...

According to the case-law, where it is established that during the administrative procedure the Commission did not disclose to the applicants documents which might have contained exculpatory evidence, there will be an infringement of the rights of the defence only if it is shown that the administrative procedure might have had a different outcome if the applicant had had access to the documents in question during that procedure (Case T-7/89 Hercules Chemicals v Commission [1991] ECR II-1711, paragraph 56, and Solvay v Commission, paragraph 66 above, paragraph 98) ... *where the exculpatory documents in question are not in the Commission's investigation file, an infringement of the rights of the defence may be found only if the applicant expressly asked the Commission for access to those documents during the administrative procedure*⁶⁵⁰ (emphasis added)

626. In this case, Intel prepared a detailed Schedule of relevant documents omitted from the Commission's document-gathering exercise. In refusing to procure such additional documents from AMD the Commission failed to address relevant evidence and infringed an essential procedural requirement. In *Aalborg v Commission* the Court held it is sufficient:

“to show that it would have been able to use the exculpatory documents in its defence ... in the sense that had it been able to rely on them during the administrative procedure, it would have been able to put forward evidence which did not agree with the findings made by the Commission at that stage and would therefore have been able to have some influence on the Commission's assessment in any decision it adopted.”⁶⁵¹

⁶⁴⁹ Annex A.271 and Annex A.272 respectively.

⁶⁵⁰ Case T-314/01 *Avebe v Commission* [2006] ECR II-3085, §§66-67. The document sought by Avebe were documents which had been obtained by the US Department of Justice and Avebe could not itself obtain a copy of the document to supply to the Commission.

⁶⁵¹ Cases C-204-5, 211, 213, 217 and 219/00 P *Aalborg A/S v Commission* [2004] ECR I-123, §§74-75.

627. This reasoning applies equally in this case, where the Commission has failed even to procure relevant and exculpatory documents

The Commission's arguments

628. The Commission seeks to justify its failure on a number of grounds: (a) The categories of documents requested were "very broad and general" (§72); (b) Intel has not demonstrated why the documents "would be exculpatory" (ibid), and moreover the documents would not, in any event, have been exculpatory to Intel (§65); (c) to have requested the documents from AMD would have been "unjustified and disproportionate" (ibid); (d) if the Commission had requested the documents in this case, it would open the floodgates to numerous and unspecified requests for documents by defendants in other cases in the future (§72); and (e) an Intel letter opposing a request by an organisation called [redacted] for full access to Intel documents produced in the US proceedings took the position that the documents that the Commission subsequently received from AMD "were likely to provide 'a full picture of all the relevant facts'" (§70). All of these points are misconceived.

629. **Allegedly broad categories of documents.** This argument is without foundation. First, the Commission failed even to procure all the AMD documents that were *specifically* identified in the Schedule. The Commission incorrectly claims at §74 that where documents were specified, it obtained these from AMD and provided them to Intel. However, the Commission obtained only 7 documents, which were not the only documents identified in the Schedule. For example, the Commission failed to obtain the document referred to in

630. Secondly, the Commission has expertise in drafting requests for information under Article 18 of Regulation 1/2003 to gather all documents potentially relevant to the scope of an investigation. Intel specifically prepared the Schedule in such a way as to assist the Commission to formulate requests to AMD for the additional documents. The documents identified in the Schedule were drafted so as to be in terms identical to those used by the Commission in its own requests to OFMs. For example, the Schedule set out as "Documents to be requested":

631. In its Article 18 request to

632. **Exculpatory nature of documents.** At §72, the Commission states that Intel did not provide “any precise indication” of why the additional AMD documents would be exculpatory. But the relevance was obvious and was set out in both the schedule and the covering letter. Intel asked the Commission to procure documents regarding issues which are central to the Decision such as foreclosure, AMD’s capacity constraints, AMD’s poor marketing and technical performance failure to execute, and absence of harm to consumers.

633. The Decision asserts that the AMD documents requested by Intel “by their very nature, cannot be considered exculpatory for Intel” (§72). The Commission then examines the 7 documents it did obtain and says that these make it “all the more unlikely that pursuing Intel’s broader, general request would lead to any appreciable result” (§83). However, as a matter of law, the Commission was not entitled to determine for itself whether the documents identified by Intel in the Schedule might have been exculpatory:

“In that regard, it should be stated that in the defended proceedings for which Regulation No 17 provides *it cannot be for the Commission alone to decide which documents are of use for the defence*. Where, as in the present case, difficult and complex economic appraisals are to be made, the Commission must give the advisers of the undertaking concerned the opportunity to examine documents which may be relevant so that their probative value for the defence can be assessed.”⁶⁵⁴ (emphasis added)

⁶⁵² Annex A.265.

⁶⁵³ Annex A.117

⁶⁵⁴ Case T-30/91 *Solvay v Commission*, [1995] ECR II-1775, §81.

634. Proportionality. The Commission contends that Intel's request was for "a virtually limitless set of documents". This is nonsense. The Schedule identified limited categories of documents, and none of the requests would have been wider than requests made by the Commission. In the context of an investigation lasting over 9 years, involving 12 formal requests for information from Intel, 141 formal requests for information from third parties, dawn raids at the premises of 21 companies, a case file consisting of hundreds of thousands of pages of documents, and a Decision imposing a fine of €1.06 billion, it was the Commission's failure to request these exculpatory documents which was unjustified and disproportionate.

635. Floodgates. It is no defence to a breach of Intel's rights for the Commission to argue that if it had requested the additional documents from AMD, this would somehow have complicated the future enforcement of competition law.

636. Intel's Letter. The Decision asserts that

ed

⁶⁵⁵ It further characterised the missing AMD Delaware documents as

⁶⁵⁶

interview

637. As set out at §§209-210, on

During the period covered by the Decision,

The Commission

prepared (but failed to place on the file) an agenda for its interview with ⁶⁵⁷ This agenda shows that the meeting was to cover issues central to the case relating to

The Commission failed to properly record this meeting, or to place its notes on the file.

638. In his testimony
confirmed that:

639. After Intel learned that the Commission had interviewed on 22 January 2008, Intel requested that the Hearing Officer provide it with any record of the interview on the case file.⁶⁵⁹ On 19 February 2008, the Hearing Officer responded that

⁶⁶⁰ On 21 February 2008, the case team confirmed that
had indeed attended a meeting with the Commission on but stated that

640. On 4 March 2008, Intel sent a letter to the Hearing Officer informing of the case team's email, and reserving the right to pursue the matter further.⁶⁶² On 10 March 2008, the Hearing Officer responded that,

641. On 7 May 2008, the Hearing Officer acknowledged that

On 19 December 2008, the Commission provided a heavily redacted copy of the note to Intel

⁶⁶⁵ It is apparent from the unredacted parts of the note that the interview with

642. In a decision dated 14 July 2009 in relation to this issue, the European Ombudsman concluded that the failure to take a proper note of this meeting constituted maladministration by the Commission.⁶⁶⁶ He further concluded that it could not be excluded that the meeting of concerned potentially exculpatory evidence:

“The Ombudsman has carefully examined the evidence made available to him in the context of the present inquiry. After examining the Agenda, the note of and the written follow-up to the meeting of the Ombudsman concludes that it cannot be excluded that, at least in part, the meeting of concerned potentially exculpatory evidence.

643. The Court has previously held that a defendant’s rights of defence are infringed if the Commission fails to draw up minutes of a meeting if “evidence relating to the meeting in question could have been used by the [defendant] as exculpatory evidence”.⁶⁶⁸ In this context, was very likely indeed to have given evidence exculpatory of Intel at meeting with the Commission. The view of

The evidence that does exist powerfully suggests that

The Commission’s failure constitutes an infringement of an essential procedural requirement going to the heart of the Decision’s findings in relation to

Q. LEVEL OF FINE

644. As explained above, Intel’s conduct during the period covered by the Decision did not infringe Article 82. Given the absence of any infringement, no fine can be imposed. If, however, the Court upholds all or part of the Commission’s findings, Intel submits that the fine of €1.06bn should be annulled or reduced substantially in light of the Court’s unlimited

⁶⁶⁵ Annex A.10, Annex III.

⁶⁶⁶ Ombudsman decision §134: Annex A.2.

⁶⁶⁷ *ibid.*, §127.

⁶⁶⁸ Joined Cases T-191/98 and T-212/98 to T-214/98 *Atlantic Container Line and others v Commission* [2003] ECR II-3275, §396.

jurisdiction to review the level of any penalty pursuant to Article 229 EC and Article 31 of Regulation 1/2003, for the following reasons: (a) the level of the fine is manifestly disproportionate; (b) there was no intent or negligence on Intel's part to infringe Article 82; and (c) the Commission has misapplied its fining guidelines and taken irrelevant considerations into account.

The level of the fine is manifestly disproportionate

645. In this case, a fine of €1.06bn – the highest fine ever imposed on a single company for an infringement of the competition rules – is manifestly disproportionate in circumstances where the Commission has failed to establish any consumer harm or foreclosure of AMD. To impose the highest ever fine in a case relating to price reductions that benefited consumers and where the complainant, AMD, has only grown in strength, is perverse.

646. It is well-established that fines for infringements of the competition rules must be proportionate to “the scale of their anti-competitive effects and the interests of the consumers or competitors injured thereby”.⁶⁶⁹ It is therefore necessary, in assessing fines, to consider the *actual effects* of the infringement and the causal link between those effects and the injury (if any) to consumers or competitors.

647. In this case, the evidence demonstrates that during the relevant period the market for CPUs was characterised by intense competition between AMD and Intel, which resulted in constantly falling prices and improving product quality, to the benefit of consumers. According to the Decision at §842, AMD's market share increased nearly fivefold during the period considered by the Commission, from [redacted] in the second quarter of 1997 to [redacted] in the fourth quarter of 2006. In revenue terms, the increase was nearly eightfold, from [redacted] to [redacted] over a similar period (§844). In the desktop segment, AMD experienced a nearly fivefold increase in its share over the same period, from [redacted] to [redacted] (§272). In revenue terms, the increase in desktop share was sevenfold, from [redacted] to [redacted] (§847). In the mobile segment, AMD's unit share rose even more dramatically, from [redacted] over a similar period (§848). In the server segment, the unit share increase was [redacted] from [redacted] to [redacted] (§850). In revenue terms, the increase in market share was still higher, from [redacted] to [redacted] (§851). As the

⁶⁶⁹ Case T-83/91 *Tetra Pak v Commission* [1994] ECR II-75, §240.

648. Moreover, to the extent that AMD suffered any losses in certain periods, the Commission has not demonstrated that these were attributable to Intel's conduct. Although

its overpayment of \$2.5bn for the acquisition of ATI,⁶⁷¹ and its failure to fulfil its promises for its new Barcelona microprocessor.⁶⁷² Moreover, as explained by

673

649. Similarly, the Commission has failed to establish any harm to consumers which would justify a fine of €1.06bn. The Commission states at §1600 that it has taken into account the "great economic importance" of the CPU market, adding that "this means that any anticompetitive behaviour on that market has a considerable impact". In the press conference at which she announced the Decision, the Commissioner for Competition Policy, Neelie Kroes, emphasised that the Decision was predicated upon harm to the consumer:

"Given that Intel has harmed millions of European consumers by deliberately acting to keep competitors out of the market for over five years, the size of the fine should come as no surprise."⁶⁷⁴

650. It is established that where, in setting the level of fines, the Commission takes account of actual effects on the market, it must demonstrate the existence of such effects to a high standard:

"... it is important to maintain a *high threshold of proof* with regard to the Commission when it asserts that a cartel has had an impact on the market for the purposes of assessing the gravity of the infringement and calculating the amount of the fine."⁶⁷⁵

"... if the Commission chooses to take account of the actual impact of the infringement on the market in assessing the gravity of the infringement and in order to determine the amount of the

⁶⁷⁰

⁶⁷¹ AMD has acknowledged that it overpaid for ATI (acquisition price \$5.4bn in July 2006), taking goodwill impairment charges totaling \$2.5bn in 2007-2008. AMD's use of cash reserves for the acquisition led it to spin off its manufacturing plants into a joint venture majority-owned by the Abu Dhabi sovereign wealth fund.

⁶⁷² **Annex A.280.**

⁶⁷³

⁶⁷⁴ Introductory remarks at press conference, Commission takes antitrust action against Intel, Neelie Kroes, European Commissioner for Competition Policy, 13 May 2009, Brussels: **Annex A.281.**

⁶⁷⁵ Joined Cases C-125/07 P, C-133/07 P, C-1350/07 P and C-137/07 P *Erste Bank der österreichischen and others*, opinion of 26 March 2009, §303.

fine to be imposed for that infringement, it must then be in a position to provide *actual, credible and sufficient evidence* showing that the infringement had *real effects on the market* and also that there was a *causal link between the anti-competitive agreement and the alteration of competition on the market.*⁶⁷⁶ (emphasis added)

651. The Commission's position is thus that the fine is based upon the alleged "harm" to "millions of European consumers ... for over five years". However, the Decision contains no "actual, credible and sufficient" evidence that the alleged abuses had "real effects" on the market. Instead, the Commission merely asserts at §1679 that Intel's conduct harmed competition on the merits, resulting in (a) a "significant reduction of consumer choice" (§1616); (b) "clear harm" to consumers and a "direct and immediate negative impact" on customers (§1603 and §1613); and (c) lower incentives to innovate (§1616).

652. The Decision presents no evidence that consumers have suffered harm of any kind. Indeed, at §1685 the Commission takes the view that it is not required to show any effects on competition at all. Accordingly, as the level of the fine is based upon the alleged "considerable impact" on the market, but no analysis of the actual effects of the alleged abusive conduct on AMD, or the market, has been carried out, there is no proper basis for the level of the fine at all. Indeed, the rebates negotiated by the OEMs will have assisted in delivering low computer prices to the benefit of consumers.

653. In these circumstances, not only is there no reasonable basis for imposing the highest ever fine, but there is the clearest risk that prices will be higher rather than lower as a result of the Decision. In fact, the evidence set out at section C demonstrates that the CPU market was extremely vibrant and highly competitive with rapid innovation during the period covered by the Decision and that consumers benefited from a wide choice of computers containing innovative AMD and Intel CPUs at ever lower prices.

654. The fine imposed upon Intel is also disproportionate compared to other recent cases including the *Microsoft* case.⁶⁷⁷ The difference is striking in terms of the market impact of the allegedly abusive conduct. Microsoft's conduct resulted in multiple and measurable negative effects on its competitors, whilst Microsoft's own share of the server segment almost tripled from 22.5% to 63% from 1996-2002,⁶⁷⁸ and its share for Windows Media Player more than

⁶⁷⁶ *ibid*, §308.

⁶⁷⁷ *Microsoft*, n. 75 above.

⁶⁷⁸ *ibid*, §570.

doubled from 22% to 45% from 1999-2003.⁶⁷⁹ By contrast, Intel's conduct had no adverse impact on AMD's increasing market share. Indeed,

655. The fine imposed upon Intel is also considerably larger than the highest ever cartel fine imposed on a recidivist. In November 2008, the Commission imposed a fine upon St Gobain, a recidivist cartel participant, of €896m which included a 60% increase for St Gobain's prior illegal activities. Despite the finding of a serious *per se* infringement to fix prices over a five-year period, St Gobain was fined some €150m less than Intel.⁶⁸¹

656. Moreover, as the Commission accepts (at §556, §936, §969, and §1734), any decision on the part of the OEMs, particularly to purchase Intel CPUs may well have been due to other business reasons and not to the loyalty inducing effects of any conditional rebates. Consistent with the decision in *Peugeot v Commission*,⁶⁸² therefore, the fine should be reduced. In that case, the Court reduced the fine imposed on Peugeot in relation to a parallel trade infringement on the basis that part of the decrease in exports referred to by the Commission was caused by the evolution in price differentials and consequently the actual impact of the infringement on the market was overestimated. The same principle applies in the present case, because the Commission accepts and the evidence shows that the

Similarly, the Commission has overestimated the effect Intel's conduct had on the market by deeming "irrelevant" and refusing to take into account the evidence presented above of AMD's strong performance and §1719 and §1770). In particular, the Commission has erred at §1783 in taking into account Intel's market share in assessing the level of fine.

657. A further factor, as explained at §603 above, is that the Commission is not an independent and impartial tribunal within the meaning of the Convention. The largest fine in competition law history (so far as Intel knows) has been imposed by an administrative authority, and not by a tribunal or court or even a quasi-judicial body. It was imposed by the

⁶⁷⁹ *ibid.*, §1082.

⁶⁸⁰ Report,

⁶⁸¹ See Commission Press Release, "Antitrust: Commission fines car glass producers over €1.3 billion for market sharing cartel", 12 November 2008: **Annex A.282**.

⁶⁸² Case T-450 *Peugeot and Peugeot Nederland v Commission*, judgment of 9 July 2009, §328.

college of Commissioners, a body of 27 political appointees, none of whom had heard the parties' submissions. Since the fine is criminal in nature, in the sense of Article 6 of the Convention,⁶⁸³ it was imposed unlawfully and in violation of Intel's right to have the charge against it decided by an independent tribunal. Accordingly, the imposition of what is the highest criminal or quasi-criminal fine ever imposed in Europe, in the absence of any evidence of harm to competition or consumers, requires particular judicial scrutiny consistent with the Court's unlimited jurisdiction to review penalties. In particular, in exercising its unlimited jurisdiction, the Court is not limited by the Commission's fining guidelines and is able to review the fine by reference to the absence of any harm to consumers or competition.

658. For all of these reasons, it is clear that the fine of €1.06bn imposed on Intel is manifestly disproportionate and should be annulled or substantially reduced.

Intel did not intentionally or negligently infringe Article 82 EC

659. Under Article 23(2)(a) of Regulation 1/2003, the Commission may only impose fines upon undertakings where they have infringed Article 82 (and/or Article 54 of the EEA Agreement) either *intentionally* or *negligently*. At §1760 the Commission advances four reasons why Intel infringed Article 82 intentionally or negligently: (i) there is clear decisional practice of the Commission and consistent case-law from the Community Courts on the unlawfulness of conditional rebates; (ii) the various elements of Intel's conduct were part of a single strategy to foreclose AMD from the x86 market; (iii) Intel took steps to preserve the secrecy of its conduct; and (iv) the AEC test conducted by the Commission does not relate to the existence of the infringement.

660. As explained in section E, the existing case-law does not show that conditional rebates are always unlawful. Rather, the question is a factual one of whether in all the circumstances of the case the rebate is capable of or likely to foreclose competition. Moreover, the Commission's attempt to predicate findings of abuse on OEMs' supposed fear of disproportionate rebate reductions is a novel approach under the case-law, as is its attempt to fashion a new category of abuse that it refers to as a "naked restriction" (see §§123-126). Intel

⁶⁸³ "In the determination of his civil rights and obligations or of *any criminal charge against him*, everyone is entitled to a *fair and public hearing* within a reasonable time by an *independent and impartial tribunal* established by law" (emphasis added); see Case T-1/89 *Rhône-Poulenc SA v Commission* [1991] ECR II-867, opinion, p.885, where Advocate General Vesterdorf explicitly espoused the reasoning of the ECtHR and noted that "in this connection considerable importance must be attached to the fact that competition cases of this kind are in reality of a penal nature". In Appl. No. 11598/85, *Société Stenuit v France*, HR Commission Report of 30 May 1991, it was concluded that fines for breaches of the French competition rules would be criminal in nature for ECHR purposes, although considered to be administrative under French law.

has also shown that the Commission has failed to establish the existence of a strategy to foreclose AMD (see section O).

661. As to the Commission's allegation that Intel took steps to conceal its conduct, this is ill-founded and wrong. The allegation as regards is addressed at Section I above. As regards the Commission has misinterpreted the key documents. First, the Commission concludes that

The Commission interprets this as evidence

⁶⁸⁴ This

662. Secondly, the Commission contends that the term

However,

Moreover,

⁶⁸⁴

Report

663. In support of its case on concealment, the Commission seeks to rely upon precisely this sort of misinterpretation, despite the plain words of the relevant documents. For example, at the Commission seeks to rely upon

Similarly, the Commission is critical of the statement

664. Finally, at the time of the allegedly abusive conduct at issue, Intel could not have foreseen the results that were ultimately reached by the Commission in the application of its AEC test. As set out above, the Commission's application of the AEC test was based upon internal data from the various OEMs which was neither known nor accessible to Intel. For example: (a) the Commission

which were never communicated to Intel); (b) the Commission calculates

but was never made available to Intel and (c) the Commission calculates

, a document to which Intel never had access

665. As set out at sections G-K.501, Intel's assumptions as to the OEMs' contestable shares were entirely reasonable. The Commission's finding of an infringement therefore entails an economic analysis based not on what Intel knew or could reasonably be expected to know, but rather on what Intel would have known had it been given complete access to its customers' confidential strategy documents and subjected them to the same one-sided interpretation as the Commission. That finding is contrary to the general principle of legal certainty:

"[i]f the lawfulness of the pricing practices of a dominant undertaking depended on the particular situation of competing undertakings, particularly ... information which is generally not known to the dominant undertaking – the latter would not be in a position to assess the

lawfulness of its own activities.”⁶⁸⁷

666. This asymmetry of information entirely vitiates the Commission’s conclusion that the relevant rebates were unlawful. Even if that submission is not accepted by the Court, at the very least the fine should be annulled or substantially reduced.

Misapplication of fining guidelines and irrelevant considerations

667. The Commission’s calculation of the basic level of the fine is vitiated by a number of flaws: (a) the Commission has failed properly to assess the goods or services to which the infringement relates between January and September 2006; (b) the Commission has erroneously taken into account concealment as a factor in assessing gravity; (c) the Commission has erroneously used its finding of a single infringement as an aggravating factor across the whole time period; and (d) the Commission has retroactively applied its fining guidelines.

668. The starting point under point 13 of the Commission’s fining guidelines⁶⁸⁸ for setting the basic amount of the fine is to “take the value of the undertaking’s sales of goods or services to which the infringement directly or indirectly relates in the relevant geographic area within the EEA”.⁶⁸⁹ The Commission has failed to define a relevant product and geographic market in respect of the allegations.

Given that the alleged abuse in respect of

669. Moreover, as

⁶⁸⁷ Case T-271/03 *Deutsche Telekom AG v Commission*, n.129 above, §192.

⁶⁸⁸ Guidelines on the method of setting fines imposed pursuant to Article 23(2)(A) of Regulation No 1/2003 [2006] OJ C210/2.

⁶⁸⁹ As regards “indirectly”, the fining guidelines note “Such will be the case for instance for horizontal price fixing agreements on a given product, where the price of that product then serves as a basis for the price of lower or higher quality products.” Although the Commission refers to sales “directly and indirectly” related (see, e.g., Decision §1776) it is not clear whether, or if so, how, indirect sales have been included. To the extent that the Commission has done so, the note to point 13 of the fining guidelines indicates that it was wrong to do so.

670. According to the guidelines, in setting the basic amount of the fine, a proportion of the value of sales will be taken into account, by making an “assessment of gravity ... on a case-by-case basis for all types of infringement, taking account of all the relevant circumstances of the case”.⁶⁹⁰ The Commission states at §1785 that it “took account of the fact that Intel took measures to conceal the conducts established in this Decision” as a factor in assessing gravity, presumably to increase the gravity. The Commission’s reference to “conducts” implies that it has taken into account its allegations of concealment in respect of each of the allegations contained in the Decision. However, quite apart from the arguments set out above (at §§661-664) that the Commission has misinterpreted the evidence and failed to establish concealment, it should be noted that the Commission has only set out specific allegations of concealment as regards

Accordingly, to the extent that it has taken concealment into account as regards all of the OEMs, it was wrong to do so.

671. The Commission has made a finding of a “single infringement” in assessing the gravity of the infringement, again presumably to increase its gravity.⁶⁹¹ As set out above, the Commission’s finding of a single infringement is not made out on the facts of the case. In particular, the Commission has cited

Moreover, it appears that the

Accordingly, the Commission’s starting point for its assessment of the fine is based upon a misapplication of its fining guidelines and a reliance upon irrelevant considerations.

672. The Commission has unlawfully applied its fining guidelines with retroactive effect.

⁶⁹⁰ Fining guidelines, point 20.

⁶⁹¹ This is based upon the fact that, at Decision §1747, the Commission states that “[t]aken together, those practices were capable of having or likely to have had an even greater negative impact on the market”.

Although the Court has previously held that Article 7 of the Convention, and the principles of non-retroactivity and the protection of legitimate expectations, do not prevent the Commission from increasing the level of fines imposed by replacing an uncodified fining practice with fining guidelines,⁶⁹² the same principles do not apply when one set of fining guidelines is replaced by another, with retroactive effect.

673. The retroactive application of the 1998 fining guidelines did not involve any infringement of legitimate expectations since the lack of transparency in the Commission's uncodified fining policy could not itself give rise to any such expectations. However, the situation is very different where the 2006 fining guidelines are applied retroactively to replace the 1998 fining guidelines inasmuch as the latter, by making the Commission's fining policy transparent and giving legal certainty to the Commission's practice, did indeed give rise to legitimate expectations.⁶⁹³ It follows that retroactive application of the 2006 fining guidelines to conduct that occurred prior to their adoption violates the principle of legal certainty, Article 7 ECHR, and the principles of non-retroactivity and the protection of legitimate expectations.

R. FORM OF ORDER SOUGHT

674. For the reasons set out in this Application, Intel respectfully asks the Court: (1) to annul in whole or in part Commission Decision C(2009) 3726 final of 13 May 2009 in Case COMP/C-3/37.990 Intel; (2) alternatively, to annul or to reduce substantially the level of the fine imposed; and (3) to order the Commission to pay Intel's costs.

⁶⁹² See, e.g., Case C-397/03 P *Archer Daniels Midland v Commission* [2006] ECR I-4429, §25.

⁶⁹³ Unlike the uncodified *ad hoc* fining practice prior to the adoption of the 1998 fining guidelines, the 1998 fining guidelines are "designed to produce external effects" since they are "aimed at traders"; were adopted "with a view to transparency and to increasing legal certainty for the undertakings concerned", and since they "determine, generally and abstractly, the method which the Commission has bound itself to use in assessing the fines imposed by the decision and, consequently, ensure legal certainty on the part of the undertakings". Moreover, "in adopting [the 1998 fining guidelines] and, by publishing them, announcing that they will henceforth apply to the cases to which they relate, the Commission imposes a limit on the exercise of its discretion and cannot depart from those rules under pain of being found, where appropriate, to be in breach of the general principles of law, such as equal treatment or the protection of legitimate expectations": see, e.g., Case C-397/03 P *Archer Daniels Midland v Commission* [2006] ECR I-4429, §91; Joined Cases C-189/02 P, C-202/02 P, C-205/02 P to C-208/02 P and C-213/02 P *Dansk Rørindustri and Others v Commission* [2005] ECR I-5425, §213; and Case T-69/04 *Schunk v Commission*, judgment of 8 October 2008, §44.

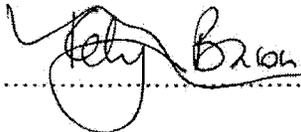
NICHOLAS GREEN QC


.....

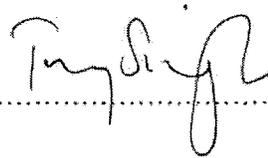
MARK HOSKINS QC


.....

KELYN BACON

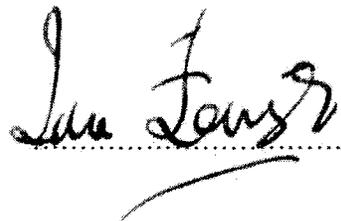

.....

TONY SINGLA


.....

of Brick Court Chambers

IAN FORRESTER QC


.....

of White & Case LLP

NIGEL PARR


.....

ROSS MACKENZIE


.....

of Ashurst LLP

Summary of application for annulment pursuant to Articles 230 and 229 EC

SUMMARY OF THE APPLICATION

Intel Corporation (“Intel”) is a company organised under the laws of Delaware, United States. Intel makes this Application pursuant to Article 230 EC for the annulment of Commission Decision C(2009) 3726 final of 13 May 2009 in Case COMP/C-3/37.990 Intel (“the Decision”) finding that Intel committed a single and continuous infringement of Article 82 EC and Article 54 of the EEA Agreement from October 2002 until December 2007 by implementing a strategy aimed at foreclosing a competitor, Advanced Micro Devices (“AMD”), from the market for x86 central processing units (“CPUs”).

Intel denies that it has infringed Article 82, and raises a number of grounds of appeal. First, Intel contends that the Commission errs in law by:

- (a) Finding that the discounts granted by Intel to its customers were abusive without establishing that they had an actual capability to foreclose competition.
- (b) Relying on a form of exclusionary abuse, termed “naked restrictions”, and failing to conduct any analysis of foreclosure (even a capability or likelihood to foreclose) in respect thereof.
- (c) Failing to analyse whether Intel’s rebate arrangements with its customers were implemented in the EC and/or had immediate, substantial, direct, and foreseeable effects within the EC.

Secondly, the Commission fails to meet the required standard of proof in its analysis of the evidence. Thus the Commission fails to prove that Intel’s rebate arrangements were conditional upon its customers purchasing all or almost all of their x86 CPU requirements from Intel. In addition, the Commission uses an “as efficient competitor” (“AEC”) test to determine whether Intel’s rebates were capable of restricting competition, but it commits numerous errors in the analysis and assessment of the evidence relating to the application of that test. The Commission also fails to address other categories of evidence relevant to the effects of Intel’s discounts. In particular, the Commission fails:

- (a) To address the evidence which shows that during the period of the alleged infringement, AMD substantially increased its market share and its profitability but that its lack of success in certain market segments and/or with certain OEMs was the result of its

own shortcomings.

(b) To establish a causal link between what it finds to be conditional discounts and the decisions of Intel's customers not to purchase from AMD.

(c) To analyse the evidence of the impact of Intel's discounts upon consumers.

Thirdly, the Commission fails to prove that Intel engaged in a long-term strategy to foreclose AMD. Such a finding is not supported by the evidence and is impossible to reconcile with the fragmented nature of the Commission's allegations (in relation to both products covered and time period) in respect of each Intel customer.

Intel also submits that all or part of the Decision should be annulled on the basis that the Commission infringed essential procedural requirements during the administrative procedure, which materially infringed Intel's rights of defence. In particular, the Commission failed:

(a) To grant Intel an oral hearing in relation to the SSO and Letter of Facts, even though they raised entirely new allegations and referred to new evidence which feature prominently in the Decision.

(b) To procure certain internal documents from AMD for the case file, when requested to do so by Intel, notwithstanding that the documents (i) were directly relevant to the Commission's allegations against Intel, (ii) were potentially exculpatory of Intel, and (iii) had been identified by Intel with precision.

(c) To make a proper note of its meeting with a key witness from one of Intel's customers, who was highly likely to have given exculpatory evidence. The European Ombudsman has decided that the Commission's failure properly to record the interview amounted to maladministration.

Pursuant to Article 229 EC, Intel also challenges the level of the fine imposed upon it on three main grounds. First, a fine of €1,060,000,000 (the largest ever fine imposed upon a single firm by the Commission) is manifestly disproportionate given that the Commission fails to establish any consumer harm or foreclosure of AMD. Secondly, Intel did not intentionally or negligently infringe Article 82: the Commission's AEC analysis is based on information that Intel could not know at the time it was granting discounts to its customers. Thirdly, in setting the fine the Commission fails to apply its 2006 fining guidelines correctly, and takes into account irrelevant or inappropriate considerations.

**UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION**

In the Matter of)	
)	
INTEL CORPORATION,	)	DOCKET NO. 9341
a corporation	)	PUBLIC DOCUMENT
)	
)	

Intel's Memorandum in Support of Memorandum in Opposition to Complaint
Counsel's Motion to Admit European Commission Decision

APPENDIX 2

In the Matter of:

Intel Corporation

March 25, 2010
Pretrial Status Conference

Condensed Transcript with Word Index



For The Record, Inc.
(301) 870-8025 - www.ftrinc.net - (800) 921-5555

FEDERAL TRADE COMMISSION

I N D E X

STATUS CONFERENCE TOPICS	PAGE
Docket 9341 called to order	5
Preliminary discussions	6
Motion on number of experts	10
Respondent's motion to extend time and increase the word limit	26
Monthly status report/conferences	49
Motion for protective order	51

For The Record, Inc.

(301) 870-8025 - www.ftrinc.net - (800) 921-5555
PUBLIC

FTC Docket No. 9341

Page 2	Page 4
<p>1 UNITED STATES OF AMERICA 2 FEDERAL TRADE COMMISSION 3 4 5 In the Matter of:) 6 INTEL CORPORATION,) Docket No. 9341 7 Respondent.) 8 -----) 9 10 THURSDAY, MARCH 25, 2010 11 2:00 P.M. 12 PRETRIAL STATUS CONFERENCE, PUBLIC RECORD 13 14 15 16 BEFORE THE HONORABLE D. MICHAEL CHAPPELL 17 Administrative Law Judge 18 Federal Trade Commission 19 600 Pennsylvania, N.W. 20 Washington, D.C. 21 22 23 24 25 Reported by: Susanne Bergling, RMR-CRR-CLR</p>	<p>1 ROBERT E. COOPER, ESQ. 2 DANIEL FLOYD, ESQ. 3 Gibson Dunn & Crutcher LLP 4 333 South Grand Avenue 5 Los Angeles, California 90071-1512 6 (213) 229-7000 7 8 9 ALSO PRESENT: 10 Victoria Arthaud 11 12 13 14 15 16 17 18 19 20 21 22 23 24 25</p>
Page 3	Page 5
<p>1 APPEARANCES: 2 3 ON BEHALF OF THE FEDERAL TRADE COMMISSION: 4 J. ROBERT ROBERTSON, ESQ. 5 KYLE D. ANDEER, ESQ. 6 Federal Trade Commission 7 600 Pennsylvania Avenue, N.W. 8 Washington, D.C. 20580 9 (202) 326-2916 10 11 ON BEHALF OF INTEL CORPORATION: 12 JAMES C. BURLING, ESQ. 13 Wilmer Cutler Pickering Hale and Dorr LLP 14 60 State Street 15 Boston, Massachusetts 02109 16 (617) 526-6000 17 ERIC MAHR, ESQ. 18 Wilmer Cutler Pickering Hale and Dorr LLP 19 1875 Pennsylvania Avenue, N.W. 20 Washington, D.C. 20006 21 (202) 663-6000 22 23 and 24 25</p>	<p>1 PROCEEDINGS 2 - - - - - 3 JUDGE CHAPPELL: Thank you. Have a seat. 4 Okay. Call to order Docket 9341. I'll start 5 with appearances of the parties. 6 Government, you're first. 7 MR. ROBERTSON: Good afternoon, Your Honor. 8 JUDGE CHAPPELL: Good afternoon. 9 MR. ROBERTSON: Robby Robertson, and I also have 10 with me Kyle Andeer, on behalf of the Government. 11 JUDGE CHAPPELL: And for Intel? 12 MR. BURLING: Good afternoon, Your Honor. Jim 13 Burling is my name. 14 JUDGE CHAPPELL: Good afternoon. 15 MR. BURLING: And I want to introduce the 16 General Counsel of Intel, Doug Melamed, and also Jim 17 Murray from Intel. 18 MR. MELAMED: Good afternoon, Your Honor. 19 JUDGE CHAPPELL: Welcome. 20 MR. BURLING: And across the table are Eric 21 Mahr, Bob Cooper, and Dan Floyd. 22 JUDGE CHAPPELL: Okay, thank you. 23 On March 23rd, the parties submitted a joint 24 summary of issues to be discussed. I've reviewed and 25 gone over that summary, and I am going to address the</p>

2 (Pages 2 to 5)

For The Record, Inc.

(301) 870-8025 - www.ftrinc.net - (800) 921-5555

PUBLIC

FTC Docket No. 9341

Page 6

1 issues in the order presented.
 2 Does anyone have anything they want to bring up
 3 before I get started on the agenda?
 4 MR. ROBERTSON: Only, Your Honor, that counsel
 5 and I have discussed some of these issues, and we
 6 probably should alert you as to those we're still
 7 negotiating and that we don't need court intervention
 8 on --
 9 JUDGE CHAPPELL: Okay.
 10 MR. ROBERTSON: -- so that we don't waste Your
 11 Honor's time. One of them relates to this issue of page
 12 limits for the expert -- pardon me, the designations.
 13 JUDGE CHAPPELL: The limit on depo pages?
 14 MR. ROBERTSON: Yes, sir.
 15 JUDGE CHAPPELL: Okay.
 16 MR. ROBERTSON: And counsel has raised that with
 17 us just recently. In general, I think we're -- we like
 18 the idea, but since they just raised it with us and we
 19 don't yet know what the designations are going to be
 20 yet, because we haven't disclosed those yet to each
 21 other, we are still negotiating what that limit is that
 22 we should propose.
 23 So, it would be, we think, premature -- and I
 24 think we are in agreement on this -- to set the page
 25 limit now before we know what that is. If we can reach

Page 7

1 agreement, I think we can get that resolved, if Your
 2 Honor is willing to come in in a status next month. I
 3 think the designation is not going to happen before then
 4 anyway. So, I think we can get it resolved then.
 5 JUDGE CHAPPELL: Right. Okay, thank you. What
 6 else?
 7 MR. ROBERTSON: On the how much time for each
 8 deposition, the only thing we were really disputing was
 9 whether in some cases that the Government should have a
 10 little more time with an AMD witness when Intel has
 11 already deposed that witness at length in another case.
 12 Since we don't even know who these AMD witnesses are
 13 yet -- Intel has agreed with us they are going to
 14 designate who those are here fairly soon -- it's too
 15 early for us to really negotiate how much time we need
 16 if we don't know who the people are. But I think we are
 17 working together to resolve that. It's not really a
 18 ripe dispute at this point.
 19 I should also say that with the exception of
 20 things that we've already briefed and put before Your
 21 Honor, in general -- I don't want to give an indication
 22 that we have all kinds of hot disputes with counsel --
 23 we talk with them on a daily basis, and we have had a
 24 very cordial and professional relationship, I believe,
 25 thus far. And some of these people I know, who are

Page 8

1 friends of mine, and we're all representing our clients
 2 vigilantly, but we're not -- we're not adding personal
 3 disputes at all.
 4 JUDGE CHAPPELL: Well, and I wanted to tell the
 5 parties, I could tell by the lack of paper raining on my
 6 office that the parties are working together, and I
 7 appreciate it.
 8 MR. ROBERTSON: So, those are the main things I
 9 can think of. I don't think there's anything in there
 10 that is a dispute that is not already being briefed that
 11 is ripe, if I've got that right.
 12 JUDGE CHAPPELL: Then that leaves me with --
 13 MR. BURLING: I have just a couple things to
 14 mention, Your Honor.
 15 JUDGE CHAPPELL: All right. Okay.
 16 MR. BURLING: Yeah. Just more to add to the
 17 list of the kind of pending discussions by way of
 18 possible previews of coming attractions, we are still
 19 talking -- we have some issues with some privilege
 20 claims asserted by complaint counsel, primarily the
 21 claim of a common interest between complaint counsel and
 22 Nvidia and complaint counsel and AMD. We have begun to
 23 discuss those. We have sent them a letter. We will try
 24 to work that out. If not, I suspect we would be back in
 25 front of the Court on that.

Page 9

1 And the other issue that we're still discussing,
 2 Mr. Cooper's prepared to address it if Your Honor wants
 3 to hear about it today, is that we -- from what we know
 4 now, we think that we will need up to eight experts in
 5 the case, rather than five.
 6 JUDGE CHAPPELL: Well, I have a note here to
 7 suggest an oral motion if the parties are prepared to
 8 deal with that today, and I can make that ruling today,
 9 and we can move on and prepare for trial.
 10 MR. BURLING: We are prepared to deal with that
 11 today, Your Honor.
 12 JUDGE CHAPPELL: Okay. And at some point I may
 13 take a short recess and you can gather your thoughts or
 14 notes if you need to.
 15 Would you be prepared to respond to that today?
 16 MR. ROBERTSON: Sure. Yes, sir.
 17 JUDGE CHAPPELL: Okay.
 18 MR. ROBERTSON: And on that -- on the first
 19 issue, again, it's something that just came up. We are
 20 working together on that. I think that -- we just got a
 21 letter from them yesterday or the day before yesterday
 22 on the --
 23 MR. BURLING: It was just yesterday. We had
 24 raised it before.
 25 MR. ROBERTSON: We haven't even gotten a

3 (Pages 6 to 9)

For The Record, Inc.

(301) 870-8025 - www.ftrinc.net - (800) 921-5555

PUBLIC

FTC Docket No. 9341

Page 10	Page 12
<p>1 privilege log from Intel yet, so a lot of these issues 2 really haven't even ripened, but we are going to discuss 3 this with them and hopefully reach a reasonable 4 compromise. And if we can't, we'll let the Court know. 5 JUDGE CHAPPELL: Okay. 6 MR. BURLING: The final item, Your Honor, and 7 it's listed on here as a pending motion. I didn't know 8 if Your Honor wanted us to address it today or not, but 9 we have a motion for a protective order in connection 10 with -- 11 JUDGE CHAPPELL: Yes. That's on my agenda. 12 MR. BURLING: Okay. Those are the items on our 13 agenda. 14 JUDGE CHAPPELL: Okay. Why don't we start with 15 the -- and I don't think you had mentioned the motion to 16 extend time to file or for an over late response. 17 MR. BURLING: Yeah. I assumed that was in the 18 agenda, because a note came out from chambers on that, 19 Your Honor. 20 JUDGE CHAPPELL: Yes, right. And the protective 21 order motion I put on the agenda since I got the 22 response yesterday and I was able to review everything 23 on that one. 24 MR. BURLING: Great, okay. 25 JUDGE CHAPPELL: So, let's start with -- do you</p>	<p>1 MR. ROBERTSON: Oh, sure. Yes, Your Honor. 2 JUDGE CHAPPELL: I am not going to worry about 3 the authority issue. 4 MR. ROBERTSON: And I wouldn't think you would, 5 but you understand why I have to -- 6 JUDGE CHAPPELL: No, I understand completely. 7 Right. 8 MR. ROBERTSON: Okay. 9 JUDGE CHAPPELL: But I don't want to force you 10 to make your argument today if you want to make more 11 points. I want to allow you to make all the points you 12 want to make, because it's legal argument I'm looking 13 for today. 14 MR. ROBERTSON: I can make whatever points there 15 are. 16 JUDGE CHAPPELL: So, I want to make sure on the 17 record everyone agrees that they're comfortable going 18 ahead with this motion today. 19 MR. COOPER: We are, Your Honor. 20 MR. ROBERTSON: Aside from what I've just said, 21 yes, sir. 22 MR. COOPER: Do you want to proceed with that 23 now? 24 JUDGE CHAPPELL: How much time do you need, 25 Mr. Robertson?</p>
Page 11	Page 13
<p>1 need some time to prepare your oral motion on the number 2 of experts? I mean, it's up to the parties. You can 3 have some time, I can take a recess later, or we can go 4 right into it. 5 MR. ROBERTSON: The only -- may I consult with 6 counsel? 7 JUDGE CHAPPELL: Go ahead. 8 (Discussion off the record.) 9 MR. ROBERTSON: Sir, the only issue is -- on the 10 experts is that it was just -- we just talked to them 11 about it yesterday, with who they want or what kind of 12 experts they wanted. I haven't had enough opportunity 13 to consult with my client on this, my client not being 14 the Commission but the people I work for within the 15 Bureau of Competition, and I've promised counsel I will 16 do that as soon as possible. 17 If Your Honor really wants to get it out of the 18 way, I'd be happy to do my best and argue it, but I 19 don't even have authority to agree to their request for 20 eight experts. You can rule on it and then I can tell 21 my boss I have to do it, that's one way to handle it, or 22 else I could find out if there's any way we can 23 compromise on it. 24 JUDGE CHAPPELL: Well, getting around the 25 authority issue, are you prepared to make an argument?</p>	<p>1 MR. ROBERTSON: I'm sorry, sir? 2 JUDGE CHAPPELL: How much time do you need for 3 the consultation? 4 MR. ROBERTSON: Oh, I don't think it's going to 5 take very long. 6 JUDGE CHAPPELL: No. I mean for whatever you 7 plan to do if we don't hear it today. 8 MR. ROBERTSON: Oh, if I consult with my client? 9 They're just not in today, so it could be tomorrow. 10 If -- one thing we could do is we could go ahead and 11 argue it, and then I could do a -- just a 1 1/2-page 12 response to whatever the oral argument is, in addition 13 to what I can say, if I need to do it. 14 JUDGE CHAPPELL: What about this: I'll hear the 15 argument today. After you do your consulting, if you 16 need to file something, do it, or if you decide you can 17 agree to it and you want to withdraw your opposition, do 18 that. 19 MR. ROBERTSON: I think that's -- that's fair. 20 JUDGE CHAPPELL: Okay. 21 With that, sir, go ahead. 22 MR. COOPER: Bob Cooper, Your Honor. 23 I need to make a couple of points, if I could. 24 There's a lot of background to all of this that may be 25 helpful. Your Honor, of course, appreciates that the</p>

4 (Pages 10 to 13)

For The Record, Inc.

(301) 870-8025 - www.ftrinc.net - (800) 921 5555

PUBLIC

FTC Docket No. 9341

Page 14

1 FTC's allegations are -- they're sweeping. We really
 2 view them as almost three different cases. But one of
 3 the basic set of allegations they have made was the
 4 subject of the AMD litigation, which was bitterly
 5 litigated, intensely litigated, over an extended period
 6 of time.
 7 A truly massive record was accumulated in that
 8 case, and as Your Honor obviously is aware, those
 9 depositions may be used significantly here, and the
 10 exhibits from those depositions may be used in a very
 11 significant manner here.
 12 When you stand back and look at just that case
 13 and the number of experts that were deemed necessary by
 14 the parties in that AMD case, each side had eight
 15 experts. In this case, we're obviously retreating from
 16 eight experts, but we think we need a total of eight
 17 experts to address all of the issues that will be
 18 presented by the FTC, because they are, in many
 19 respects, independent and separate.
 20 JUDGE CHAPPELL: So, you're telling me that you
 21 had eight experts in what you call one of the three
 22 subsets of this case?
 23 MR. COOPER: Yes, and I can kind of walk you
 24 through that if that would be helpful in terms of --
 25 JUDGE CHAPPELL: I don't think so. I understand

Page 15

1 the point.
 2 MR. COOPER: To give you a little more
 3 background, Your Honor, the economic experts who covered
 4 the issues in the AMD case, which are largely pricing
 5 and whether there was exclusive dealing and de facto
 6 exclusive dealing, the plaintiff's economic expert
 7 actually filed a report of 1177 pages, 200 pages of
 8 exhibits. We responded with about half of that amount.
 9 Obviously, we need at some point to have a discussion
 10 with Your Honor about not only the number of experts,
 11 but the length of reports and the circumstances under
 12 which the reports may or may not be used in front of the
 13 Court. That, I think, should wait for, obviously,
 14 another time.
 15 Now, in terms of what -- who we would intend
 16 to -- the subjects we would intend to cover by different
 17 experts, the anticompetitive pricing and exclusive
 18 dealing piece, as alleged by the FTC, sweeps across ten
 19 years of competition, some 12 different OEMs. Now,
 20 these are competitions that take place very frequently.
 21 The deals reached are very short term in nature,
 22 typically no more than a year, usually less. Each
 23 negotiation involves teams on both sides. They're quite
 24 intense. It is necessary to -- for an expert to look at
 25 a number of these transactions and sort out the economic

Page 16

1 consequences of the deals that were struck. That will
 2 be one expert in this case, and it will be a very
 3 substantial piece of work for that particular expert.
 4 Then we have secondly an expert who will now
 5 have to deal with similar sort of issues that arise in
 6 the context of the graphics allegations. That would be
 7 another economic expert. And as I understand the
 8 disclosure we got yesterday from plaintiff's counsel,
 9 from complaint counsel, they -- I believe they are
 10 looking at also using two economic experts to cover
 11 these separate stages or aspects of the case.
 12 Then -- if I can have a moment here -- we have
 13 three technology experts, all of whom, I think, will be
 14 very helpful to Your Honor. One technology expert is
 15 steeped in the microprocessor technology. Why is this
 16 important? It's important, among other reasons, because
 17 there's an allegation in the FTC complaint that Intel
 18 lost the technology lead to AMD, and yet AMD did not --
 19 was not as successful as it believes it should have
 20 been. That becomes a very important issue. We believe
 21 that it is entirely in error, and we can prove that the
 22 technology lead basically was with Intel throughout this
 23 period, and that accounts for Intel's success. That's
 24 one expert.
 25 Then we'll need a separate expert to deal -- a

Page 17

1 technology expert to deal with the graphics issues,
 2 which Your Honor will be unfortunately hearing a great
 3 deal about, and it is a very complex subject matter unto
 4 itself. And then we need a third expert to deal with
 5 the complaint's allegations about deception with respect
 6 to compilers and benchmarking, and that is another
 7 highly technical phase of this business which will
 8 require an expert.
 9 As I understand it, the FTC is also looking at
 10 having an expert with respect to compilers. I do not
 11 know if they have an expert with respect to the graphics
 12 technology or with respect to the microprocessor
 13 technology.
 14 On top of that, we think -- we know we need a
 15 cost accounting expert. Now, why is that important?
 16 Because one of the key issues here is whether Intel,
 17 when it competed, competed at prices that were above the
 18 appropriate level of cost. We are confident that was
 19 always the case, and it is very important for us to
 20 bring in a cost expert to establish that fact. We
 21 understand that the FTC has a cost expert who intends to
 22 challenge us on that -- on that particular aspect of the
 23 case. So, we have sort of lined up one on one in that
 24 regard.
 25 We also believe we will need a licensing expert.

5 (Pages 14 to 17)

For The Record, Inc.

(301) 870-8025 - www.ftrinc.net - (800) 921-5555

PUBLIC

FTC Docket No. 9341

Page 18

1 That, of course, I guess hinges on whether the remedies
 2 issues are to be tried at the same time as the case in
 3 chief or whether they would be tried in a sort of a
 4 separate proceeding, but in any event, we think we will
 5 need a licensing expert, whenever that is addressed.
 6 The last expert that we have in mind is what I
 7 would call a manufacturing capacity expert. The FTC has
 8 not, as I understand it, proposed a manufacturing
 9 capacity expert, but I understand why. One of the
 10 essential arguments that we will make is that AMD,
 11 during the period when they say they should have
 12 blossomed and done so much better, actually was
 13 capacity-constrained, could not have sold more in any
 14 event.
 15 The FTC has designated, as a witness, a
 16 gentleman named Daryl Ostrander, who is a manufacturing
 17 individual employee or former employee of AMD. In the
 18 AMD case, he submitted an expert report with respect to
 19 AMD's manufacturing capacity. Since the FTC plans to
 20 use him as an expert, I believe we will need to respond
 21 with an expert, obviously whereas an individual from AMD
 22 can come in and talk about his company and its capacity
 23 and capabilities based on his own knowledge --
 24 JUDGE CHAPPELL: If relevant.
 25 MR. COOPER: -- we can't, obviously. So, we

Page 19

1 need to have an independent expert. So, that takes us
 2 -- that takes us to eight.
 3 JUDGE CHAPPELL: Now, are you -- I hear you
 4 talking about what the FTC is doing. You're talking
 5 about the request for eight, including rebuttal, a total
 6 of eight.
 7 MR. COOPER: A total of eight, and when I
 8 referred to what the FTC was doing, they were very
 9 gracious in giving us their proposals -- their tentative
 10 proposals for experts and their names, and I think I've
 11 matched them up properly, although I should let
 12 Mr. Robertson talk on that.
 13 In any event, that's -- that is, in a nutshell,
 14 what we are thinking about. Of course, obviously, if we
 15 use these -- all of these experts, and it appears to us
 16 that they be necessary now, we would have to fit them in
 17 within the time that we are accorded, and we would plan
 18 to do.
 19 Now, if it would be helpful and if this decision
 20 can be delayed, we would be happy to submit this in
 21 writing so Your Honor would have a clear grasp of what
 22 the experts would be covering.
 23 JUDGE CHAPPELL: Well, I'll let you know if I
 24 need it in writing.
 25 MR. COOPER: I didn't understand.

Page 20

1 JUDGE CHAPPELL: I'll let you know if I need it
 2 to be filed in writing.
 3 MR. COOPER: Okay. Thank you.
 4 JUDGE CHAPPELL: Mr. Robertson?
 5 MR. ROBERTSON: Yes, Your Honor. And I don't
 6 want to spend a lot of time on what the case is about,
 7 because obviously we have a disagreement about that;
 8 otherwise, we wouldn't be here. In fact, we believe
 9 this is one strategy by Intel, not three cases; it was
 10 one strategy.
 11 Your Honor may not know that we have identified
 12 five experts ourselves to counsel, and they cover
 13 essentially the same territory that was just mentioned
 14 with the exception of only one thing, and that's this
 15 capacity issue, which I can address. So, we've already
 16 identified five experts in accordance with the rule,
 17 which says you can't have more unless there are
 18 extraordinary circumstances. That's what 3.31(a)(b)
 19 says.
 20 My understanding is that's not an unusual rule
 21 in that many federal district courts have limitations on
 22 numbers of experts, too. Apparently they had eight
 23 apiece in AMD, but that was a -- also a damages case.
 24 They were seeking billions of dollars in damages, and a
 25 lot of what was being litigated was the extent of that

Page 21

1 damage. None of us are going to be doing that here.
 2 We're not trying to get money out of Intel.
 3 But we cover the same territory with five
 4 people, except for capacity. For example, they have
 5 three technology experts; we have one. They cover the
 6 same the categories of information. Things that were
 7 mentioned about capacity, which I should address, I
 8 don't think that the case is about AMD at all. In fact,
 9 a lot of the economic analysis that was done even in the
 10 AMD case, and as done in other cases and here, a lot of
 11 that's talking about an equally efficient competitor.
 12 But even still, that counsel has mentioned that
 13 there will be a fact witness who will testify as to the
 14 fact of the capacity that AMD had or did not have, that
 15 is a fact. I don't believe that is even an appropriate
 16 area for an expert to give a fact testimony on that, and
 17 so I don't see the point of that. I think that some of
 18 these technology experts, it sounds like, intend to do a
 19 lot of the same thing, talk about facts. Otherwise, we
 20 could just have one technology expert out there, as we
 21 do.
 22 Now, I do agree with counsel that we need to
 23 have some limits on this in terms of page numbers. I
 24 think some of these cases we tend to write four, five,
 25 six, seven hundred page reports, and then they go in the

6 (Pages 18 to 21)

For The Record, Inc.

(301) 870-8025 - www.ftrinc.net - (800) 921-5555

PUBLIC

FTC Docket No. 9341

Page 22

1 file cabinet and don't really get used very much. What
 2 really gets used is what an expert says on the stand and
 3 the exhibits they prepare and the actual work that they
 4 do, rather than these hundreds of pages of fact
 5 statements where they're trying to -- each expert -- and
 6 we have done the same thing, so I shouldn't blame
 7 everybody else for it -- try to do a second closing
 8 argument through an expert.
 9 Your Honor and other judges typically don't pay
 10 much attention to that but want to know what the actual
 11 expertise of this particular person is so they can tell
 12 us about accounting or tell us about their expertise in
 13 technology and not about facts. So, I think that a
 14 limit on page numbers is great. We haven't yet reached
 15 an agreement on that, but we are going to try to come up
 16 with something so we don't burden Your Honor with these
 17 big binders of expert reports that aren't even going to
 18 be used.
 19 But I do think that they're overkilling on the
 20 number of experts. If we cover the same territory with
 21 five, I don't think we have extraordinary circumstances
 22 to have eight. The only thing we don't have an expert
 23 covering in terms of a expert is capacity. I do believe
 24 that's a fact question. They can cross examine AMD.
 25 They already have cross examined this fellow, and they

Page 23

1 have his information. They have had AMD's information
 2 at hand for about six years and have litigated this
 3 thing quite a bit. I don't think there's a need to go
 4 over the limit just for an expert for that.
 5 So, that's basically it, Your Honor. I don't
 6 think that we have extraordinary circumstances here, and
 7 it's Your Honor's choice, obviously, under the rules, as
 8 to what you want to do, and I -- but those are -- that's
 9 our position. And if Your Honor has any questions, I'll
 10 be happy to answer them.
 11 JUDGE CHAPPELL: Give me a moment.
 12 MR. ROBERTSON: Okay.
 13 (Pause in the proceedings.)
 14 JUDGE CHAPPELL: So, your biggest argument
 15 against extraordinary circumstances is there's not a
 16 billion dollars -- there's not a billion dollars of
 17 money at stake, a billion dollars? Is that -- is that
 18 what I heard?
 19 MR. ROBERTSON: No, sir. I was trying to
 20 explain why they had eight in another case. It was a
 21 different kind of case. Here, my main argument is we
 22 can have five experts to cover the same territory. Why
 23 can't they?
 24 JUDGE CHAPPELL: Well, I don't know that there's
 25 any quid pro quo rule on the number of experts, other

Page 24

1 than the limit. Just because you want five, maybe your
 2 five experts will give 5000 opinions, and they've got
 3 five that are going to give ten opinions. I don't think
 4 you can go by that per capita on the number of opinions.
 5 MR. ROBERTSON: Well, yes, sir, but I know in
 6 these cases, if we get another expert, we are going to
 7 get a whole lot more opinions, and then I'll be in a
 8 position where I'm going to have to ask for rebuttal
 9 experts, and the number of experts is going to grow very
 10 quickly.
 11 JUDGE CHAPPELL: Well, I hope everybody
 12 understands that we need facts more than we need opinion
 13 in the case.
 14 Well, I will point out that the Commission found
 15 good cause to extend the time limit here to set it nine
 16 months out when they wrote the complaint. So, keep that
 17 in mind.
 18 MR. ROBERTSON: Yes, sir. I'm aware of that.
 19 JUDGE CHAPPELL: All right. I will wait to hear
 20 from you, Mr. Robertson, before I make my ruling.
 21 MR. ROBERTSON: Thank you. And I promise I will
 22 do that tomorrow.
 23 JUDGE CHAPPELL: Okay.
 24 MR. ROBERTSON: And I sincerely say, I hope I
 25 don't have to do anything, but if I do have to write

Page 25

1 something, it won't be more than a page and a half,
 2 which is really that much (indicating) with the caption.
 3 JUDGE CHAPPELL: And if you withdraw your
 4 opposition, then this will go away. Does everybody have
 5 that understanding?
 6 MR. ROBERTSON: Correct. With one
 7 understanding, is that we did talk that if Your Honor
 8 did allow them to do it, that I would have the ability
 9 to call people -- the same number of people.
 10 JUDGE CHAPPELL: That sounds like the genesis of
 11 some agreement right there.
 12 MR. ROBERTSON: That's what we were talking
 13 about yesterday.
 14 JUDGE CHAPPELL: It sounds to me like that's
 15 something that should work, to be fair.
 16 MR. COOPER: That would be -- I'm happy to try
 17 to talk our way through it. I -- there was one comment
 18 I would like to add so that the record will be complete
 19 on --
 20 JUDGE CHAPPELL: On your motion?
 21 MR. COOPER: Yes.
 22 JUDGE CHAPPELL: Unless you want to take a
 23 moment and talk about whether you can work this out.
 24 MR. COOPER: It's a very simple point, Your
 25 Honor. I'm just that I'm afraid that in the context of

7 (Pages 22 to 25)

For The Record, Inc.

(301) 870-8025 - www.ftrinc.net - (800) 921-5555

PUBLIC

FTC Docket No. 9341

Page 26	Page 28
<p>1 the argument, it could get lost. 2 The point about capacity, why we need an expert, 3 I wanted you to understand that it's not about the 4 actual capacity they had. It's about the testimony of 5 this Mr. Ostrander about what I call "would've, 6 could've, should've," and it goes into the question of 7 what could they have accomplished in a short period of 8 time and in what circumstances. I'm not sure it's 9 necessary. It will depend. But we have to be -- we 10 need to be covered on that. 11 MR. ROBERTSON: And with that understanding, at 12 least I understand what they're doing now. I just don't 13 have authority. I've agreed I'm going to try to get 14 that authority. It's a larger issue than I think it 15 sounds, because experts have to be contracted; experts 16 have to go through other people besides myself. It's -- 17 there are very few things in cases like this where I 18 don't have authority to make a decision. Contracting 19 outside employees happens to be one of them. 20 JUDGE CHAPPELL: Okay. I appreciate that. So, 21 let me know if you can work something out or where we 22 stand on this. 23 MR. ROBERTSON: Yes, sir. 24 JUDGE CHAPPELL: Next, I have the respondent's 25 motion to extend time and to increase the word limit.</p>	<p>1 JUDGE CHAPPELL: Well, I read all that, and it 2 sounded to me like judicial notice or official notice. 3 MR. COOPER: In a sense, they're not asking for 4 judicial notice. They're asking that it be admitted as 5 evidence. 6 JUDGE CHAPPELL: I understand that. 7 MR. COOPER: And the test then becomes whether 8 or not it is sufficiently trustworthy. Now, they've 9 said that the burden now shifts to us -- in their 10 papers, the burden now shifts to Intel to show that 11 there is sufficient trustworthiness, and -- 12 JUDGE CHAPPELL: Well, we want to pause here, 13 because I'm not hearing -- today, I'm not hearing the 14 merits of the motion to admit it -- 15 MR. COOPER: No, and I appreciate that. 16 JUDGE CHAPPELL: -- although we seem to be 17 wading into that. 18 MR. COOPER: Unfortunately, we do, because that 19 is the reason why we need some more space, because it is 20 the issues that we have to go into to show the lack of 21 trustworthiness. It's kind of a strange situation, Your 22 Honor, in a way, because the rule -- the rule is clear, 23 I think, that Your Honor must make a decision in the 24 first place as to whether or not the decision is 25 sufficiently trustworthy, and the standards that were</p>
Page 27	Page 29
<p>1 MR. COOPER: I haven't had a chance to review 2 the opposition that was filed, Your Honor, and let me 3 comment on that first. I was a little surprised by the 4 notion that the complaint counsel takes the position 5 Your Honor has no authority to expand the number of 6 words or the number of pages in the filing. I looked 7 quickly in that regard at other appropriate rules, for 8 example, Rule 32(7) of the Federal Appellate Rules 9 states, similar to the language you find in the FTC 10 Rules, that a briefing shall not exceed 30 pages for the 11 principal brief, yet that is constantly changed by the 12 Court under appropriate circumstances. 13 It's a situation -- the situation we have here 14 is certainly unique. I lived through the EC process, so 15 I can bear witness to much of what occurred there. Much 16 of what occurred was really pretty extraordinary in 17 terms of our concepts of due process and fairness. Your 18 Honor is required to decide whether or not that decision 19 is sufficiently trustworthy to be admitted, and that's 20 446 or so pages of so-called fact-findings and opinions. 21 Reliability and trustworthiness is the 22 touchstone. In fact, counsel made that clear in their 23 papers when they explained that they believed they had 24 made a prima facie case that it was trustworthy, because 25 it was a tribunal, it was a fact-finder --</p>	<p>1 developed, in effect, require you in some respects to 2 weigh the evidence. 3 So, when counsel says, "Well, that should wait 4 for a later time in the process," when Your Honor would 5 weigh the evidence, no, that's not correct. The law 6 does require that you weigh the evidence to some extent 7 in deciding whether or not it is sufficiently 8 trustworthy. 9 We tried to very briefly set out in our motion 10 some of the complexity of that particular enterprise, 11 and among other things, counsel, for example, said, 12 "Well, gee, the law is similar or the same." Well, 13 that's just simply not correct. The law -- EC law is 14 not the same, and that, of course, has an impact on the 15 decisions and the findings that they make. It doesn't 16 mirror the U.S. law. 17 For example, causation is largely irrelevant 18 under the EC law, whereas it's very, very important here 19 under our antitrust laws. The procedures essential to a 20 normal adjudicative process are missing here, and they 21 were truly missing here. As you know, of course -- and 22 these are things we have to develop in the form that 23 Your Honor can take notice of them. We have to submit 24 affidavits from practitioners who will explain what 25 procedures are.</p>

8 (Pages 26 to 29)

For The Record, Inc.

(301) 870-8025 - www.ftrinc.net - (800) 921-5555

PUBLIC

FTC Docket No. 9341

33294f50-90f4-4b4f-a225-7c301b2601b6

Page 30

1 But the EC team -- EC case team controls
 2 everything in that record, and they investigate, they
 3 prosecute, they write the decision, and we cannot
 4 compel -- Intel cannot compel evidence. Now, that
 5 doesn't mean that that alone makes it untrustworthy, but
 6 then you have to take the next step and see what we were
 7 entitled to do in order to ask the EC to look at
 8 evidence, and that's where some showing is necessary.
 9 And what happened there was that we were basically
 10 denied that opportunity.
 11 We, of course, had no opportunity to cross
 12 examine the witnesses, but more importantly, there's
 13 this parallel litigation going on over here in the
 14 United States with AMD, where we are developing a wealth
 15 of material and evidence. In the EC, the case team
 16 basically was working with AMD, which was the
 17 complainant. They took what AMD gave them. When we
 18 asked them to go after other materials from AMD, they
 19 basically didn't do it. They had some, but there is an
 20 endless testimony that is very valuable that I believe
 21 should have changed their opinion.
 22 JUDGE CHAPPELL: You mentioned you may have to
 23 file affidavits. Does anyone believe that attachments
 24 count in the 2500-word limit?
 25 MR. COOPER: I don't know the answer to that. I

Page 31

1 wondered about that.
 2 MR. ROBERTSON: I think under the rules, they
 3 don't.
 4 JUDGE CHAPPELL: They do not.
 5 MR. COOPER: Well, I'm glad to hear that. I was
 6 worried about that. These are not -- these are not --
 7 well, they're an effort to explain the procedures over
 8 there so Your Honor would have some sort of context,
 9 but -- and it's not my purpose today to try to walk you
 10 through the sort of things we would like to show you,
 11 but to emphasize that we have the right to try to show
 12 that to Your Honor so Your Honor can make that threshold
 13 decision as to whether it is sufficiently trustworthy.
 14 We also will ask Your Honor to look at this
 15 whole issue of admitting a 446-page opinion on the same
 16 issues basically, according to complaint counsel, that
 17 they are litigating here under Rule 403 of the Federal
 18 Rules, or its counterpart here, which I think is Rule
 19 3.43(b), and I believe 3.43(b) just tracks exactly 403
 20 of the Federal Rules. It says it was substantially
 21 outweighed by the danger of unfair prejudice or will
 22 lead to undue delay, waste of time, or needless
 23 presentation of cumulative evidence, it should not be
 24 admitted. So, we will -- we will want to pursue that,
 25 also.

Page 32

1 JUDGE CHAPPELL: Well, let me make it clear.
 2 Regardless of my ruling on this motion, if this document
 3 is in evidence, you'll be prepared -- you'll be allowed
 4 to refute it, to defend it in any way you see fit.
 5 That's just fair, if I get to that point. It's not
 6 admitted yet.
 7 MR. COOPER: I appreciate that, Your Honor,
 8 and --
 9 JUDGE CHAPPELL: What I'm saying is you don't
 10 need to spend all your ammo right now. If it is
 11 admitted, you'll have the chance to defend yourself.
 12 MR. COOPER: Yeah. And my concern --
 13 JUDGE CHAPPELL: And I don't need 10,000 words
 14 to make the points that you're making, especially when
 15 you allude to an affidavit from someone else.
 16 MR. COOPER: Yes, I do appreciate that. The
 17 concern I have is our opportunity to defend ourselves
 18 with respect to that 446-page opinion is simply -- if
 19 it's admitted as evidence in this case and we have to
 20 respond to it, we are really in a bit of a bind. The
 21 time is very short that we have to deal with all of
 22 these issues, and taking on each and every one of those
 23 findings, which we can do, will consume an enormous
 24 amount of time, and to the extent -- as counsel says,
 25 it's really the same thing they're trying to prove here

Page 33

1 anyway -- why shouldn't they be forced to prove it
 2 themselves and let us respond to it when we both have an
 3 equal amount of time?
 4 They would like to basically dump in 446 pages
 5 of findings and make us respond to those, as well as
 6 respond to everything they intend to prove in court. It
 7 really imposes a very unfair burden on us, and I think
 8 that is one reason alone, under --
 9 JUDGE CHAPPELL: Well, that would depend on,
 10 first, whether it's admitted, and if admitted, whether
 11 it's a conditional or limited admission and for what
 12 purpose it's admitted.
 13 MR. COOPER: I -- I mean, I understand that. It
 14 does -- if I -- you have to appreciate the problem it
 15 does pose for us. We have actually set out --
 16 JUDGE CHAPPELL: Well, my point is, if someone
 17 says that we're offering this for the fact that here's
 18 this opinion, this decision, not -- not to be
 19 conclusions or legal conclusions or findings that it
 20 wants to control this case, then that's a limited
 21 admissibility right there.
 22 MR. COOPER: It is.
 23 JUDGE CHAPPELL: It's not admitted for all
 24 purposes.
 25 MR. COOPER: But then do we let it sit there

Page 34

1 unresponded to? Are we allowed to create our own
 2 document that doesn't take any trial time, to submit our
 3 own response, with all the exhibits that we would need
 4 to cover, as a companion document, so when that's
 5 analyzed, we're not being -- we're not being
 6 disadvantaged with respect to the very limited amount of
 7 time that we have to try this case?
 8 Now, I didn't understand it that they were
 9 offering it for any limited purpose. They were offering
 10 it as evidence.
 11 JUDGE CHAPPELL: Well, I understand that, but if
 12 you read what they offer, it does have some limitation
 13 in the wording, the way it's being offered.
 14 MR. COOPER: Well, they said to do with it what
 15 you would like, basically.
 16 JUDGE CHAPPELL: Which I plan to do if I admit
 17 it.
 18 I didn't mean to knock you off track there.
 19 MR. COOPER: No, no, you haven't knocked me off
 20 track. I was just focused on the time we need and the
 21 space we need.
 22 Now, 2500 words is essentially ten pages. We
 23 believe that we should have the full opportunity to
 24 address and advise your Court of the reasons why we
 25 believe this decision cannot be accepted under the

Page 35

1 requirement that Your Honor must rule on, which is, is
 2 it sufficiently trustworthy? To do that, we cannot do
 3 it in 2500 pages -- 2500 words. It's a big undertaking.
 4 We have been obviously working on it already, trying to
 5 figure out how to stuff it into 7500 words. Even that
 6 would be very difficult.
 7 But the time -- and complaint counsel has
 8 graciously agreed to our request for an extension of the
 9 time, and hopefully, with that time, we can get it down
 10 to 7500 words. I don't know if there's a -- if there is
 11 really an arbitrary constraint of 2500 words, but if
 12 there is, I would suggest that another way of looking at
 13 this is, we're responding to their motion, but we want
 14 to make the motion under Rule 33 -- 3 -- 4 -- whatever it
 15 is or 403 of the Federal Rules. Maybe you ought to join
 16 those two together, to give us some more space, if Your
 17 Honor feels you are constrained by an arbitrary rule
 18 that only allows 2500 words.
 19 But my point is not to argue the merits of the
 20 motion, and, indeed, we have asked -- and read over our
 21 brief. I realize it was unclear on one point, but --
 22 JUDGE CHAPPELL: Well, I understood that the
 23 purpose of this motion was you need more space, in your
 24 opinion, to address the merits, but we're not addressing
 25 the merits today.

Page 36

1 MR. COOPER: Yes. We need more space to address
 2 the merits, which go to whether or not it meets the
 3 threshold requirement of being sufficiently trustworthy
 4 and reliable, and that, in turn, requires us to develop
 5 certain -- a number of examples of where dispositive
 6 testimony to the absolute contrary was simply ignored or
 7 they didn't go get it or they said silly things like,
 8 "Well, we don't understand what the process of a
 9 deposition is, so we really can't count that."
 10 Thank you.
 11 MR. ROBERTSON: Thank you, Your Honor.
 12 In response to their motion, I initially saw
 13 that we had an issue as to time, and I think I'm clear
 14 on that. We don't have any position at all as to how
 15 much time you want to give them, because this is not --
 16 we're not having the trial tomorrow anyway, and the only
 17 reason we filed as soon as we did was to give them more
 18 time to have to deal with a response to those issues,
 19 which, by and large, are a lot of the same issues that
 20 we're dealing with here in about half the case.
 21 JUDGE CHAPPELL: Well, we're not talking about
 22 the merits yet, but for purposes of their opposition,
 23 what are your purposes of offering the exhibit?
 24 MR. ROBERTSON: Well, I think -- as our motion
 25 stated, I think it is evidence. How Your Honor actually

Page 37

1 uses it or weighs it is something that you need to
 2 decide after the case is over. I --
 3 JUDGE CHAPPELL: But the defense needs to know,
 4 if I have factual findings and legal conclusions, they
 5 need to know whether I'm going to accept those, rely on
 6 those, or not. They need to know, I believe, am I going
 7 to treat this like a district court case that somebody
 8 gives me and asks me to make judicial notice ruling on
 9 or official notice? There's a big difference there in
 10 whether it's part of the record because it's officially
 11 noticed or whether it's evidence that's accepted for all
 12 purposes.
 13 MR. ROBERTSON: I think we are --
 14 JUDGE CHAPPELL: I mean, I can understand that
 15 they need to know that in order to respond.
 16 MR. ROBERTSON: I think we were clear, and maybe
 17 I was wrong, but I thought we were clear that we are
 18 offering it as evidence for the factual findings under
 19 803(8)(C), which talks about factual findings as a
 20 result of an investigation. For example, a lot of the
 21 cases that are being cited within those cases that we
 22 included, a lot of the things are like police reports.
 23 If I have an accident, a car accident, a policeman makes
 24 the report, that goes into evidence. Now, we can
 25 challenge it and say, "Well, he wasn't there" or "He

10 (Pages 34 to 37)

For The Record, Inc.

(301) 870-8025 - www.ftrinc.net - (800) 921-5555

PUBLIC

FTC Docket No. 9341

<p style="text-align: right;">Page 38</p> <p>1 didn't see the accident, he came an hour later," but 2 it's still evidence. 3 To give an example here, we have factual 4 findings as to barriers to entry, market definitions, 5 and market shares, statistical information that was 6 found there. Intel responded. Their response is 7 somewhere in all the production that we have. They can 8 give Your Honor what they responded to at the EC. These 9 issues that they have raised here this morning on 10 fairness and all that, they actually litigated that in 11 court in Europe. They lost that, that issue. 12 JUDGE CHAPPELL: But, see, that's my point. The 13 fact that it was litigated and the decision was made, we 14 don't need to relitigate it here. If you're telling me 15 to accept the facts in law, for example, they are going 16 to need to relitigate these things, and we have time 17 limits. 18 MR. ROBERTSON: Well, yes, sir, but as he said, 19 a lot of the same issues are the same issues that are in 20 our complaint that we are litigating right now. It's 21 not going to take them any more time to -- 22 JUDGE CHAPPELL: Then if we are going to 23 litigate them now, why do I need to accept what was 24 found over in Europe? 25 MR. ROBERTSON: Because they are factual</p>	<p style="text-align: right;">Page 40</p> <p>1 MR. ROBERTSON: And I don't want them -- that's 2 the one thing I need to clarify, and I thought I had 3 made that clear in our motion. We are not asking Your 4 Honor to be bound by anything that the EC did. I think, 5 as a judge, you have to make an independent 6 determination as to whether any fact should be regarded 7 or disregarded, in the same way that they have mentioned 8 in their brief that there was one witness that the 9 Commission disregarded, some prominent witness. I don't 10 know who it is. 11 Well, judges do that all the time, and Your 12 Honor has the right to do the same thing here, say, 13 "Look, I don't agree with what the EC did. I think six 14 markets isn't right and it should be seven or it should 15 be one." Even a federal judge has to make an 16 independent determination. It doesn't mean it's not 17 evidence, in the same way that all this evidence that 18 comes in from witnesses, from documents, from -- and we 19 have -- right now, I think we're over 100 million 20 documents so far in the production from all these other 21 cases. It's all going to be evidence, and we do not 22 want it to be controlling or estoppel or anything of 23 that nature. 24 There is some case law that says that it should 25 be, but we have determined not to take that position,</p>
<p style="text-align: right;">Page 39</p> <p>1 findings that were -- 2 JUDGE CHAPPELL: How are they going to cross 3 examine these findings? How are we going to get to the 4 truth or reliability? 5 MR. ROBERTSON: Well, I'll give an example, 6 because they litigated it. I didn't. The factual 7 findings that are in the record -- and, Your Honor, you 8 can look at them to see how they carry them out in the 9 opinion. In the opinion, if they say, "We believe that 10 this is a market definition," they're citing testimony 11 from witnesses that these folks have already deposed in 12 at least two cases and know exactly what they said, and 13 they've already responded to it, and many of those 14 people are going to be right up here on the witness 15 stand or, speaking of pulling in other things from other 16 cases, we've already agreed to pull in a whole lot, 17 literally a hundred or so depositions, from the AMD case 18 into this case, and -- OEM depositions, AMD depositions. 19 We're pulling in a lot of factual records from other 20 cases here that is going to be evidence that we can all 21 cite to in our findings. 22 JUDGE CHAPPELL: By agreement. 23 MR. ROBERTSON: Yes, sir. Yes, sir. 24 JUDGE CHAPPELL: You don't really expect them to 25 agree to be bound by that ruling in this forum.</p>	<p style="text-align: right;">Page 41</p> <p>1 and I want to be very clear that we are not. We want 2 Your Honor to make an independent determination in this 3 case, but we do believe that it should be admitted as 4 evidence. But today, all we're talking about, I think, 5 is -- 6 JUDGE CHAPPELL: Admitted as evidence of what? 7 MR. ROBERTSON: Each factual finding that's in 8 there. There aren't that many that we're talking about. 9 It is 400 pages, double-spaced, and it's -- all the 10 factual findings were repeated twice in the opinion, and 11 Your Honor will see it's -- in terms of the factual 12 findings, it's a lot shorter than what Your Honor just 13 did in a case. 14 But mainly, we're talking about, like, market 15 definitions, market shares, barriers to entry, things 16 that they found after a nine-year investigation in a 17 worldwide market, and we think those are findings that 18 Your Honor can rely on. You may look at the expert 19 testimony from their experts or our experts or factual 20 documents and make a completely different decision, 21 which we believe Your Honor obviously is free to do, but 22 it doesn't mean that it shouldn't be admitted as 23 evidence. 24 Now, I am doing the same thing counsel did, and 25 I apologize. I don't want to be arguing the merits of</p>

11 (Pages 38 to 41)

For The Record, Inc.

(301) 870-8025 - www.ftrinc.net - (800) 921-5555

PUBLIC

FTC Docket No. 9341

Page 42

1 the motion --
 2 JUDGE CHAPPELL: Well, no, I've asked about the
 3 merits, so that's on me.
 4 MR. ROBERTSON: Okay.
 5 JUDGE CHAPPELL: I wanted to make it clear to
 6 everyone here what's going on and what they need to
 7 respond to.
 8 MR. ROBERTSON: In terms of the page limit, this
 9 isn't an emotional, do-or-die motion on our part. We
 10 just read the rule. That's what it says. Your Honor
 11 can make a ruling --
 12 JUDGE CHAPPELL: Well, I'll tell you, I read
 13 your motion, and I read it and said, "Okay, so what?"
 14 I'm not ruling on the motion now, but I said, "So what?"
 15 Here it is. What am I supposed to do with this? And
 16 what would I do with this if I were Intel? How in the
 17 world am I going to defend against this?"
 18 MR. ROBERTSON: It's the same thing -- as far as
 19 the opinion, it's the same thing they've been litigating
 20 for six, seven years, with five law firms. They know
 21 exactly what those issues are. And in terms --
 22 JUDGE CHAPPELL: Give me your best answer for
 23 what's relevant about that European decision. What's
 24 the relevance?
 25 MR. ROBERTSON: The issues that were determined,

Page 43

1 for example, market definition, market shares, barriers
 2 to entry, the basic, fundamental building blocks of an
 3 antitrust case, are done the same way there as they are
 4 here. Now, there are factual findings that were made.
 5 The same way that a police officer said, "The car ran a
 6 red light and hit another car," and then drew a diagram
 7 on a police report, that would go into evidence, and the
 8 parties would still be able to litigate whether that
 9 actually happened or not.
 10 JUDGE CHAPPELL: So, in any case in the United
 11 States where those issues have gone in favor of Intel,
 12 am I to take those cases in as evidence, those
 13 decisions, those findings?
 14 MR. ROBERTSON: The factual findings?
 15 JUDGE CHAPPELL: If they're out there.
 16 MR. ROBERTSON: If they're out there. If
 17 they're out there.
 18 JUDGE CHAPPELL: But I'm just following your
 19 logic here. This is another court that -- this is a
 20 commission that had their proceeding and found it the
 21 way they wanted to find it, and am I to take then any
 22 court that does a finding and I am supposed to take that
 23 as evidence? Just because they found it, I am supposed
 24 to find it?
 25 MR. ROBERTSON: If it's on the same exact issues

Page 44

1 that we're talking about, I think that it is evidence
 2 that Your Honor can consider. It could be a case --
 3 there aren't any that I know of, following your
 4 hypothetical.
 5 JUDGE CHAPPELL: But if there are?
 6 MR. ROBERTSON: If there are, I think they
 7 could. If they could raise it and give us ample notice,
 8 we could deal with it.
 9 JUDGE CHAPPELL: But if I am supposed to do an
 10 independent fact-finding here, what relevance do I give
 11 to an independent fact-finding by another forum? I'm
 12 not bound by that, so why do I even want to look at it?
 13 MR. ROBERTSON: Well, let me give you what we
 14 see in these other cases that we cited where they used
 15 even lesser forms of the same thing. They were sending
 16 those to the jury in those cases, and it was clear, the
 17 cases explain it, that the other side could contest
 18 it --
 19 JUDGE CHAPPELL: Well, they sent it to the jury,
 20 but I'm sure they had some limiting instructions.
 21 MR. ROBERTSON: But they were offering it as
 22 evidence. In the case of KAL, for example -- you know
 23 what they had in KAL, Your Honor? You may remember
 24 that, the plane got shot down. The report that went
 25 in --

Page 45

1 JUDGE CHAPPELL: By the Koreans?
 2 MR. ROBERTSON: Yes, sir. And the report that
 3 went in was a report by the Russians, and everybody
 4 said, "You have got to be kidding me." Well, the judge
 5 said, "Well, it's still evidence, and then we will see
 6 what the other evidence is to see what value it has
 7 later."
 8 Today, we don't have any evidence in the record,
 9 and so Your Honor can't make a determination today
 10 whether the things I'm talking about actually have value
 11 in this case until you see the rest of the evidence.
 12 After you've looked at all the evidence, if you say,
 13 "You know, I really don't need that," that's your
 14 determination, or if you say, "You know what? I've now
 15 heard the evidence. It's exactly what the EC found."
 16 It's another piece of evidence that you can rely on. We
 17 can't tell that today because we're not ready to try the
 18 case today.
 19 JUDGE CHAPPELL: Well, is it analogous to an
 20 intersection collision where three witnesses say
 21 somebody ran the red light? You have got to know that
 22 someone says somebody ran the red light, so the trier of
 23 fact considers that one as well as the others?
 24 MR. ROBERTSON: Yes, sir, and determines which
 25 one is more truthful.

Page 46	Page 48
<p>1 JUDGE CHAPPELL: And perhaps it's cumulative. 2 MR. ROBERTSON: If it's cumulative at the end of 3 the day, there are many times, Your Honor, where 4 sometimes cumulative -- well, if it's overly cumulative, 5 unreasonably cumulative, but sometimes having cumulative 6 evidence helps to understand whether what you're hearing 7 is correct or not, and -- but that's a judgment call 8 that you make. 9 JUDGE CHAPPELL: But are you asking me to defer 10 to what the European Commission did? 11 MR. ROBERTSON: No, sir. 12 JUDGE CHAPPELL: You're telling me that I can, 13 carte blanche, accept this ruling and every fact that's 14 found in there, I can accept that and say, "The EU did 15 it. I agree." 16 MR. ROBERTSON: I'm saying that you could, but I 17 really doubt, having practiced for 20 years, that you 18 would ever do that. So, I hope you want to hear the 19 rest of the story and the rest of the evidence and give 20 Intel a full opportunity to litigate this case, which we 21 are doing right now. 22 The page limits, you know, we tried to keep it 23 in the rules. We did 25 -- less than 2500 words, and 24 now they want 7500 words, probably to argue the merits 25 of the decision, and that's the --</p>	<p>1 Do we have an offer or -- 2 MR. ROBERTSON: Oh, yes, sir. 3 JUDGE CHAPPELL: Okay. 4 MR. ROBERTSON: On the time limit, I think what 5 they had proposed, which was an additional 14 days, we 6 have agreed to, and they also had offered to give us 7 more time, too, which we would obviously agree to if 8 Your Honor says it's okay. And the page limits, 5000 9 words, and we respond with 1250, if Your Honor says 10 that's okay, we are in agreement on that. 11 MR. COOPER: We are, and the only condition I 12 had was we are allowed to use big words. 13 JUDGE CHAPPELL: Okay. I am in agreement with 14 all of that. I will need Intel to file a notice of 15 withdrawal, not a motion, but a notice of withdrawal of 16 your motion. 17 MR. COOPER: Very good. 18 JUDGE CHAPPELL: And the terms are on the record 19 here, what everyone has agreed to and what I have ruled 20 on. 21 MR. ROBERTSON: Thank you, Your Honor. 22 MR. COOPER: Thank you. 23 JUDGE CHAPPELL: Any questions? 24 (Pause in the proceedings.) 25 MR. ROBERTSON: Your Honor, I just have one</p>
<p>Page 47</p> <p>1 JUDGE CHAPPELL: Will you agree to limiting it 2 at 5000? 3 MR. ROBERTSON: And could I respond in short -- 4 the 1250 or something that's in the rules? 5 JUDGE CHAPPELL: You bet. 6 MR. ROBERTSON: I think we're done. 7 JUDGE CHAPPELL: Is that acceptable? Do we need 8 a moment for the brain trust to get together? 9 MR. ROBERTSON: I would take you up on your 10 offer. 11 MR. COOPER: I am going to have a quick 12 consultation, if I may, Your Honor -- 13 MR. ROBERTSON: Oh, okay. 14 MR. COOPER: -- without you. 15 JUDGE CHAPPELL: If you agree to something, it's 16 out of my hands, that's better for all of us. 17 MR. COOPER: Well -- 18 JUDGE CHAPPELL: Do you want to take a short 19 recess? 20 MR. COOPER: Sure. That would be very helpful, 21 Your Honor. 22 JUDGE CHAPPELL: We are going to take -- let's 23 take 20 minutes or 25 minutes. We'll reconvene at 3:20. 24 (A brief recess was taken.) 25 JUDGE CHAPPELL: Okay. Back on the record.</p>	<p>Page 49</p> <p>1 other thing to bring up that we both had asked for, if I 2 can mention it. 3 JUDGE CHAPPELL: Okay. 4 MR. ROBERTSON: I think both of us had asked if 5 we could come back here each month until we're close to 6 the end of this discovery -- 7 JUDGE CHAPPELL: You're jumping ahead on my 8 agenda, but go ahead. 9 MR. ROBERTSON: I'm sorry. 10 JUDGE CHAPPELL: No, that's all right. Go 11 ahead. 12 MR. ROBERTSON: And I would also mention, I know 13 that a lot of these folks are from California. I also 14 commute from another state. This time is actually a 15 wonderful time for us, or depending on Your Honor's 16 schedule, in terms of time of the week and -- at least 17 for me it is, but I know it's harder to get back from 18 here down there if we're finished on a late Friday 19 afternoon or something, until we get to the hearing. 20 MR. BURLING: Well, Your Honor, we hadn't -- you 21 know, I can't speak for -- 22 JUDGE CHAPPELL: Well, I had assumed that 11:00 23 a.m. Pacific time is better than 6:00 a.m. Pacific time. 24 MR. BURLING: I'm from Boston, Your Honor, so 25 I'm fine with whatever you want to do, but for the</p>

13 (Pages 46 to 49)

For The Record, Inc.

(301) 870-8025 - www.ftrinc.net - (800) 921-5555

PUBLIC

FTC Docket No. 9341

Page 50

1 Californians, that's probably so. We certainly join in
2 the request for a monthly conference. We think that
3 both what happens in the conference and what happens
4 right before the conference is very productive. Some
5 things got worked out that might not have been worked
6 out in the absence of this conference. Whatever fits
7 Your Honor's schedule is fine with us.

8 JUDGE CHAPPELL: Well, my feeling was that I
9 would ask you -- I'd ask for a status report, let's say,
10 the third Tuesday of each month, and as for whether we
11 have a hearing or not, if you could let me know if you
12 think we need a hearing, and I'll decide, but if we need
13 a hearing, we'll have one. But it may be that we don't
14 need a hearing and we can avoid everyone having to come
15 in from all over the country.

16 So, what I am going to do is, to make it
17 official, I'm going to order the parties to submit a
18 joint report on the third Tuesday of each month. Is
19 that clear?

20 MR. ROBERTSON: Yes, sir. And until -- through
21 the end of discovery or until all the way to the trial
22 or --

23 JUDGE CHAPPELL: Until it's no longer needed,
24 whatever that is.

25 MR. ROBERTSON: Okay.

Page 51

1 MR. BURLING: Thank you, Your Honor.

2 JUDGE CHAPPELL: And next I am going to deal
3 with the pending motion for protective order. Does
4 either side wish to be heard on that?

5 MR. BURLING: If I could briefly, Your Honor. I
6 think our position is fairly straightforward, but I
7 might emphasize a few things for you.

8 JUDGE CHAPPELL: It's a rare trial lawyer that
9 doesn't want to make oral argument when given the
10 opportunity.

11 MR. BURLING: My clients are here, Your Honor.
12 I have to.

13 JUDGE CHAPPELL: I understand. I've been there.

14 MR. BURLING: As you know, this is a motion for
15 a protective order with respect to a deposition notice
16 under 3.33(c). There were five topics identified in the
17 motion. Four of them had to do with defenses that we
18 had -- well, actually, all five of them had to do with
19 defenses we had asserted in our response. The first had
20 to do with the defense that the relief sought was not in
21 the public interest.

22 JUDGE CHAPPELL: Let's pause for a second.

23 (Pause in the proceedings.)

24 JUDGE CHAPPELL: Go ahead.

25 MR. BURLING: Thank you, Your Honor.

Page 52

1 As I was saying, the notice included five
2 specified topics. The first was our defense that the
3 relief sought in the complaint was not in the public
4 interest; the second, that the Commission lacked
5 jurisdiction over conduct that didn't reasonably impact
6 U.S. commerce; the third specified topic was someone to
7 speak to a laches defense we had asserted, our seventh
8 defense; the fourth, our defense that there were
9 legitimate business reasons for each of the acts that we
10 were accused of committing in violation of Section 5;
11 and the last topic, the fifth topic, was someone to
12 speak to the facts in an eight-page summary of our
13 defensive position that was set out at the beginning of
14 our answer.

15 We timely objected to those specifications on
16 the basis that they did not describe topics under 3.33
17 with reasonable particularity, that it was an
18 inefficient way to discover into these matters that were
19 superior means, and that with respect to some of them,
20 that they really sought legal and expert opinions rather
21 than facts.

22 We conferred with complaint counsel about some
23 way to try to obviate the dispute. We were not
24 successful. So, we filed this motion for a protective
25 order.

Page 53

1 Let me just speak quickly to the application of
2 those three grounds on which we base our objection, two
3 of the now four matters that remain in dispute. With
4 the opposition that was filed late yesterday, complaint
5 counsel seems to have withdrawn or agreed to our
6 position that there shouldn't be a deposition with
7 respect to the laches defense in particular.

8 With respect to the topic in which we are asked
9 to supply a witness or witnesses to address an
10 eight-page summer of our position of defense, covering
11 all the things you've heard from Mr. Cooper, the ten
12 years of all the acts of which we are accused in
13 multiple technology areas, under multiple causes of
14 action, that seems to us not describing with reasonable
15 particularity, as the rule requires. It also seems to
16 us probably the most burdensome and inefficient form of
17 discovery that you could select.

18 Each of the defenses were asked about in
19 interrogatory answers. I think that applies more to the
20 remaining topics than to this eight-page statement
21 topic. But in addition, we have been told that
22 complaint counsel intends to depose no fewer than, I
23 think, 55 or 60 Intel witnesses. There's no doubt that
24 those depositions will probe facts in the matters that
25 we included in our summary position, our summary

14 (Pages 50 to 53)

For The Record, Inc.

(301) 870-8025 - www.ftrinc.net - (800) 921-5555

PUBLIC

FTC Docket No. 9341

Page 54	Page 56
<p>1 defensive position, at the beginning of the complaint. 2 So, we think that the objection is certainly appropriate 3 and a protective order ought to issue with respect to 4 that specification. It is simply way too broad, and it 5 is duplicative and inefficient in view of the other 6 depositions that will be taken. 7 There are similar stories with respect to the 8 other three remaining topics in dispute. The defense 9 that each of the acts that they say violate Section 5 10 and Section 2 of the Sherman Act was a legitimate act in 11 the -- a legitimate business act with a legitimate 12 business purpose. Again, someone covering all of those 13 business acts of which we are accused, having one or two 14 or 20 or 30 witnesses cover that would be very 15 difficult. If they had selected one, if they had said, 16 "We'd like to understand the business purpose for this 17 particular design or that particular discount," then I 18 think you could argue that there was reasonable 19 particularity with respect to that, but given the 20 breadth of pulling in deponents to address each and 21 every transaction, even if we knew -- which we don't -- 22 all of the transactions that they say violated Section 5 23 or Section 2, it just is not reasonable particularity. 24 And as I said before with respect to the eight-page 25 summary, the most efficient way to get into the business</p>	<p>1 public interest is that there's no liability; there's no 2 violation of acts here, of Section 2 of the Sherman Act 3 or Section 5. 4 And further, Your Honor, we, I think, submitted 5 15 pages of interrogatory responses covering the 6 business justification, the remedy, and the foreign 7 commerce defenses that are three of the issues here. 8 Those answers had not been submitted at the time that we 9 filed our motion for protective order, although we did, 10 in that motion, note that those questions had been 11 asked. I'm happy to supply the Court with our 15-page 12 answer and interrogatories addressed to those defenses, 13 but between that answer and the upcoming 55 depositions, 14 certainly there are more efficient means of discovery 15 than trying to get a 30(b)(6) witness or a set of 16 witnesses, however many it will take, to address all of 17 the business acts that have taken place. 18 Lastly, the last topic that is specified for 19 which we seek a protective order is our defense that 20 there should be no liability for acts that only affect 21 foreign commerce and don't affect U.S. commerce. We 22 don't even know whether we are going to be accused of 23 such acts. All we know is that in the complaint, there 24 are references to OEMs with respect to our discounting 25 practices, foreign OEMs.</p>
<p>Page 55</p> <p>1 purpose for all these acts is the deposition of the 55 2 or 60 Intel deponents. 3 A similar story with respect to the defense -- 4 JUDGE CHAPPELL: Well, let me stop you for a 5 second. Your position is that there will be overlap 6 between the 55 or 60 and the designated corporate 7 representative? 8 MR. BURLING: There is -- if you look at the 9 subject matters specified in the specification, what are 10 the business reasons why you did all these things that 11 we're trying to say violated Section 5? And we don't 12 even know which ones those are with specificity yet. 13 Those things that they say violated Section 5 will 14 certainly be probed in the 55 depositions. I assume 15 they will also probe the business reasons why those acts 16 were undertaken. So, it's simply duplicative, Your 17 Honor, and beyond that, saying we want to take -- have a 18 30(b)(6) witness address the business reason for 19 everything you did in the last ten years is not a 20 description with reasonable particularity under Rule 21 3.33 in our view. 22 The same rationale applies with respect to our 23 defense that the remedy is not in the public interest. 24 That really is a super-set of the business reasons for 25 all our behavior. One reason the remedy is not in the</p>	<p>Page 57</p> <p>1 So, because of some allegations in the complaint 2 that same to touch on foreign matters, we asserted what 3 is really a subject matter jurisdiction type defense 4 saying that Section 5 liability doesn't reach purely 5 foreign matters, and how a 30(b)(6) witness, lay 6 witness, fact witness, could address that, when we don't 7 even know what the allegations are at this point, is not 8 clear, and to the extent that we ultimately will address 9 those, if we are charged with such acts, that is 10 certainly a legal position and perhaps the kind of thing 11 that would be addressed in expert testimony, but more 12 likely, a legal argument about jurisdiction. 13 JUDGE CHAPPELL: Did I understand your position 14 to be that the timing of the witnesses is dictated by 15 the rule? For example, complaint counsel must notice 16 the 30(b)(6) witnesses first or vice versa? 17 MR. BURLING: I don't think the rule requires 18 that, Your Honor. What I'm saying is -- what I'm 19 principally saying is -- 20 JUDGE CHAPPELL: I don't mean your argument 21 today. I mean what I read in your pleading earlier, in 22 your motion. 23 MR. BURLING: I think what we were saying in the 24 motion as to ordering was that these -- each of these 25 topics is so broad, the ones that are factual -- a</p>

15 (Pages 54 to 57)

For The Record, Inc.

(301) 870-8025 - www.ftrinc.net - (800) 921-5555

PUBLIC

FTC Docket No. 9341

Page 58	Page 60
<p>1 couple are factual, but they are enormously broad. What 2 we were saying was take your 55 depositions first, see 3 what facts you get -- and we think you'll have most of 4 this, because it's the kind of thing that you'll inquire 5 into -- and then, if there's anything left, come back 6 properly under Rule 3.33, with a specific subject 7 described with reasonable particularity, that a witness 8 might actually be able to address in seven hours. 9 For witnesses to address these topics, it would 10 require potentially 50 or 100 witnesses and I don't know 11 how many hours of testimony. They're just way too 12 broad. As I said at the outset, if there is a 13 particular factual matter, the business reason for this 14 act, for example, or whether we think this sale taking 15 place in Taiwan is subject -- is purely foreign, if 16 there's some factual inquiry into that and they can lay 17 out that topic with reasonable particularity, that is 18 something that we could talk to them about. 19 But when you look at the requirements, at least 20 as I understand them, of Rule 3.31, and you ask whether 21 this is the best way to get at this kind of discovery, 22 certainly this broad, sweeping Rule 3.33 requests, at 23 the outset in the case, before they've used the 24 interrogatory answers, taken the discovery from all of 25 the other Intel witnesses, and when they have such</p>	<p>1 the rule, they could have my cousin or my -- or the gas 2 station attendant, as long as he agreed to testify, 3 speak on behalf of Intel. In some of these cases, many 4 of the Federal Rule 30(b)(6) type -- 5 JUDGE CHAPPELL: But they're saying that they 6 don't have enough specificity to give you a 7 representative. 8 MR. ROBERTSON: I am going to get to that. 9 Again, on my first point, they kept talking about let's 10 wait and take some of these depositions and that ought 11 to be enough. There's a problem with the timing of 12 that, because number one, I'll have to take more 13 depositions than I need to, and then at the end, I may 14 still need to take this deposition, and my discovery 15 period will be over. So, that -- and I won't even know 16 what their defenses are. 17 If Your Honor looked at their answer to the 18 complaint, they -- which we actually quoted in our 19 notice -- 20 JUDGE CHAPPELL: You're not suggesting that I 21 haven't read their answer? 22 MR. ROBERTSON: No, sir. That was a rhetorical 23 comment. 24 JUDGE CHAPPELL: Of course, I've read the 25 answer, for the record.</p>
Page 59	Page 61
<p>1 immensely broad categories, is not a fair way and not an 2 efficient way, certainly, to go about discovery. That's 3 the essence of our position. 4 JUDGE CHAPPELL: Okay, thank you. 5 MR. BURLING: Thank you, Your Honor. 6 JUDGE CHAPPELL: Go ahead. 7 MR. ROBERTSON: Your Honor, let me just go 8 through a few of these just to be clear. On -- there 9 were there were five topics. We did drop one after 10 receiving their interrogatories, thinking that we did 11 have a response. The others, we don't believe we had 12 enough detail in the responses in their interrogatories 13 in order to proceed with discovery. 14 These 55 witnesses, or however many there may 15 be, so far, Intel has only agreed to schedule these 16 things -- over half of them are from May through June, 17 and they go all the way to the end of the discovery 18 period. It would be much more efficient, in our view, 19 to have depositions of this nature -- and I'll go 20 through each of these topics to explain why -- now, so 21 that I can determine how many of these people I really 22 need to take depositions of. 23 For example, if there is a particular topic -- 24 they don't have to produce, for example, Knut Grimsrud 25 on a particular topic. They may choose to do so. Under</p>	<p>1 MR. ROBERTSON: I didn't mean to say it like 2 that. 3 But, for example, what -- counsel just read, the 4 first few words of one of them about whether it's in the 5 public interest. What their defense actually says is 6 that because it would, among other things, harm 7 competition, injure consumers, interfere with valid 8 contracts, and aggregate valid intellectual property 9 rights, and in the answer to the interrogatory, that's 10 exactly what they fed back to us. We still don't know 11 what the valid contracts are or what the valid 12 intellectual property rights are. We have no clue. 13 If I knew what those were, it might help me 14 tailor discovery, which is why I would like to take a 15 deposition on it. And if they -- and their motion 16 hinted that, well, maybe this is something that only an 17 expert can do. If that's really true and only an expert 18 can do it and these are not matters known or reasonably 19 available to Intel, as the rule says, just tell me, and 20 then we'll know that no fact witness from their side 21 will come in and testify about valid intellectual 22 property rights or valid contracts. And frankly, I 23 doubt that. I think they will have witnesses who will 24 testify about that. 25 The second point about lacks jurisdiction over</p>

16 (Pages 58 to 61)

For The Record, Inc.

(301) 870-8025 - www.ftrinc.net - (800) 921-5555

PUBLIC

FTC Docket No. 9341

Page 62

1 conduct that does not have a direct, substantial, and
 2 reasonably foreseeable effect on U.S. commerce, counsel
 3 has said they just don't know what that is yet. If they
 4 don't have anybody at Intel that has facts, known or
 5 reasonably available, to establish that, they can say
 6 so. If that's something that an expert is going to do
 7 alone, I just need to know that now, and then we can
 8 tailor our discovery to that.

9 The laches thing has been dropped, because I
 10 think we've dealt with that. With their answer, I now
 11 understand what their claim is.

12 On the Section 5, what it says is at all times
 13 they acted in accordance with legitimate business
 14 justifications. There had already been a substantial
 15 amount of discovery taken in AMD, the AMD litigation,
 16 and also in the investigation in this case that dealt
 17 with this issue, which is, for example, their CEO, why
 18 did you decide to give Dell so much money? We have some
 19 of those answers, but I want to know what are the
 20 legitimate business justifications? Are they meeting
 21 competition? Are they something else?

22 For example, we have alleged for the compiler,
 23 things that are very specific in the complaint, that
 24 they changed the compiler so it would disable the
 25 ability of other CPUs to operate with instructions. Why

Page 63

1 did they do that? What was the legitimate business
 2 justification? We know, at the end of the day, that
 3 senior management made the decision. We know who did
 4 make the decision. I want to know why, what their
 5 position is, and if it's -- if it's what I think it is,
 6 then that's fine. I'll know how to tailor my discovery
 7 for the next three months to deal with that.

8 But I'm really afraid of coming in here at trial
 9 and finding out that, really, we're talking about two
 10 different things and they have some other justification
 11 that I don't know about. And when I go through 55
 12 deponents, I find that there's no limit to what the
 13 reasons are or I pick the wrong people and I don't
 14 really know what their position is. Their expert gets
 15 on the stand and has this elaborate story about what
 16 their business justifications are, and I am past
 17 discovery, and I've got a problem. That's why you take
 18 these depositions.

19 The final one, I thought I was clear, and I'm
 20 looking at it now, and maybe counsel misread it because
 21 my -- my drafting wasn't that good. I don't mean to
 22 take a deposition on everything they said in all -- I
 23 don't know how many pages of their preamble, but what I
 24 mentioned in our brief was they have two sections in
 25 there, decreasing prices and expanding output and

Page 64

1 dramatic increases in innovation. We came in here at
 2 the initial status conference, and I saw slides from the
 3 slide show on these points, with graphs and all of that,
 4 and we've tried to track down what the source of that
 5 is, whether it's true or not, whether the statements
 6 they made in their answer and in here were accurate or
 7 not.

8 We don't believe they are, and I'd like to take
 9 a deposition of somebody who has the matters known or
 10 reasonably available to Intel that can explain, of those
 11 two issues. They happened to occupy about a page and a
 12 half, with bullet points and things, at the very
 13 beginning of their answer. I say in the footnote here,
 14 which is probably why I wasn't that clear, the footnote
 15 said, "The remaining" -- and I said, "vague allegations
 16 can be dealt with through other discovery."

17 What I mean by that is we don't need to do that,
 18 you know, in this 3.33(c)(1) deposition, but I do think
 19 now that we have already put into play these arguments
 20 here in front of the Court at initial status, and we
 21 still haven't received any documents related to any of
 22 those issues -- in fact, we just started receiving Intel
 23 documents just four days ago -- I think this deposition
 24 can help narrow the facts, narrow the issues, and help
 25 me find out what the real basis for those arguments and

Page 65

1 statements are before we get here to trial.

2 In terms of this argument that it's duplicative,
 3 it's not exactly duplicative yet, because we haven't
 4 taken a single Intel deposition. Normally in these
 5 cases, it makes sense to take a 3.33(c)(1) deposition
 6 earlier in the case to narrow the issues, narrow the
 7 facts, figure out what witnesses we need, and hopefully,
 8 be more efficient in the way we take depositions. I've
 9 done that in every case I've ever had. Other people
 10 have done it against me. You don't like it because you
 11 have to reveal your position on these issues, of course,
 12 but it is there as a rule, because it does have a very
 13 good purpose.

14 In terms of their answers to interrogatories,
 15 sure, they answered interrogatories. Mr. Murray back
 16 here, a fine gentleman back here, he signed them with an
 17 affidavit. I doubt they're going to want me to take his
 18 deposition. In fact, his affidavit says very clearly
 19 that he got the information from others, not from
 20 himself. Well, I want to talk to somebody who can
 21 really tell me, as a person on behalf of Intel, what
 22 their facts are, matters known or reasonably available
 23 to Intel, for the things I've just stated in the record.

24 They're their defenses. They were supposed to,
 25 under the rule, state the facts in the answer to the

17 (Pages 62 to 65)

For The Record, Inc.

(301) 870-8025 - www.ftrinc.net - (800) 921-5555

PUBLIC

FTC Docket No. 9341

Page 66

1 complaint, but I looked back and read every decision
 2 from Your Honor and all the way back to Judge Timony,
 3 and I don't see any ALJ that has ever been eager to
 4 dismiss or strike an affirmative defense. In fact, all
 5 the opinions I've read, including Your Honor's, it's
 6 let's let this get dealt with in discovery, and that's
 7 what people then have to do. But I do think that we're
 8 entitled to know the answer, which is why it's in the
 9 Rule 3.12, but also in this rule here. It enables us to
 10 get the basis or the bases for their defenses.
 11 If I get a person there at the deposition and
 12 they can't answer because they don't have the knowledge
 13 or reasonable availability, nobody at Intel knows the
 14 answers to these questions. And they need to find out
 15 more about our case. We gave them over 80 pages of
 16 response in our interrogatories, which we'd be happy
 17 also to share with Your Honor whenever you want it. I
 18 think we have a schedule for that. And so they know
 19 exactly what our position is on these things. And if
 20 they don't know now and they need more time to figure
 21 that out, they need to tell me, because I don't want to
 22 get here at trial and be surprised.
 23 JUDGE CHAPPELL: Well, regarding affirmative
 24 defenses and history, a lot of those seem to run off
 25 into the sunset, not to be heard from by the time we get

Page 67

1 to trial.
 2 MR. ROBERTSON: That's right.
 3 JUDGE CHAPPELL: I'm not saying that's going to
 4 apply to this case. They tend to disappear sometimes.
 5 Anything else?
 6 MR. ROBERTSON: Yes, sir. And I've tried to be
 7 fair. They had a -- nearly a dozen defenses. I'm
 8 picking on three of them, not all of them. So, I think
 9 we're trying to focus on things that are fact-related
 10 and not legal- or expert-related. And if we're mistaken
 11 and that's all they have, they can say so, and we can
 12 move on to the next stage.
 13 MR. BURLING: May I make three brief points in
 14 response, Your Honor?
 15 JUDGE CHAPPELL: Go ahead.
 16 MR. BURLING: First, I did mention that we had
 17 answered questions with respect to these affirmative
 18 defenses in interrogatory answers. They've been
 19 commented on in the opposition brief, and as Your Honor
 20 considers this motion, I would like to offer you these
 21 answers to examine them, because I think you will find
 22 that they are very complete with respect to each of
 23 these defenses. So, with Your Honor's permission, may I
 24 give you one of these? This is just the excerpt that
 25 deals with the affirmative defenses. It's a single

Page 68

1 interrogatory answer.
 2 JUDGE CHAPPELL: Sure.
 3 MR. BURLING: (Documents tendered.) Thank you,
 4 Your Honor.
 5 JUDGE CHAPPELL: By the way, this is not a
 6 filing. I'm just looking at this.
 7 MR. BURLING: Sorry?
 8 JUDGE CHAPPELL: This is not considered to be a
 9 filing in the case, this document.
 10 MR. BURLING: Right. Yes, Your Honor.
 11 And two more quick points when Your Honor is
 12 ready to proceed.
 13 JUDGE CHAPPELL: Go ahead.
 14 MR. BURLING: Yes. The second thing I wanted to
 15 say, Your Honor, in terms of the timing of discovery and
 16 the plea that we're running out of time, counsel acts as
 17 if we never had a Part 2 in this case. You heard in the
 18 opening scheduling conference about a month ago how many
 19 years it is counsel said they had been looking into
 20 this. They received millions and millions of pages of
 21 documents. They examined a number of witnesses in Part
 22 2. So, it's not as if they are starting from scratch
 23 here at the present time.
 24 And the last thing I would say, there was --
 25 Mr. Robertson was saying, well, he didn't really mean

Page 69

1 the entire eight-page beginning part of the answer in
 2 the deposition specification. I'm sorry, that's, in
 3 fact, what it says, "Intel's purported assertions of
 4 fact in its preamble on pages 1 through 8 of its
 5 answer."
 6 If, in fact, as he now argues, he would like to
 7 narrow that to say what's the business rationale or what
 8 underlies a slide that you put up on the screen, that
 9 begins to sound more like reasonable particularity, and
 10 if he's saying that, well, I said that in my reply,
 11 well, that I got last night. Obviously, that's not
 12 notice. We're only dealing with the notice that was
 13 before us, Your Honor.
 14 MR. ROBERTSON: I think Your Honor understood
 15 what I was saying. I had put that in our reply because
 16 I felt -- and I felt they could do the same thing --
 17 that most of the other stuff that's in their -- that's
 18 in their answer is talking about information from
 19 another company and not from them. The only part that
 20 sounded like it was really coming from Intel were these
 21 two topics, decreasing prices and expanding output and
 22 dramatic increases in innovation. It sounds like
 23 counsel and I are slowly moving towards an agreement, at
 24 least on one point, which is good.
 25 JUDGE CHAPPELL: All right. Anything further?

Page 70

1 MR. ROBERTSON: No, sir.
 2 MR. BURLING: Nothing, Your Honor. Thank you.
 3 JUDGE CHAPPELL: I've read the pleadings, heard
 4 the argument, and I am going to get into the more
 5 specificity, but the motion is granted in part and
 6 denied in part. And I know that, based on what I've
 7 seen here, that these parties know how to work together,
 8 and I think what we have here is a failure to
 9 communicate.
 10 I think that each side knows that that side
 11 can't dictate to the other one where they look for
 12 facts. Facts are discoverable. And the opposition is
 13 not locked into the factual -- to the factual
 14 description given in an interrogatory answer. Those are
 15 generally prepared by a lawyer, worked on with a lawyer
 16 or someone. That's not the same as a fact witness. And
 17 nobody's forced to be limited to that.
 18 I think that some of these are vague and
 19 overbroad, and getting back to your point about the
 20 30(b)(6), or what I call corporate reps, I have done
 21 this before. You have got a list of people. You can
 22 get in a room together; you can work this out.
 23 Mr. Robertson says, "I want to know this, this, and
 24 this." Then you can say, "Well, John Jones knows that,
 25 Bill Thompson knows that," whatever. You can work this

Page 71

1 out. So, what I want to see is I want to see the
 2 parties work this out.
 3 I know that facts are discoverable, and there's
 4 going to be a limit on the discovery of facts, and I'm
 5 concerned that the depositions have been held up, and I
 6 don't want to see this schedule get sidetracked or
 7 knocked off the track. I know that complaint counsel's
 8 questioning -- and this is part of my ruling --
 9 questioning is going to be limited to questions about
 10 factual matters. This is the part of the order I'm
 11 granting -- the motion I'm granting.
 12 I don't want any attempt to elicit testimony on
 13 legal theories, positions, conclusions, other
 14 information protected by attorney-client privilege, and
 15 I know that everybody understands that, but I'm just
 16 making that clear, because I saw part of that in the
 17 motion, that this could get into legal conclusions,
 18 legal theories. But all of you have been doing this
 19 long enough to know that that's not what we do. That's
 20 not allowed.
 21 You don't say, "Well, why did you file this
 22 affirmative defense," for example. That manager, he
 23 doesn't know that; that officer of the corporation, they
 24 don't know that. They might know that, but that's not
 25 your source for that. That's legal work, and we don't

Page 72

1 get into that stuff.
 2 But I know you can whittle down these numbers.
 3 I know you can get together probably somewhere and meet
 4 in the middle, and get a list of names and get your HR
 5 people, get somebody in there who knows what the people
 6 know, and you can knock out these corporate
 7 representatives, and you can whittle this list down.
 8 And you can be more specific, complaint counsel,
 9 on what exactly you're looking for so that Intel's
 10 attorney can say, "I've got three guys who will tell you
 11 that, and here's what I can get you." And you need to
 12 work it out.
 13 Any questions?
 14 MR. ROBERTSON: No, Your Honor. I think that's
 15 fair, and we will make every attempt to do that. And do
 16 you want us to report back to you as to what we've
 17 decided to do?
 18 JUDGE CHAPPELL: Well, let's see if he has any
 19 comments or questions.
 20 MR. BURLING: No. I think you are very clear,
 21 Your Honor, and I'm sure if there are factual issues,
 22 narrowly defined, we can find a middle ground, and we
 23 will.
 24 JUDGE CHAPPELL: And, again, I'm keeping in mind
 25 the track record I've got from both sides here of

Page 73

1 working things out. That's why I expect it to be done,
 2 and I took this seriously, and I knew that there was an
 3 impasse that we have got to get past. I want to make
 4 sure before I leave here that everybody understands my
 5 ruling.
 6 MR. BURLING: We understand it loud and clear,
 7 Your Honor, and we will work with them and try to work
 8 this out.
 9 JUDGE: And I don't think I need to be down to
 10 the level of micromanaging this to get involved any
 11 further. Is that right?
 12 MR. ROBERTSON: Yes, sir.
 13 MR. BURLING: Yes, Your Honor.
 14 MR. ROBERTSON: I think your ruling, though, has
 15 helped get us to the point where we can resolve this.
 16 JUDGE CHAPPELL: Okay. Anything further?
 17 MR. BURLING: Thank you. Nothing further from
 18 us. Thank you, Your Honor.
 19 JUDGE CHAPPELL: Hearing nothing further, until
 20 next time, we're adjourned.
 21 (Whereupon, at 3:59 p.m., the status conference
 22 was adjourned.)
 23
 24
 25

1 CERTIFICATION OF REPORTER

2 DOCKET/FILE NUMBER: 9341

3 CASE TITLE: IN THE MATTER OF INTEL

4 DATE: MARCH 25, 2010

5.

6 I HEREBY CERTIFY that the transcript contained
7 herein is a full and accurate transcript of the notes
8 taken by me at the hearing on the above cause before the
9 FEDERAL TRADE COMMISSION to the best of my knowledge and
10 belief.

11

12 DATED: 3/30/2010

13

14

15

16 SUSANNE BERGLING, RMR-CRR-CLR

17

18 CERTIFICATION OF PROOFREADER

19

20 I HEREBY CERTIFY that I proofread the transcript
21 for accuracy in spelling, hyphenation, punctuation and
22 format.

23

24

25 SARA J. VANCE, CMRS

MEMO/09/235

Brussels, 13 May 2009

Antitrust: Commission imposes fine of 1.06 billion euros on Intel for abuse of dominant position; orders Intel to cease illegal practices - questions and answers

(see also [IP/09/745](#))

What must Intel do to comply with EU law?

The Decision sets out how Intel has breached EU antitrust law by engaging in two types of practices which have harmed competition. First, Intel gave wholly or partially hidden rebates to computer manufacturers on condition that they bought all, or almost all, their x86 central processing units (CPUs) from Intel. Intel also made direct payments to a major retailer on condition it stock only computers with Intel x86 CPUs. Second, Intel made direct payments to computer manufacturers to halt or delay the launch of specific products containing a competitor's x86 CPUs and to limit the sales channels available to these products. Intel is obliged desist from the specific practices identified in this case and not to engage in these or equivalent practices in the future.

What is the geographic scope of the remedy?

This is a worldwide market. Within this context, Intel is obliged not to engage in any abusive practices that have an effect within the European Economic Area (EEA).

How will this Decision help innovation in the market?

Intel limited consumer choice and stifled innovation by preventing innovative products for which there was a consumer demand from reaching end customers. Such practices deter innovative companies which might otherwise wish to enter and compete in the market. By ordering Intel to end its abusive practices, competition on the x86 CPU market will play out on the merits with the effect that innovation to the benefit of the consumer can flourish.

Does the Commission seek to limit companies' ability to provide customers with discounts?

No. This case is about the **conditions** associated with Intel's rebates and payments, not the rebates and payments themselves. What is at stake here are loyalty or fidelity rebates, granted on condition that a customer buys all or most of its requirements from the dominant undertaking, thereby preventing that customer from purchasing from competitors. Intel also paid clients to delay or not launch computers incorporating a competitor's CPUs, a conduct which is not linked at all to a company's ability to provide customers with discounts.

Does the Commission's Decision seek to protect competitors?

No, the Commission acts in the interests of consumers. The Commission does not look at the specific interests of individual companies, but is charged with ensuring that competition on the merits is safeguarded. This creates an environment where consumers can benefit and where innovation can flourish.

What is the case-law underpinning the Commission's case?

The legal underpinning of the Commission's case is based on a consistent pattern of Court jurisprudence, including Case 85/76 *Hoffmann-La Roche v Commission*, Case T-203/01 *Michelin v Commission*, Case C-95/04 *British Airways v Commission*, Joined Cases T-24/93 and others, *Compagnie Maritime Belge v Commission* and Case T-228/97, *Irish Sugar*.

Has the Commission applied its Guidance Paper on its enforcement priorities in applying Article 82?

Formally, the Guidance Paper does not apply to this case since proceedings were initiated before it was issued. The Decision is nevertheless in line with the orientations set out in the guidance paper, and includes a rigorous, effects-based analysis which has demonstrated that Intel's conduct has reduced consumer choice and limited innovation in the market.

Intel is a US company. What gives the European Commission authority to decide whether its behaviour is legal or not?

Intel sells its products *inter alia* in the European Union, which is one of its main markets in the world. It must therefore respect EU antitrust rules in the same way that European companies must respect US law when operating on the other side of the Atlantic.

Did the Commission co-operate with the United States on this case?

The Commission and the United States Federal Trade Commission have kept each other regularly and closely informed on the state of play of their respective Intel investigations. These discussions have been held in a co-operative and friendly atmosphere, and have been substantively fruitful in terms of sharing experiences on issues of common interest.

Does Intel have to pay the fine immediately?

The fine must be paid within three months of the date of notification of the Decision.

Where does the money go?

Once final judgment has been delivered in any appeals before the Court of First Instance (CFI) and the Court of Justice, the money goes into the EU's central budget, thus reducing the contributions that Member States pay to the EU.

Does Intel have to pay the fine if it appeals to the European Court of First Instance (CFI)?

Yes. In case of appeals to the CFI, it is normal practice that the fine is paid into a blocked bank account pending the final outcome of the appeals process. Any fine that is provisionally paid will produce interest based on the interest rate applied by the European Central Bank to its main refinancing operations. In exceptional circumstances, companies may be allowed to cover the amount of the fine by a bank guarantee at a higher interest rate.

What percentage of Intel's turnover does the fine represent?

The fine represents **4.15 %** of Intel's turnover in 2008. This is less than half the allowable maximum, which is 10% of a company's annual turnover.

How was Intel able to exercise its rights of defence?

Intel has been provided full access to the Commission's file, with the exception of legitimate claims relating to business secrets of other companies and internal Commission documents. Intel has been able to fully comment on the evidence on which the Commission has based its Decision. The file in this case comprises several hundred thousand pages and the Decision is based on a broad range of contemporaneous evidence from a variety of sources.

How long is the Decision?

The Decision is 542 pages long.

When is the Decision going to be published?

The Decision in English (the official language version of the Decision) will be made available as soon as possible on DG Competition's website (once relevant business secrets have been taken out). French and German translations will also be made available on DG Competition's website in due course. A summary of the Decision will be published in the EU's Official Journal L series in all languages (once the translations are available).

**UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION**

In the Matter of)	
)	
INTEL CORPORATION,	)	DOCKET NO. 9341
a corporation	)	PUBLIC DOCUMENT
)	
)	

Intel's Memorandum in Support of Memorandum in Opposition to Complaint
Counsel's Motion to Admit European Commission Decision

APPENDIX 4

Appendix 4
DG Comp and Legal Services Staff Referenced in FTC Privilege Log

REC#	DATE	FROM	TO	CC	TITLE/FILENAME	DOC TYPE	WP	CI	INF	LE	DP

**UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION**

<hr/>)	
In the Matter of)	
	)	DOCKET NO. 9341
INTEL CORPORATION,)	
a corporation	)	PUBLIC DOCUMENT
)	
<hr/>)	

Intel's Memorandum in Support of Memorandum in Opposition to Complaint
Counsel's Motion to Admit European Commission Decision

APPENDIX 5

The European Ombudsman

Decision of the European Ombudsman closing his inquiry into complaint 1935/2008/FOR against the European Commission

Available languages: en

This complaint was treated as confidential. This document has therefore been anonymised.

Contents	Related documents
<p>THE BACKGROUND TO THE COMPLAINT THE SUBJECT MATTER OF THE INQUIRY THE INQUIRY THE OMBUDSMAN'S ANALYSIS AND CONCLUSIONS</p>	<p>Case: 1935/2008/FOR Summary: Procedural errors in a competition case Press release: Ombudsman publishes decision on complaint by Intel</p>
<p>Preliminary remarks A. The allegation, and related claim, that the Commission failed to take minutes of the 23 August 2006 meeting with representatives of Dell, despite the fact that the meeting was directly concerned with the subject matter of its investigation of Intel, and, as a result, that the Commission did not make a record of potentially exculpatory evidence B. The allegation, and related claim, that the Commission encouraged Dell and AMD to enter into an information exchange arrangement which had the effect of allowing AMD to circumvent the rules limiting AMD's right to have access to the Commission's investigation file C. Conclusions</p>	
<p>FURTHER REMARK</p>	

THE BACKGROUND TO THE COMPLAINT ▲

1. The complainant represents Intel Corporation (hereinafter "Intel"), a company that produces microprocessors.
2. At the time the complaint was submitted to the Ombudsman, the European Commission was investigating Intel as a result of a complaint it had received from AMD, an Intel competitor. The Commission's investigation (Case COMP/37.990) sought to verify whether Intel had contravened Article 82 EC[1] by using anticompetitive practices to exclude competitors from the market for certain central processing units. In the course of its inquiry, the Commission obtained extensive information from Original Equipment Manufacturers (OEMs) who purchased central processing units from Intel and/or AMD. One of these OEMs was Dell.

3. On 13 May 2009, that is, during the course of the Ombudsman's inquiry, the Commission took a decision in which it found that Intel had infringed Article 82 EC.

THE SUBJECT MATTER OF THE INQUIRY ▲

4. The subject-matter of the complaint concerns alleged procedural errors by the Commission committed during its investigations in Case COMP/37.990. The Ombudsman understood the complainant to allege the following:

(i) The Commission failed to take minutes of the meeting with representatives of Dell on 23 August 2006, despite the fact that the meeting was directly concerned with the subject-matter of its investigation of Intel, with the result that the Commission did not make a record of potentially exculpatory evidence.

(ii) The Commission encouraged Dell and AMD to enter into an information exchange arrangement which had the effect of allowing AMD to circumvent the rules which limit the right of AMD to have access to the Commission's investigation file.

5. The Ombudsman understood that the complainant did not seek any other remedy or redress in the context of his proceedings.

THE INQUIRY ▲

6. The complaint was submitted on 10 July 2008. On 22 July 2008, the Ombudsman opened an inquiry in relation to the complainant's first allegation, that is, that the Commission failed to take minutes of the 23 August 2006 meeting with representatives of Dell, despite the fact that the meeting was directly concerned with the subject-matter of its investigation of Intel. As a result, the Commission did not make a record of potentially exculpatory evidence arising from this meeting. The Ombudsman requested the Commission to submit an opinion by 30 November 2008.

7. In order to clarify fully the issues raised by the complainant in relation to the first allegation and the related claim, the Ombudsman, in his letter opening the inquiry, suggested that the Commission include in its opinion its views in relation to the following specific issues and questions:

"(i) When drafting its opinion, the Commission should, in particular, bear in mind Paragraph 358 of TACA.[2] In this context the Ombudsman notes that Annex VII of the complaint dated 10 July 2008 and Annex I of the additional letter dated 10 July 2008, in conjunction with Annex VI of the complaint dated 10 July 2008, would seem to indicate that the meeting of 23 August 2006 may have dealt with certain issues which the complainant considers to be potentially exculpatory.

(ii) Was the Commission the author of the document entitled "Indicative list of topics to be discussed with Dell Meeting of 23 August 2006"?[3] The Ombudsman understands that Annex VII of the complaint appears to be part of a response from Dell to follow-up questions posed by the Commission in relation to issues discussed in the meeting of 23 August 2006. Is this understanding correct?

(iii) Did the Commission officials present at the meeting draft their own personal notes of the meeting of 23 August 2006?

(iv) In order for notes of a meeting to constitute "statements", pursuant to Article 19 of Regulation 1/2003, they must be signed by the party interviewed. Did the Commission request the Dell representatives to sign any notes prepared by the members of the case team? If not, can the Commission confirm, if it is still possible, on the basis of the notes of the Commission officials present at the meeting, to request Dell to sign minutes of the meeting?"

8. As regards the second allegation, the Ombudsman, in his letter opening the inquiry, noted that the complainant had not provided any evidence to support his allegation that the Commission actively encouraged AMD and Dell to enter into an information exchange agreement. Thus, in his letter of 22 July 2008 opening the inquiry, the Ombudsman informed the complainant that there were insufficient grounds to open an inquiry into the second allegation.

9. On 19 September 2008, the complainant wrote to the Ombudsman. He included in his letter a copy of a letter from Dell's outside counsel dated 18 September 2008, in which Dell's outside counsel states that "*in order to avoid a lengthy debate over confidentiality claims, the Commission suggested to Dell to enter into a non disclosure agreement with AMD's counsels and economists for the sharing of Dell documents used in the [Statement of Objections]*". The letter also contained copies of correspondence between the Commission and Dell's counsel. In light of this information, the complainant requested the Ombudsman to review his position as regards the second allegation set out in his complaint of 10 July 2008.

10. In light of the further correspondence from the complainant, the Ombudsman decided, on 26 September 2008, to extend his inquiry to cover the complainant's second allegation. In his letter informing the Commission of the extension of the scope of the inquiry, the Ombudsman requested that, in its opinion to the Ombudsman, the Commission specifically comment on the statement of Dell's counsel that the Commission suggested to Dell that it enter into an information exchange agreement with AMD. He also requested the Commission to comment specifically on a letter of the Hearing Officer^[4] to the complainant dated 18 October 2007 in which it is stated that the agreement in question was not "notified", in any form, to the case team.

11. On 30 September 2008, the Commission wrote to the Ombudsman informing him that, since his letter of 26 September 2008 had extended the scope of the inquiry, it required an additional period, namely, until 15 January 2009, to submit an opinion to the Ombudsman. On 15 October 2008, the Ombudsman agreed to this request.

12. On 13 October 2008, the complainant wrote to the Ombudsman to inform him of two applications which had been submitted by Intel to the European Court of First Instance on 10 October 2008. On 5 November 2008, the Ombudsman wrote to the Commission in relation to this correspondence.

13. The complainant sent correspondence to the Ombudsman on 30 December 2008, 12 January 2009 and 26 January 2009 in relation to the complaint. The Ombudsman forwarded this correspondence to the Commission for information.

14. The Ombudsman received the Commission's opinion on 20 January 2009 and forwarded it to the complainant for his observations. The complainant sent his observations on 3 February 2009.

15. On 16 February 2009, the Ombudsman requested a further opinion from the Commission. On 20 March 2009, the Commission sent its further opinion to the Ombudsman, which was forwarded to the complainant for observations. The complainant sent further observations on 14 April 2009 and 16 April 2009.

16. In his observations, dated 16 April 2009, the complainant provided the Ombudsman with new evidence. As a result, on 23 April 2009, the Ombudsman requested the Commission to provide him, by 31 May 2009, with any comments it might have in relation to this new evidence, or relevant information in relation thereto. He also requested the Commission to allow his services to inspect internal Commission documents which the Ombudsman had identified as being relevant for the present inquiry.

17. On 28 May 2009, 29 May 2009 and 10 June 2009, the Ombudsman carried out an inspection of documents at the premises of the Commission. A note concerning this inspection was sent to the complainant and the Commission, for information, on 6 July 2009.

18. On 10 June 2009, the Commission sent the Ombudsman its reply to his letter of 23 April 2009. This further opinion was forwarded to the complainant, who sent further observations on 15 June 2009. An annex to the complainant's further observations of 15 June 2009 was received by the Ombudsman on 29 June 2009.

THE OMBUDSMAN'S ANALYSIS AND CONCLUSIONS ▲

Preliminary remarks ▲

Admissibility of the Complaint

19. On 13 October 2008, the complainant wrote to the Ombudsman to inform him that, on 10 October 2008, Intel had made an application to the Court of First Instance, seeking the annulment of the Commission's decisions: (i)

setting a deadline of 17 October 2008 for Intel to respond to the Commission's Supplementary Statement of Objections issued on 16 July 2008; and (ii) refusing Intel's request that the Commission obtain additional documents from AMD, which Intel reasonably believed were exculpatory. Intel also made an application to the President of the Court of First Instance for interim measures to suspend the Commission's procedure in Case COMP/37.990 pending a ruling on the main application.[5] In his letter of 13 October 2008, the complainant informed the Ombudsman that the two applications were unrelated to the matter under investigation in Complaint 1935/2008/FOR. The complainant attached to his letter a copy of two documents, both of which are entitled "Summary of Application".

20. On 5 November 2008, the Ombudsman wrote to the Commission. He noted that Article 1(3) of the Statute of the European Ombudsman states that the Ombudsman may not intervene in cases before courts or question the soundness of a court's ruling. Further, Article 2(7) states that, when, because of legal proceedings, in progress or concluded, concerning the facts which have been put forward, has to declare a complaint inadmissible or terminate consideration of such complaint, the outcome of any inquiries he has carried out up to that point shall be filed definitively. The Ombudsman noted that he had carefully examined the complainant's letter dated 13 October 2008 in order to evaluate whether the subject-matter of the applications before the Court of First Instance was the same as the subject-matter of the allegations in Complaint 1935/2008/FOR. The Ombudsman noted that the first allegation in Complaint 1935/2008/FOR was that the Commission did not take minutes of a meeting with Dell. In contrast, the application to the Court of First Instance concerned a decision by which the Commission refused to agree to a request to procure additional documents from AMD. The Ombudsman thus concluded that, on the basis of the information which had been submitted to him, the first allegation in Complaint 1935/2008/FOR did not concern the subject-matter of the application to the Court of First Instance. As regards the second allegation, the Ombudsman concluded, on the basis of the information which had been submitted to him, that the applications of 10 October 2008 did not concern the facts which have been put forward by the complainant in Complaint 1935/2008/FOR. In light of the above, the Ombudsman informed the Commission that there were no grounds to close his inquiry in relation to the first or the second allegation in Complaint 1935/2008/FOR.

21. In its opinion forwarded to the Ombudsman on 20 January 2009, the Commission argued that Intel linked both its applications before the Court of First Instance to the complaint before the Ombudsman. The Commission pointed out that Intel had attached Complaint 1935/2008/FOR, and the entire correspondence with the Ombudsman, as annexes to the main application before the Court of First Instance. Amongst other arguments, Intel stated in the main application that the Commission's investigation was "*discriminatory and partial*". In order to substantiate this claim, Intel made reference to examples of what it considered to be discrimination and partiality in the Commission's investigation. These examples included a specific reference to the two alleged instances of alleged bias on which the Ombudsman has opened his inquiry in Complaint 1935/2008/FOR. Intel included the entire correspondence with the Ombudsman as evidence. On this basis, the Commission argued that all the facts put forward in Complaint 1935/2008/FOR were now pending in legal proceedings before the Court of First Instance. The Commission also stated that when, on 13 October 2008, Intel informed the Ombudsman of the applications to the Court of First Instance, Intel only submitted summaries of these applications. The Commission noted that the summaries made no reference to any of Intel's arguments referred to in Complaint 1935/2008/FOR. The Commission therefore requested that the Ombudsman reconsider the assessment made in his letter of 5 November 2008 by basing himself on the complete facts outlined in the Commission's opinion of 20 January 2009 and declare Complaint 1935/2008/FOR to be inadmissible in its entirety.

22. In his observations dated 3 February 2009, the complainant stated that he did not accept the Commission's arguments. He stated that the subject-matter of Complaint 1935/2008/FOR, and the subject-matter of the proceedings before the Court of First Instance in Cases T-457/08 R and T 457/08, were quite distinct. He stated that, while Intel referred to Complaint 1935/2008/FOR in its written filings to the Court of First Instance in order to apprise the Court of First Instance of the full procedural history of the Commission's investigation of Intel, and also to provide some background against which the decision subject to Intel's application might be assessed, Intel did not appeal the two acts of maladministration that are the subject-matter of Complaint 1935/2008/FOR. He stated that Intel's citation, in its applications, of (a) the Commission's failure to make a complete record of an interview with senior Dell representatives, and (b) its role in providing AMD with access to confidential Dell materials forming part of the Commission's file, as examples of the Commission's bias and lack of objectivity, cannot be construed to mean that these acts were themselves part of the subject-matter of Intel's appeal and request for interim measures. He argued that his viewpoint was confirmed by the fact that the President of the Court, in his Order of 27 January 2009 dismissing Intel's application for interim measures,[6] focused his analysis exclusively on the two decisions that were the subject-matter of the appeal and nowhere referred to the two acts of maladministration that are the subject-matter of Complaint 1935/2008/FOR. Thus, in the complainant's view, the two acts of maladministration, which are the subject-matter of Complaint 1935/2008/FOR, did not form the subject-matter of the appeal and request for interim measures in Cases T-457/08 and T-457/08 R.

23. The complainant also argued that the Commission's claim that Intel's allegation of maladministration was currently pending before the Court of First Instance was now overtaken by events and rendered moot. In effect, the complainant stated that Intel did not intend to appeal the 27 January 2009 order of the President of the Court of First Instance. Further, on 3 February 2009, Intel formally withdrew its main application in Case T-457/08. Given that the proceedings before the Court of First Instance, invoked by the Commission as allegedly precluding the Ombudsman's investigation of Complaint 1935/2008/FOR, were no longer pending, the Commission's objections in that respect were therefore moot.

24. The Ombudsman notes that, in accordance with Article 195(1) second paragraph of the EC Treaty, the Ombudsman shall not conduct inquiries where the alleged facts are or have been the subject of legal proceedings. Article 1(3) of the Statute of the European Ombudsman also states that the Ombudsman may not intervene in cases before courts or question the soundness of a court's ruling. Further, Article 2(7) of the Statute of the European Ombudsman states that, when the Ombudsman, because of legal proceedings, in progress or concluded concerning the facts which have been put forward, has to declare a complaint inadmissible or terminate consideration of it, the outcome of any inquiries he has carried out up to that point shall be filed definitively.

25. The Ombudsman emphasises the importance he attaches to ensuring that his inquiries do not, in any way, impinge upon the role of the courts. If facts have been established or interpreted in a ruling by a court, the Ombudsman will not reevaluate the existence of, or the interpretation of, such facts.

26. The Ombudsman notes that, on 27 January 2009, the President of the Court of First Instance issued an Order in relation to Case T-457/08 R.[7] In his Order, the President of the Court of First Instance concluded that the interim measures application in Case T-457/08 R should be declared inadmissible. Following a careful examination of the Order of the President of the Court of First Instance, the Ombudsman notes that the Order does not establish the existence of alleged facts, or evaluate any facts, which are the subject of the present inquiry. As such, the Ombudsman concludes that the Order of the President of the Court of First Instance does not call into question the admissibility of Complaint 1935/2008/FOR.

27. Further, on 3 February 2009, before the Court of First Instance could take a view on any of the alleged facts or facts brought before it in relation to that application, Intel withdrew its application in Case T-457/08. As such, it is not now necessary for the Ombudsman to take a view as regards whether alleged facts which were brought to the attention of the Court of First Instance in the context of that application are the same as the alleged facts which are the subject-matter of the present inquiry.

28. In light of the above, the Ombudsman considers that the present case is admissible.[8]

Alleged delays by the Commission

29. In his observations dated 3 February 2009, the complainant stated that he was concerned that the Commission was deliberately seeking to delay the Ombudsman's investigation of Complaint 1935/2008/FOR. In sum, he argued that it was difficult to believe that the Commission was not in a position to submit its five-page, non-factual opinion, which was based on a single procedural argument (that the complaint was inadmissible), within the original deadline of 30 November 2008, or, at the least, before the expiry of the extended deadline of 15 January 2009. He noted that Cases T-457/08 R and T-457/08 were filed on 10 October 2008 and were communicated to the Commission on 14 October 2008 (for the interim measures application) and 27 October 2008 (for the main application). Given the very limited nature of its submission dated 20 January 2009, the Commission should have been in a position to provide its submission shortly after it obtained a copy of Intel's main application in Case T-457/08 on 27 October, 2008, but in any event within the original deadline of 30 November 2008.

30. The Ombudsman notes that the original deadline set for providing an opinion to the Ombudsman was 30 November 2008. On 30 September 2008, the Commission wrote to the Ombudsman informing him that, since his letter of 26 September 2008 had extended the scope of the inquiry, the Commission required an additional period, namely, until 15 January 2009, to submit an opinion to the Ombudsman. Given the complexity and sensitivity of the allegations in Complaint 1935/2008/FOR, the Ombudsman agreed to this request.

31. The Ombudsman notes that, since the Commission's request of 30 September 2008 was made prior to the applications to the Court of First Instance on 13 October 2008, it must have been the Commission's intention, when it made the request for an extension, to provide the Ombudsman with an opinion in relation to the *substance* of the allegations in Complaint 1935/2008/FOR.

32. The Ombudsman is of the view that the Commission would comply with its duty to cooperate with the Ombudsman in the conduct of an inquiry, if, in the event that such an extension was not necessary for the purposes of responding to the Ombudsman, it decided not to make use of the extension granted to it.

33. The Commission's opinion of 20 January 2009 was based solely on the issue of admissibility discussed in paragraphs 19 to 28 above. The opinion indeed consisted of only five pages. The Ombudsman cannot, however, exclude the possibility that the Commission did not quickly arrive at the views expressed in its opinion of 20 January 2009. In sum, the Ombudsman cannot exclude the possibility that the Commission was not certain of the soundness of its arguments in relation to the admissibility of the complaint during the period between 27 October 2008 and 15 January 2009, and was therefore also considering responding on the substance of the case by 15 January 2009. This view would be confirmed by the fact that when, on 16 February 2009, the Ombudsman set a very short deadline for the submission of a further opinion by the Commission on the substance of the allegations, the Commission was able to meet this very short deadline.[9] The Commission's ability to meet this deadline would indicate that the Commission had indeed (at least partially) used the period between 27 October 2008 and 15 January 2009 to consider the substance of the allegations made in the present inquiry. Further, the Commission replied promptly to the Ombudsman's request of 23 April 2009 for a second further opinion. Finally, the Ombudsman notes that the Commission responded promptly and flexibly to the Ombudsman's request to carry out an inspection of documents.

34. The Ombudsman does not, therefore, agree with the complainant's statement that the Commission was "deliberately" seeking to delay the Ombudsman's investigation of Complaint 1935/2008/FOR.

A. The allegation, and related claim, that the Commission failed to take minutes of the 23 August 2006 meeting with representatives of Dell, despite the fact that the meeting was directly concerned with the subject matter of its investigation of Intel, and, as a result, that the Commission did not make a record of potentially exculpatory evidence ▲

Arguments presented to the Ombudsman

35. The complainant states that, on 23 August 2006, the Commission case team responsible for dealing with Case COMP/37.990 met with senior representatives of Dell to discuss issues relating to Case COMP/37.990. The complainant argues that the Commission failed to record, and include in the case file, a detailed note of the meeting. This, in the complainant's view, constitutes a very serious act of maladministration.

36. The complaint argues that, in the meeting of 23 August 2006, Mr A (a senior executive at Dell) must have informed the Commission of facts which, in the context of Case COMP/37.990, would be exculpatory of Intel. In support of this argument, the complainant, provided the Ombudsman with a copy of a document, which, according to the complainant, is an agenda for the meeting of 23 August 2006 (hereinafter, "the Agenda"). The complainant states that the Agenda was prepared by the Commission's case team. According to the complainant, the Agenda makes it clear that the purpose of the 23 August 2003 meeting was to cover, amongst other issues, the following issues:

- Dell's alleged *de facto* exclusivity with Intel;
- Performance differences between Intel and AMD;
- The Intel discount system introduced at the end of 2001 and the *quid pro quo*, if any, from Dell;
- Mr A's testimony to the US Federal Trade Commission (hereinafter, the "FTC") concerning Dell's interest in ensuring Intel's performance advantage over AMD;
- Dell's "single sourcing" business model, which led it to source solely from Intel;
- Intel's "ability to retaliate" if Dell should begin sourcing microprocessors from AMD;
- Dell's uncertainties about AMD's "roadmap";
- [Intel's discounts to Dell since April 2004].

37. In the complainant's view, it is clear that, if the Agenda were followed,[10] the meeting of 23 August 2006 focused on the key areas of Mr A's FTC testimony. The complainant states that Mr A's FTC testimony exonerates Intel and contradicts the allegations contained in the Statement of Objections[11] concerning Dell's relationship with Intel. In sum, Mr A's sworn testimony to the FTC in 2003[12] consisted of information relating to the same facts which were being investigated by the Commission in Case COMP/37.990. The complainant states that the Commission was aware of this testimony since, at the latest, 18 July 2006.

38. In the complainant's view, the meeting of 23 August 2006 also covered some new material which was not covered in Mr A's FTC testimony, but which was similarly central to the allegations in the Statement of Objections concerning Dell. For example, the Statement of Objections **[made assertions about the reasons why Dell purchased only from Intel]**. It is clear, in the complainant's view, that the accuracy of this claim was a central subject of the Agenda.

39. In the complainant's view, it is also reasonable to assume that, had evidence provided by Mr A incriminated Intel and supported the Commission's allegations, it would have been relied on by the Commission in the Statement of Objections. Since that was not the case, it also seems reasonable to assume that Mr A's evidence was either neutral or exonerated Intel.

40. The complainant argues that the case team failed to make a detailed note of its interview with a material witness who (a) it knew, or should have known from the documents already in its possession, had provided exculpatory evidence contradicting many of the Commission's key assumptions, which were later incorporated into the Statement of Objections, and (b) with whom it appears to have discussed issues central to the Commission's case.

41. Against this background, the complainant argues, it is clear that the Commission's failure to record and include in the case file a detailed note of Mr A's responses to the case team's questions constitutes a very serious act of maladministration and, indeed, calls into question the integrity of the Commission's entire investigation.

42. The complainant states that, in its correspondence with the complainant, the Commission initially denied the existence of the meeting.[13] It subsequently stated that a meeting had taken place, but that no minutes of that meeting were taken.[14] At a yet later date, it stated that a note for the file relating to that meeting had been created and that the note would now be placed in the official case file. However, the Commission's Hearing Officer then informed Intel that it would not have access to that note, since this was an "*internal document*" and did not constitute agreed "*minutes*" of the meeting.[15]

43. The complainant argues that the creation of written minutes of meetings is good administrative practice, which respects the principle of transparency in administrative proceedings. It also ensures impartiality in the investigatory process. In the complainant's view, the Commission's failure to make a record of the meeting constitutes maladministration.

44. The complainant made reference to Article 24 of the European Code of Good Administrative Behaviour which requires the Commission to "*keep adequate records of their incoming and outgoing mail, of the documents they receive, and of the measures they take.*" It follows that the duty to keep adequate records must, in the complainant's view, also apply to the interview of a material, exculpatory witness. The case team's failure to do so is, in the complainant's view, also inconsistent with the good administrative practice that is incumbent upon an institution with the extensive powers enjoyed by the Commission.

45. The complainant also argues, in relation to the allegation, that the Commission failed to respect the principle of transparency in administrative proceedings. He states that the case team's denial that it interviewed a key witness, and its initial denial that a written note of the meeting had been produced - later transformed by the Hearing Officer into the statement that "*no interview according to Article 19 of Regulation 1/2003 took place ... nor were any minutes taken during or after the meeting which form part of the file*" - inconsistent with the facts as finally established, and with the need to ensure transparency in administrative proceedings. In the complainant's view, the case team's conduct constitutes a manifest violation of Articles 11[16] and 12[17] of the European Code of Good Administrative Behaviour, which require Commission officials to exhibit fair and correct conduct and "*reply as completely and accurately as possible to questions which are asked.*"

46. Also in relation to his allegation, the complainant further argues that the Commission was not impartial during the investigatory process. He notes that the Commission has broad and far-reaching powers under Regulation 1/2003 and argues, in addition, that, in competition cases, the Commission acts as "*the investigator, the jury and the judge*" and is subject to judicial review only after it has adopted a decision. In particular, and in contrast to the system in place in some Member States, such as France, where the investigatory and adjudicative functions are split between two agencies, the Commission has the power both to conduct an investigation of the facts and to adopt a decision establishing that an infringement of the competition rules has occurred. In the complainant's view, the extensive nature of the Commission's powers requires that the Commission exercise particular vigilance against any tendency toward bias, lack of objectivity or overzealous prosecution, when performing its investigative

and adjudicative functions. In this respect, in the complainant's view, the case team clearly infringed Articles 7, 8 and 9 of the European Code of Good Administrative Behaviour by 1) attempting to cover up the interview of 23 August 2006; 2) attempting to deny that any written note was produced; 3) failing to make the contents of that interview part of the record; and 4) failing to make a detailed record of the questions asked of Mr A and the answers he provided.[18]

47. In its further opinion to the Ombudsman dated 20 March 2009, the Commission states that members of the case team handling the investigation in Case COMP/37.990 had a meeting on 23 August 2006 with two of Dell's senior executives, Mr A and Mr B, as well as with two of Dell's outside counsel. According to the Commission, the purpose of the meeting was to discuss a number of documents which Dell had recently submitted to the Commission[19] and to prepare the Commission's further investigation of the case.

48. The Commission states that, during the meeting, Dell's representatives discussed a number of questions with the Commission. According to the Commission, Dell subsequently answered these questions formally in a letter dated 22 September 2006.

49. The Commission also states that, between the meeting of 23 August 2006 and the sending of the first Statement of Objections to Intel on 26 July 2007, Dell made eight additional submissions to the Commission pertaining to the key issues of the investigation. According to the Commission, Intel received full access to all these answers when it was given access to file on 29 July 2007 and has thus been aware of the existence of the meeting since that date. The existence of the meeting was further confirmed by the case team by email of 21 February 2008.

50. As to the actual content of the meeting, the Commission states that no notes or records, other than the note of 29 August 2006, exist in the Commission's file. According to the Commission, the note of 29 August 2006 summarises the impressions of one of the case handlers present at the meeting. It incorporates information from other sources, personal views, and the case handler's views on further investigative strategy. The note was therefore, in the Commission's view, not drafted for the purpose of being countersigned or agreed by any other attendees of the meeting (and indeed it never was countersigned or agreed by any other attendees of the meeting). It was not meant to become, at any point in time, part of the facts (inculpatory or exculpatory) resulting from the investigation. Rather, the note of 29 August 2006 was an *aide memoire* for the case handler for preparing further investigative measures.

51. Moreover, the Commission noted, the purpose of the meeting with Dell was to explore further investigative measures related to Dell. The purpose was not to gather information in the format of countersigned minutes or Article 19 statements.

52. The Commission states that, although it maintains that there was no obligation to send the note of 29 August 2006 to Intel, a non-confidential version of the said note, which excluded confidential information relating to Dell and to the Commission's strategy considerations, was sent to Intel on 19 December 2008.

53. The Commission states that, while, as a result of its access to the file,[20] Intel was aware of the meeting, the Commission did not initially inform Intel of the existence of the note of 29 August 2006, since the case team considered that it was not part of the official case file in Case COMP/37.990. The Hearing Officer overruled that initial position by decision of 7 May 2008, and asked that the note to the file of 29 August 2006 be placed on the official case file in Case COMP/37.990. However, at the same time the Hearing Officer denied Intel access to the note of 29 August 2006 on the grounds that the note was an "internal document", and therefore not accessible to Intel.

54. As regards the fact that Intel submitted a document to the Ombudsman that "appears"[21] to be a list of topics to be discussed at the meeting, the Commission took the view that it is not possible, from the document itself, to determine from whom this document originates. The Commission states that it has not been able to locate this document and cannot therefore state with certainty where it originates from. The document in question is most likely a personal note of a case handler that was either sent to Dell by email prior to the meeting or handed over to Dell during the meeting. Such notes normally serve as a preparation for both the case team and the other parties attending a meeting in order to acquaint themselves with possible subjects that could be discussed at a meeting. However, in the course of a meeting, discussions often depart from the topics outlined in such notes, depending on the limited time available for such meetings and the topics that arise in them.

55. The Commission noted that Intel argues that the Commission's handling of the meeting on 23 August 2006 constitutes an act of maladministration. The Commission understands Intel's argument to be based on three different grounds. Firstly, Intel alleges that the topics discussed at that meeting were exculpatory and that the Commission should therefore have recorded them. In order to substantiate its claim, Intel submits a document that it states "*appears to be an agenda prepared by the case team for the meeting*" and holds that the topics listed in that document were actually discussed at the meeting. Moreover, Intel makes reference to the testimony of Mr A (one of the attendees of the meeting of 23 August 2006) before the FTC on 26 March 2003 and claims that (1) the content of that testimony would be exculpatory for Intel and (2) that Mr A must have made similar statements as in his FTC deposition. Secondly, Intel alleges that the Commission hid the fact that a meeting with Dell representatives took place and that a note on that meeting had been prepared. Finally, Intel infers that, by its handling of the meeting with Dell, the Commission has used its powers for purposes that have no basis in law and are not motivated by public interest, and that the Commission has not been impartial and independent by taking into consideration all the relevant factors and giving each of them its proper weight.

56. In relation to the above, the Commission states that Paragraph 12 of the Notice on Access to File[22] states that:

"There is no obligation on the Commission departments to draft any minutes of meetings with any person or undertaking. If the Commission chooses to make notes of such meetings, such documents constitute the Commission's own interpretation of what was said at the meetings, for which reason they are classified as internal documents".

57. The Commission states that the case law underlying the above paragraph of the Notice is set out in paragraphs 349-359 of the TACA judgement.[23] It notes that, in paragraph 351 of TACA, the Court of First Instance states that "*there is by contrast no general duty on the part of the Commission to draw up minutes of discussions in meetings or telephone conversations with the complainants which take place in the course of the application of the Treaty's competition rules*". The Commission goes on to state that the Court of First Instance has further confirmed this finding in the *Group Danone* case.[24]

58. The Commission goes on to add that, in paragraph 358 of TACA, to which the Ombudsman has made reference in his letter opening the inquiry, and paragraph 67 of *Group Danone*, the Court held that "*according to the case-law infringements of the rights of the defence must be examined in relation to the specific circumstances of each particular case*". In both judgments, however, the Court of First Instance goes on to say that:

"if the Commission intends to use in its decision inculpatory evidence provided orally by another party it must make it available to the undertaking concerned so as to enable the latter to comment effectively on the conclusions reached by the Commission on the basis of that evidence. Where necessary, it must create a written document to be placed in the file".

59. As regards Intel's claims that, at the meeting in question, exculpatory information was passed to the Commission and that there is an obligation to record such information, the Commission states that the content of the meeting partly related to documents that were already on the Commission's case file and partly served the purpose of formulating subsequent information requests that were then answered by Dell by letter of 22 September 2006. As regards Intel's claims that the meeting must have addressed exculpatory information that is not contained on the Commission's file, the Commission notes that, in order to substantiate its claim, Intel refers to Mr A's FTC testimony made more than three years prior to the meeting of 23 August 2006 and to a document that allegedly shows the indicative topics to be discussed at the meeting. The Commission states that none of these documents contains evidence of what actually was discussed at the meeting. Without prejudice to whether any statements made to the FTC by Mr A three years previously are exculpatory, the fact that such statements were made by Mr A to the FTC does not demonstrate that Mr A provided any information which might be exculpatory to the Commission. In fact, according to the Commission, Mr A's statement, made before the FTC, largely relates to a period preceding the practices which the Commission objected to in its Statement of Objections of 26 July 2007. [25] This is further confirmed by the questions raised during the meeting, to which Dell has answered in writing and which largely related to the performance of an AMD product (Hammer) in the course of the year 2002. Equally, the indicative list of topics[26] does not imply that these topics were indeed addressed (partially or fully) at the meeting and, if they were addressed, with what level of detail. Therefore, the Commission's "*preliminary assessment*" is that the meeting did not cover any exculpatory information.[27] In the Commission's view, Intel did not provide evidence which would invalidate this preliminary assessment. The Commission noted that the final determination of what information would be exculpatory or inculpatory can only be made once the Commission has concluded the investigative stage of the procedure.

60. Finally, the Commission emphasised that the relevant case law, which exceptionally establishes an obligation to create a written document for the file with respect to inculpatory evidence, is not applicable in this case because the meeting did not pertain to information that the Commission "*intends to use in [any possible] decision.*" It noted that neither of the two Statements of Objections sent in this case rely on the content of the meeting of 23 August 2006. As regards the question whether the meeting covered exculpatory information, this can only be answered definitively in the future, once the Commission will have in its possession all the information needed to take a decision in the present case.[28]

61. The Commission noted that the fact that a case handler decided to draft a note to the file summarising, *inter alia*, his impressions of the meeting does not make this purely internal document an accessible document which the Commission was obliged to provide to Intel. This was also confirmed by the Hearing Officer and the document was therefore provided to Intel on 19 December 2008 "*as a matter of courtesy only*".

62. The Commission then addressed the issues raised by the Ombudsman in opening the present inquiry (see Paragraph 7 above). As regards the first issue raised by the Ombudsman, the Commission concludes that it acted in full compliance with the Notice on Access to File and the Court's rulings in *TACA*[29] and *Groupe Danone*[30], when it did not take minutes of the meeting with Dell representatives on 23 August 2006, since these provisions and judgments did not oblige it, in the context of the present case, to do so.

63. As regards the second issue raised by the Ombudsman, the Commission concludes that it cannot be established who the author of the document "*Indicative list of topics to be discussed*" was, but that most likely this document was submitted by a Commission case handler to Dell prior to or during the meeting. Typically, such notes serve as a way to organise the preparation of meetings and are not necessarily strictly followed during the meeting. Moreover, the Commission confirms that the questions to which Dell has responded in writing (in its written follow-up to the meeting) were "*in all likelihood*" discussed during the meeting of 23 August 2006.

64. As regards the third issue raised by the Ombudsman, the Commission concludes that no minutes of the meeting of 23 August 2006 were taken. The note of 29 August 2006 does not constitute "*minutes*", since it was not drafted with a view to providing a full summary of the content of the meeting but with an eye to preparing further investigative measures related to Dell. Moreover, it is not possible to determine which content of the note of 29 August 2006 stems from the meeting and which stems from other sources. The note of 29 August 2006 was also not meant to be countersigned by Dell. The investigative measures following that note have triggered voluminous submissions by Dell that were made fully available to Intel.

65. As regards the fourth issue raised by the Ombudsman, the Commission concludes that Dell representatives have not been asked to sign any minutes, since the purpose of the meeting of 23 August 2006 was not to produce an Article 19 statement. Moreover, the note to the file addressed in the same sections above did not have the purpose of constituting minutes of the meeting and is not designed to accurately or fully reflect the contents of the meeting. Consequently, it is not possible at this stage to request Dell to sign minutes of the meeting, since no such minutes exist.

66. The Commission argued that it did not hide the fact that a meeting took place. Intel was made aware of a note to the file relating to the hearing in the course of the second stage of the usual access to file procedure, where decisions on access are first taken by DG COMP and are then subject to review by the Hearing Officer.

67. Based on the facts described above, the Commission submits that the handling of the above meeting was in full compliance with the applicable legal provisions and by no means puts into question the objectivity and even-handedness of the Commission's investigation. It argues that Intel's account of the events is inaccurate and incomplete. In the Commission's view, there are elements to support this conclusion, namely, the note of 29 August 2006 itself.

68. In his observations of 14 April 2009 and 16 April 2009, submitted in response to the Commission's opinion of 20 March 2009, the complainant stated that the Agenda, which was prepared by the Commission in advance of the 23 August 2006 meeting, outlined key topics. He noted that many of these topics would become the foundation of the Commission's allegations in the Statement of Objections dated 26 July 2007. The complainant stated that, prior to the meeting of 23 August 2006, the Commission reviewed Mr A's 2003 testimony before the FTC. Indeed, as the Agenda indicates, the Commission knew in advance of that meeting that much of Mr A's prior testimony was intimately related to the topics on the Agenda. Moreover, the Commission was fully aware that Mr A was **[a Senior Dell executive]** and that he was **[the Dell executive]** responsible for Dell's relationship with Intel. As a result, it is

simply not credible that the Commission did not anticipate that Mr A would provide important evidence during the meeting and, given Mr A's 2003 testimony before the FTC, that this evidence would likely be exculpatory of Intel.

69. The complainant states that, in its comments, the Commission attempts to deflect the obvious conclusion that the interview with Mr A focused on the Commission's key allegations concerning Dell. The Commission tries to dismiss the reliability of the agenda for the meeting, by stating that "*such notes are a way to organize the preparation of meetings and are not necessarily strictly followed during the meeting*". However, in its opinion to the Ombudsman, the Commission also concedes that "*the questions to which Dell has responded in Annex VII of Intel's complaint were in all likelihood discussed during the meeting of 23 August 2006.*" Further, the note of 29 August 2006 itself unequivocally confirms that the meeting tracked the proposed agenda closely. Thus, for example, the note of 29 August 2006 states plainly that the "Q&A focused on [Mr A's] deposition to the FTC" and, in particular, on "*Dell's products strategy*", "**[Dell's decision to source from Intel and its relation to Intel's discount programme]**" and "**[Intel's response, should Dell change its approach]**". All these topics are identified in the Agenda.

70. The complainant states that the note of 29 August 2006, and Mr A's consistent testimony before the FTC in 2003, and in AMD's civil suit against Intel in [redacted] 2009, unequivocally demonstrate that Mr A must have provided evidence during the meeting that the Commission recognised at the time as being exculpatory of Intel. Indeed, one of the non-redacted portions of the note [redacted] clearly supports one of Intel's central defence arguments and is therefore clearly exculpatory.

71. The complainant states that Intel has established that Mr A provided highly exculpatory evidence in his 2003 testimony before the FTC on precisely the same topics covered in the 23 August 2006 meeting. The Commission's submission seeks to dismiss the evidentiary value of Mr A's FTC testimony, which was both highly exculpatory of Intel and which, by the Commission's own admission, constituted the "*focus*" of the 23 August 2006 meeting by arguing that "*Mr A's statements made before the FTC largely relate to a period preceding the practices to which the Commission has objected in the [Statement of Objections]*". As regards the Commission's suggestion that Mr A's responses at the 23 August 2006 meeting might have differed from his FTC testimony, the complainant states that: (i) Mr A's FTC testimony was given under oath; and (ii) [redacted] 2009, Mr A again gave sworn testimony confirming that the key points made in his 2003 FTC testimony, to the effect that Dell did not have an exclusive relationship with Intel and that Intel did not "*threaten*" or "*punish*" Dell for considering a dual-source strategy, were equally applicable throughout the alleged infringement period.

72. The complainant states that, against this background, it is simply not credible that Mr A would have testified one way under oath in 2003 and 2009, but provided contrary evidence on the very same issues to the Commission in 2006. In particular, the FTC testimony of 2003 leaves no room for doubt that the information Mr A provided to the Commission during the 23 August 2006 meeting undermined the Commission's key allegations concerning Dell and was thus highly exculpatory of Intel.

73. The complainant states that, given that the Agenda and Mr A's FTC testimony were the focus of the meeting, the Commission would have known at the time of the meeting that the evidence provided by Mr A to the FTC was exculpatory of Intel. As a result, the Commission was required either to make a transcript during the meeting or else subsequently to prepare an adequate record of the exculpatory evidence presented. However, the complainant states, the Commission has unambiguously conceded that it failed to make an adequate record. Moreover, the fact that it is even necessary to enter into a discussion of what was said during the meeting of 23 August 2006 is the direct result of the Commission's maladministration. Had the Commission taken a full note, or recorded a transcript of the 23 August 2006 meeting, as good administrative practice requires, there would be no uncertainty as to precisely what Mr A said, and, as a result, no debate over whether Mr A's statements are relevant to the Commission's allegations and/or exculpatory of Intel.

74. As regards the Commission's legal arguments, the complainant states that the Commission seeks to evade the seriousness of its failure to make a complete record of the meeting of 23 August 2006 by arguing that "*whether the meeting would have covered exculpatory information can only be answered definitively when the Commission will have all the information to take a decision in the present case*". In other words, the Commission appears to contend that it alone retains the exclusive discretion to decide: (i) whether evidence is, in fact, exculpatory and, therefore should be the subject of a detailed written record; and (ii) when, if ever, it is going to disclose such exculpatory evidence to a defendant in a pending investigation. This cannot possibly be a correct formulation of acceptable administrative procedure. First, if it is only possible to determine whether evidence is exculpatory after the investigation has been concluded, it would never be possible for the Commission to know when it was necessary to prepare a full record of a meeting. Second, if the Commission's approach were accepted, the

Commission could, as it has sought to do in this case, conceal the existence of exculpatory evidence from the defendant. In the complainant's view, it is evident that such an interpretation would result in a grave violation of a defendant's rights of defence. The complainant states that it is well-settled case law that "*in adversarial proceedings established by the regulations for the application of Articles 81 EC and 82 EC, it cannot be for the Commission alone to decide which documents are of use for the defence of undertakings in proceedings involving infringement of the competition rules*".^[31] In particular, having regard to the general principle of "equality of arms", it is not acceptable for the Commission to be able to decide on its own whether or not to use documents against the applicant, when the applicant had no access to them and is therefore unable likewise to decide whether or not it would use them in its defence.

75. The complainant states that the Commission seeks to create the impression that it called Intel's attention to the existence of the meeting with Mr A in the documents provided to it as part of its file access. In fact, the complainant states, the reference to the meeting with Mr A appeared in a single Dell document, among the hundreds of thousands of pages of file material provided to Intel. Intel did not become aware that this document contained a reference to a meeting with Mr A until sometime around mid-January 2008, after Intel filed its Reply to the Statement of Objections. The complainant stated that, if anything more is required to assess the credibility of the Commission's view, it is sufficient to recall that, when questioned about the meeting, the Commission initially denied that there had been an interview with Mr A and that any note of that interview had been prepared. In the complainant's view, it is clear from these events that the Commission sought to conceal and suppress exculpatory evidence. Also in the complainant's view, this misconduct (and the failure to make a complete note of the meeting which would have eliminated any debate as to what Mr A said) constitutes a serious act of maladministration.

76. In sum, the complainant states, it is clear, in the light of the case law of the Community Courts, that the Commission's argument that it is for the Commission alone to decide "*definitively*" whether material is exculpatory and whether it needs to be provided to the defendant is untenable and has been rejected by the Community Courts.

77. Lastly, the complainant states that the Commission argues that the case law requiring the Commission to create an adequate record was not applicable to the note of 29 August 2006, "*because the meeting did not pertain to information that the Commission intends to use in [any possible] decision*". This argument only serves to reveal the Commission's fundamental misunderstanding of the relevant issues. The Commission's admission that it does not intend to use the information of the meeting with Mr A in a final decision underlines the very essence of the complainant's first allegation. Put otherwise, it is precisely because the Commission does not intend to use the exculpatory evidence that Intel's rights of defence have been violated. A defendant must be given access to the exculpatory evidence in order that it may use that evidence in its own defence. The Commission's position would completely undermine Intel's rights of defence, and would effectively preclude Intel, and any other defendant in a competition case, from using existing exculpatory evidence in the Commission's possession. This result is neither acceptable nor consistent with Community law. In sum, the case law unequivocally establishes that, in respect of exculpatory evidence, it is sufficient for the undertaking to show that it would have been able to use the exculpatory documents in its defence, in the sense that, had it been able to rely on them during the administrative procedure, it would have been able to put forward evidence which did not agree with the findings made by the Commission at that stage and would therefore have been able to have some influence on the Commission's assessment in any decision it adopted. The Court's approach to exculpatory documents is also reflected in the case law concerning the Commission's obligation to create an adequate record of meetings, in which exculpatory information has been provided.

78. According to the complainant, the TACA judgment (on which the Commission seeks to rely in its opinion to the Ombudsman) confirms and supports Intel's submission that the Commission was under an obligation to provide an adequate record of the meeting with Mr A. In TACA, the defendants' plea alleging the Commission's failure to disclose minutes of a meeting with the complainant was rejected on the basis of the specific facts of the case. In sum, in TACA, the defendants were unable to specify the exculpatory evidence sought or adduce the slightest indication that such evidence existed and therefore of its relevance for the purposes of that case. In addition, the defendants' second plea in TACA, namely, that the Commission failed to draw up minutes of a meeting with a third party, was equally rejected because the defendants could not identify the exculpatory evidence in question and did not adduce any evidence of its existence and therefore of its usefulness for the purposes of that case. The complainant argued that there can be no doubt that, in contrast to the situation in TACA, Intel has sufficiently specified the exculpatory evidence sought and has also sufficiently shown both that such evidence existed and that it is relevant and useful to the Commission's investigation. The complainant therefore submitted that the TACA judgment in no way alters the conclusion that the Commission was clearly under an obligation to (i) create an adequate record of the interview with Mr A given the apparent exculpatory nature of the information provided by Mr

A during the meeting and (ii) make that record available to Intel.

79. In its second further opinion, submitted to the Ombudsman on 10 June 2009, the Commission argues that, as was underlined in the Commission's opinion of 20 March 2009, the question whether any statements that Mr A may have made on 23 August 2006 could be of exculpatory nature could only be decided with certainty in the light of the Commission's final conclusions on Intel's practices, as expressed in a final decision. Before any such decision is taken, the Commission, on the basis of its preliminary assessment of the case that it is developing on a continuous basis, assesses what information is of relevance for the case. On that basis, the Commission has, at all times, a preliminary view on the exculpatory or inculpatory nature of the information. However, it is only at the moment of the final decision that this view becomes definitive. Consequently, it was not before the draft final decision that the Commission definitively assessed whether any statements that Mr A may have made on 23 August 2006 could be of exculpatory nature. The final Decision[32] in fact extensively addresses Mr A's depositions made in the US, in so far as they relate to the conditions attached to the rebates Intel granted to Dell. Therein, the Commission essentially concludes that Mr A, throughout his testimonies, did not change his position concerning the relevant question of whether Intel's rebates to Dell were conditional. Furthermore, the Commission concludes that none of Mr A's statements made during any of his testimonies contradicts the Commission's findings concerning Intel's abusive behaviour. In view of this, it is not plausible to assume that Mr A would have added anything of relevance to the case at the meeting of 23 August 2006, which was not already on the Commission's file. There is no indication that between March 2003 and February 2009 Mr A would have had a reason to change his position and to provide the Commission with a different version of the facts than the one presented before the FTC and the Delaware Court. There is no basis to assume that the Commission has disregarded additional facts which are of relevance to Intel's defence and which were communicated to it during that meeting.

80. The Commission maintained its legal position, outlined in paragraphs 22 to 30 of its comments to the Ombudsman dated 20 March 2009, and reflected in recitals 39 to 49 of the Decision of 13 May 2009, to the effect that it had no obligation to record or take notes of the interview with Mr A. However, this question is without relevance to the present case, since Intel is not able to substantiate how the facts allegedly presented by Mr A on 23 August 2006 would have refuted the Commission's findings made in the Decision.

81. In his observations of 15 June 2009 concerning the Commission's further opinion of 10 June 2009, the complainant stated that the Commission largely repeated the arguments set forth in the Commission's previous submission dated 20 March 2009. In particular, the Commission reiterated that it has sole discretion to decide: (i) whether evidence is exculpatory and therefore should be the subject of a detailed written record; and (ii) when, if ever, it is going to disclose such exculpatory evidence to a defendant. According to the Commission, the exculpatory nature of the statements Mr A made during the interview of 23 August 2006 could only be determined "with certainty in the light of the final conclusions of the Commission on Intel's practices, as expressed in a final decision" so that "it was not before the draft final Decision that the Commission definitively assessed whether any statements that Mr A may have made on 23 August 2006 could be of exculpatory nature". The complainant states that, as explained in detail in his observations of 14 April 2009, the Commission's position has been rejected by the Community Courts.[33] The complainant again stated the Community Courts' unequivocal finding that a defendant must be able to use and rely on exculpatory material "during the administrative procedure" in order to address the Commission's findings "at that stage" and with a view to being able "to have some influence on the Commission's assessment in the final decision" directly contradicts the Commission's argument that it can withhold potentially exculpatory material until the final decision. The complainant repeated his argument that it is not for the Commission alone to decide which evidence is of use for Intel in its defence. He reiterated his argument that, had the Commission made a (proper) note of the 23 August 2006 meeting, Intel could have relied on that note in its defence.

The Ombudsman's assessment

82. As a preliminary general observation, the Ombudsman notes that the Commission's role as guardian of the Treaty, and specifically its role of ensuring that Articles 81 EC and 82 EC are respected, requires it to endeavour, once it decides to open an investigation into a suspected infringement of Article 81 EC or Article 82 EC, to inform itself sufficiently of all the relevant facts.[34] While the Commission has a reasonable margin of discretion[35] as regards its evaluation of what constitutes a relevant fact, the Commission, when seeking to ascertain relevant facts, should not make a distinction between evidence which may indicate that an undertaking has infringed Article 81 EC or Article 82 EC (inculpatory evidence) and evidence which may indicate that an undertaking has not infringed Article 81 EC or Article 82 EC (exculpatory evidence). In sum, the Commission has a duty to remain independent, objective and impartial[36] when gathering relevant information in the context of the exercise of its

investigatory powers pursuant to Article 81 EC and 82 EC.

83. The Commission's powers of investigation in relation to Articles 81 EC and 82 EC are set out in Regulation 1/2003.[37] The entry into force, on 1 May 2004,[38] of Regulation 1/2003 led to/resulted in an enhancement of the Commission's investigatory powers compared to those provided for in the predecessor of Regulation 1/2003, that is, Regulation 17/62.[39] As regards the taking of statements, Recital 25 of Regulation 1/2003 reads as follows:

"The detection of infringements of the competition rules is growing ever more difficult, and, in order to protect competition effectively, the Commission's powers of investigation need to be supplemented. The Commission should in particular be empowered to interview any persons who may be in possession of useful information and to record the statements made."

84. Article 19 of Regulation 1/2003 (Power to take statements) constitutes the legal basis empowering the Commission to carry out interviews for the purpose of collecting information relating to the subject-matter of an investigation. Article 19(1) reads as follows:

"In order to carry out the duties assigned to it by this Regulation, the Commission may interview any natural or legal person who consents to be interviewed for the purpose of collecting information relating to the subject-matter of an investigation."

85. In its opinions to the Ombudsman,[40] the Commission argues that it is under no obligation to draft any "minutes" of meetings with any person or undertaking (emphasis added by the Ombudsman). It argues that, in accordance with its own Notice on Access to the File, if it, the Commission, chooses to make notes of meetings, such documents constitute its own interpretation of what was said at the meetings, for which reason they are classified as internal documents.[41] The Commission states that its view is consistent with the rulings of the Court of First Instance in *TACA*[42] and *Group Danone*. [43] In particular, the Commission maintains that the meeting of 23 August 2006 was not an "interview" pursuant to Article 19 of Regulation 1/2003.

86. The Ombudsman notes that, in examining the classification of a legal act, the analysis cannot be restricted to considering the official title of a measure, but must be based on objective factors which are amenable to judicial review. Those factors include, in particular, the aim and content of the measure.[44] Since the choice of form cannot alter the nature of a measure, it must be ascertained whether the content of a measure is wholly consistent with the form attributed to it by the institution concerned.[45]

87. The Ombudsman considers that an interview[46] will only fall within the scope of Article 19 of Regulation 1/2003, if its purpose is to collect information relating to the subject-matter of an investigation. Thus, for example, a meeting which has as its aim and content to determine whether information which has already been collected should be classified as confidential business secrets, or a meeting which has as its aim and content the organisation of a procedural step in the context of the investigation, are not "interviews" pursuant to Article 19 of Regulation 1/2003 (hereinafter "Article 19 interviews"). Further, a meeting which has as its aim and content to provide a third party with information concerning the Commission's views will not be an "Article 19 interview". Further, a meeting which has as its aim and content the collection of information which does not relate to the "subject-matter of an investigation" (for example, the collection of information to be used in the evaluation of competition policy in general[47]) will not be an "Article 19 interview".[48]

88. The Ombudsman also notes that the Commission has a reasonable margin of discretion as regards whether to conduct an "Article 19 interview".[49] However, when the Commission exercises that discretion, and chooses to interview a third party for the purposes of gathering information in relation to the subject-matter of an investigation, the classification of the resultant interview should not be arbitrary, but must rather be based on the aim and content of the interview.

89. The Ombudsman has carefully examined the evidence in relation to the meeting of 23 August 2006 and has noted the following:

a. The Agenda of the meeting of 23 August 2006 indicates that the issues to be discussed at the said meeting were related to the subject-matter of the investigation in Case COMP/37.990. As such, it is clear that the Commission, by setting this Agenda, had the aim of gathering information in the meeting of 23 August 2006.

b. The note of 29 August 2006 summarises the impressions of one of the case handlers present at the meeting of 23 August 2006. However, while the note is a summary, it contains extensive factual information provided by Mr A (a senior executive at Dell) relating to at least a number of the issues discussed in the meeting of 23 August 2006. It is clear, from an examination of the note of 29 August 2006, that the aim and content of that meeting concerned directly the gathering of information from Dell, which related to the subject-matter of the investigation in Case COMP/37.990. Specifically, the note of 29 August 2006, in numerous instances refers to questions posed to Mr A by the Commission and to Mr A's responses. As such, it is clear that the Commission, by posing questions to Mr A, had the aim of gathering information in the meeting of 23 August 2006. These responses constituted information which was directly related to the subject-matter of the investigation in Case COMP/37.990. Thus, the content of the meeting was information directly related to the subject-matter of the investigation in Case COMP/37.990.

c. It is clear from an examination of Dell's written follow-up to the meeting of 23 August 2006 that the aim and content of the said meeting concerned directly the gathering from Dell of information concerning the subject-matter of the investigation in Case COMP/37.990. Dell's response is entitled "*Meeting with [Mr A] 23 August 2006 Follow-up to Oral Queries Raised by the European Commission*". In its response, Dell provides answers to eight questions posed by the Commission. For example, the first paragraph of the answer to Question 4 clearly indicates that, in the meeting of 23 August 2006, the Commission asked Mr A questions directly related to the subject-matter of the investigation, and that, in the same meeting of 23 August 2006, Mr A provided information to the Commission in response to those questions. Similar conclusions can be drawn from an examination of the first paragraph of the answer to Question 6. As such, it is clear that the Commission, by posing questions to Mr A, had the aim of gathering information in the meeting of 23 August 2006. The content of the meeting was information directly related to the subject-matter of the investigation in Case COMP/37.990.

90. The Ombudsman therefore concludes that, in the meeting of 23 August 2006, the Commission sought information from Mr A which was related directly to the subject-matter of the investigation in Case COMP/37.990, that the issues actually discussed in the meeting of 23 August 2006 related directly to the subject-matter of the investigation in Case COMP/37.990 and that Mr A provided concrete information to the Commission which was related directly to the subject-matter of the investigation in Case COMP/37.990. In light of the above, the Ombudsman concludes that the meeting of 23 August 2006 should, in light of its aim and content, have been classified as an "*Article 19 interview*". Having reached this conclusion, the Ombudsman observes that the Community Courts have not yet had the opportunity to provide an interpretation of Article 19 of Regulation 1/2003. It must be recalled that the highest authority on the meaning and interpretation of Community law is the Court of Justice.[50]

91. Regulation 773/2004 lays down specific rules concerning the initiation of proceedings by the Commission, as well as the handling of complaints and the hearing of the parties concerned. Article 3 of Regulation 773/2004 (Power to take statements) reads as follows:

"1. Where the Commission interviews a person with his consent in accordance with Article 19 of Regulation (EC) No 1/2003, it shall, at the beginning of the interview, state the legal basis and the purpose of the interview, and recall its voluntary nature. It shall also inform the person interviewed of its intention to make a record of the interview.

2. The interview may be conducted by any means including by telephone or electronic means.

3. The Commission may record the statements made by the persons interviewed in any form. A copy of any recording shall be made available to the person interviewed for approval. Where necessary, the Commission shall set a time-limit within which the person interviewed may communicate to it any correction to be made to the statement."

92. Article 3 of Regulation 773/2004 thus contains a series of obligations which the Commission must comply with whenever a meeting, by reason of its aim and content, must be characterised as an "*interview*" pursuant to Article 19 of Regulation 1/2003. This interpretation is borne out by the use of the imperative case ("*shall*") in relation to each of these obligations. It must be underlined that Article 3 of Regulation 773/2004 should not be interpreted as setting out conditions which must be met *in order for* an interview to be categorised as an "*Article 19 interview*", but rather contains a series of obligations which must be complied with, *once* an interview is correctly categorised as an "*Article 19 interview*". As is evident from paragraph 88 above, whenever the Commission interviews a third party

for the purposes of gathering information in relation to the subject matter of an investigation, the interview should, given its aim and content, be classified as an "Article 19 interview". In effect, non-compliance with an obligation set out in Article 3 of Regulation 773/2004 does not imply that an interview ceases to be an "Article 19 interview", but rather that the Commission has failed to comply with an obligation in relation to an "Article 19 interview".

93. The obligations which the Commission must comply with, whenever a meeting must be characterised as an "Article 19 interview", include the obligation to state the legal basis and the purpose of the interview, and the obligation to recall the voluntary nature of the interview, at the beginning of the interview. It also includes the obligation on the Commission to inform the person interviewed of its intention to make a record of the interview.

94. Article 3 of Regulation 773/2004 states that the Commission "may record the statements made by the persons interviewed in any form" (emphasis added). Article 3 of Regulation 773/2004 thus clearly gives the Commission discretion as regards how it records an Article 19 interview.[51] Article 3 of Regulation 773/2004 also states that, once a recording is made, a copy of any such recording must be made available to the person interviewed for approval. The wording of Article 3 of Regulation 773/2004 is, however, not necessarily as clear as regards whether the Commission is legally obliged to make a record of an Article 19 interview.[52] In sum, Article 3 of Regulation 773/2004 does not specifically state that a record shall be made of an "Article 19 interview".[53] Further, Article 3.3 of Regulation 773/2004 states that "[a] copy of any recording shall be made available to the person interviewed for approval." (emphasis added) The use of the word "any" in Article 3.3 of Regulation 773/2004 could be understood to imply that the Commission has, legally, discretion as regards whether to make a record of an "Article 19 interview".[54]

95. Even if it were accepted that Article 3 of Regulation 773/2004 does not impose a legal obligation to make a record of an "Article 19 interview",[55] but rather gives the Commission discretion as regards whether or not it makes a record of an "Article 19 interview", the Ombudsman notes that, while failure to respect legal rules is a form of maladministration, the concept of maladministration is broader than the concept of legality. In particular, when exercising a discretionary power, the administration must always have good and legitimate reasons for choosing one course of action rather than another.[56]

96. As noted in Paragraph 82 above, the Commission's role, when ensuring that Articles 81 EC and 82 EC are respected, requires that, once it opens an investigation into a suspected infringement of Article 81 EC or Article 82 EC, it inform itself fully of all the relevant facts. Even if it were accepted that the Commission has a certain margin of discretion as regards the making of a record of an "Article 19 interview", and, indeed, even if it were argued that an interview with a third party in which information relating to the subject-matter of an investigation is gathered should not be categorised as an "Article 19 interview", the Ombudsman is of the view that it would exceed the Commission's margin of discretion, and thereby breach a principle of good administration, if the Commission were to use that margin of discretion in a way which would imply that it does not ensure that a proper record is made, in some form, of all the "information relating to the subject-matter of an investigation" which is provided to it in the context an investigation, and that the record is subsequently included in the file.

97. Again, assuming that the Commission has a certain margin of discretion as regards the making of a record of an interview with a third party in which information relating to the subject-matter of an investigation is gathered,[57] it is arguable that there could, exceptionally, be situations where principles of good administration might not require a proper interview note to be drafted.

98. First, if the information provided to the Commission is already in the Commission's file, because it has been obtained by the Commission from another source, it might not be necessary, in accordance with principles of good administration, to draft a proper interview note. (However, if this is the case, the Commission should, at least, draft an internal note indicating that the information provided by the persons interviewed was already in the file.[58]) The same reasoning does not, however, apply as regards information which the Commission may be able to obtain subsequent to the interview in question. The Commission's ability to collect, at a subsequent point in its investigation, the precise information already provided to it in the (non-recorded) interview is, necessarily, uncertain. As such, it would not constitute good administration for the Commission to risk, through a failure to make a proper record of an interview, not including in the file "information relating to the subject-matter of an investigation" which has been provided to it. If the (non-recorded) information constituted inculpatory evidence, the Commission would risk losing the opportunity to make use of this inculpatory evidence in its eventual decision. This would limit the Commission's ability to ensure that Articles 81 EC and 82 EC are respected. If the (non-recorded) information constituted exculpatory evidence, the Commission would risk infringing the investigated party's rights of defence, in the event it were to adopt a decision finding that the investigated party had infringed Article 81 EC or Article 82 EC. The Ombudsman is of the view that, irrespective of whether the risks outlined above do or do not

subsequently materialise,[59] it does not constitute good administration for the Commission to incur such risks by failing to draft a proper interview note when it obtains oral evidence which is not already, in some form, in the file.

99. Furthermore, if, after analysis of the information gathered from the persons being interviewed, it emerges that the information provided is not in fact information relating to the subject-matter of an investigation, it would not be necessary to draft a comprehensive interview note.[60] However, if this is the case, the Commission should, at least, draft an internal note indicating that the information provided by the persons interviewed did not constitute "information relating to the subject-matter of an investigation".

100. A factor which must be taken into account by the Commission, when exercising its discretion as regards whether or not to make a record of an interview, will be the identity of the person(s) being interviewed. The Ombudsman notes that the significance of the meeting of 23 August 2006 for Case COMP/37.990 is enhanced by the fact that Mr A was a [a Senior Dell executive].[61] He was also [the Dell executive] responsible for Dell's relationship with Intel. He was thus a direct witness of the circumstances which he described.[62] He was also accompanied by his senior in-house counsel and by senior outside counsel.[63] Finally, Mr A knew that the Commission had in its possession documents relating to his testimony before the FTC in 2003. He, therefore, had an opportunity to reflect on the reply he would give, in the event the Commission were to put to him questions regarding those matters. It follows, from all those circumstances, that Mr A's statements must be regarded as having been made deliberately and after mature reflection, thus making them particularly credible. These factors would have made it more important to record such statements appropriately.[64]

101. The Ombudsman is also of the view that a proper record of an interview should describe accurately all the information relating to the subject-matter of the investigation provided to the Commission in such an interview.

102. In order to ensure that this is the case as regards an "Article 19 interview note", Article 3.3 of Regulation 773/2004 imposes a legal obligation that a copy of any recording made must be made available to the person interviewed for approval. An "Article 19 interview note" will thus become an "Article 19 Statement", once it has been approved by the person(s) interviewed.[65] Since the purpose of an Article 19 interview is to gather information from third parties, an "Article 19 interview note" should only record information provided in the interview.[66] A properly drafted Article 19 interview note should not contain, for example, the assessments and personal views of the Commission or its services. The "Article 19 Statement" should, when completed (that is, once it has been approved by the interviewee or when the time period for its approval has passed), be included in the case file.

103. Even if it were accepted that an interview with a third party in which information relating to the subject-matter of an investigation is gathered should not be categorised as an "Article 19 interview", the Ombudsman considers that it is good administrative practice to ensure that notes containing information relating to the subject-matter of an investigation gathered from third parties are accurate. This is all the more important in the context where the Commission exercises its investigatory powers under Article 81 EC and 82 EC, and where it has extensive powers of sanction. As such, if the Commission had any doubts regarding the accuracy of a note of an interview in which it obtained information relating to the subject-matter of an investigation, it would be in accordance with principles of good administration for it to verify its understanding of the facts with the interviewee.

104. It is evident that, if, in the course of an investigation, the Commission gathers information relating to the subject-matter of an investigation, it should add this information to the file. This is the case irrespective of whether the information is reflected in an "Article 19 interview statement" or in any other format.

105. The Ombudsman is of the view that, if there is an agreed agenda for such an interview, the agenda should be annexed to the "Article 19 Statement", or any other relevant note. This is the case if the agenda were prepared by the interviewee and sent to the Commission, or prepared by the Commission and sent to the interviewee. Further, if, in the context of an interview, the Commission receives any other documents from the party being interviewed, it should also annex these to the relevant note. Such documents should also be included in the file.

106. According to the Commission, the Agenda[67] document was "most likely" a personal note of a case handler that was either sent to Dell by email prior to the meeting or handed over to Dell during the meeting. First, the Ombudsman finds it surprising that the Commission cannot categorically identify the source of the Agenda. In any event, even if it is assumed that the source of the Agenda is the Commission, it is not in dispute that the Agenda was transferred to Dell's representatives before or during the meeting. Second, the Ombudsman does not agree that such a document, which was transmitted to Dell in the context of an administrative proceeding, can continue to

be classified by the Commission as an "*internal document*" of the Commission, once it was handed over to a third party by the Commission's services.

107. According to the Commission, the note of 29 August 2006 "summarises" the impressions of one of the case handlers present at the meeting of 23 August 2006.[68] It incorporates "*information from other sources, personal views, and the case handler's views on further investigative strategy.*" In the Commission's view, the note was not drafted for the purpose of being countersigned or agreed by any other attendees of the meeting (and indeed it never was countersigned or agreed by any other attendees of the meeting). According to the Commission, it was not meant to become, at any point in time, part of the facts resulting from the investigation. Rather, in the Commission's view, the note of 29 August 2006 was an *aide memoire* for the case handler for preparing further investigative measures. As such, the Ombudsman concludes, the note of 29 August 2006 cannot be classified as "*Article 19 interview note*".

108. The Ombudsman thus agrees with the Commission that, since the note of 29 August 2006 constitutes the Commission's own interpretation of what was said at the meetings, that note was correctly classified as an "*internal document*".

109. The Ombudsman is of the view that, since the note of 29 August 2006 is merely a summary, and contains information from other sources, as well as the views of the case handler who wrote the note, it could not, given its structure and specific content, be subsequently transformed into agreed minutes of the meeting for submission, for countersignature, to the other attendees of the meeting. The Ombudsman observes that the Commission shares this view (see paragraph 65 above).

110. According to the Commission, no notes or records, other than the note of 29 August 2006, exist in the Commission's file.

111. In Paragraphs 96 to 98 above, the Ombudsman noted that, even if it were assumed that Article 3 of Regulation 773/2004 does not create a legal obligation to record an "*Article 19 interview*" in all circumstances,[69] and, indeed, *even if* it were accepted that an interview with a third party in which information relating to the subject-matter of an investigation is gathered should not be categorised as an "*Article 19 interview*", principles of good administration require that the Commission should ensure that a proper record is made, in some form, and subsequently included in the file, of all the "*information relating to the subject-matter of an investigation*" that was gathered by the Commission in the course of an investigation. He also noted that, subject to certain exceptions, it is at least arguable that principles of good administration do not necessarily require that a record should always be made of information provided to the Commission, when that information is *already* in the Commission's file. [70]

112. The Ombudsman notes, in this context, that it can be concluded from Dell's responses as set out in the note of 29 August 2006,[71] that not all the information supplied by Dell in the meeting of 23 August 2006 was already in the Commission's file before 23 August 2006.[72] For example, an examination of the note of 29 August 2006 indicates that, in that meeting, Mr A updated the Commission as regards Dell's policy, by providing it with information relating to **[2005, 2006 and 2007]**.

113. In addition, an examination of Dell's written follow-up to the meeting of 23 August 2006 confirms that facts occurring *subsequent* to Mr A's FTC testimony of March 2003 were also discussed in the meeting of 23 August 2006. The written follow-up consists of 1) Dell's understanding of questions which were posed by the Commission in the course of the meeting of 23 August 2006[73] and 2) Dell's response to those questions. Most of the Commission's questions, set out in Dell's written follow-up, make reference to Mr A's FTC testimony. Dell's written follow-up indicates that in the meeting of 23 August 2006 the Commission also requested further and updated information (which would be provided by Dell in its written follow-up to the meeting). For example, Question 1 refers to a Commission request to Mr A "*to confirm*" when an identified software developer started a particular project. It is clear from that wording that the Commission wished Mr A "*to confirm*" information which had *already* been provided, at least in some detail, in the meeting of 23 August 2006. It is also evident from an examination of the Dell follow-up that the information which was "*confirmed*" relates to events which occurred as late as **[Redacted]** 2005. Thus, while the issues discussed in the meeting of 23 August 2006 may have been based on the FTC hearing testimony, their scope must have extended beyond what was provided by Mr A in his FTC testimony. There are numerous other examples in Dell's written follow-up, from which similar conclusions can be drawn. In this context, the Ombudsman provisionally concludes from the Dell follow-up, that not all the information supplied by Dell in the meeting of 23 August 2006 was already in the Commission's file before that date.[74]

114. Thus, in the meeting of 23 August 2006, the Commission *did* gather information relating to the subject-matter of its investigation, some of which was not in the file at that time (see paragraphs 111 and 113 above). The Commission *did not* make a proper note of that meeting, either as an "Article 19 interview note" or otherwise. The Agenda of the meeting was *not* included in the file. In this context, the Ombudsman concludes that, by choosing not to draft a proper note of the meeting of 23 August 2006, the Commission committed an instance of maladministration.

115. It is recalled that, in its opinions to the Ombudsman,[75] the Commission argued that it is under no obligation to draft any "minutes" of meetings with any person or undertaking and that, if it *chooses* to make notes of such meetings, such documents constitute its own interpretation of what was said at the meetings. For this reason, they are classified as internal documents. The Commission states that its view is consistent with the rulings of the Court of First Instance in *TACA*[76] and *Group Danone*.[77]

116. The Ombudsman notes that, in both *TACA* and *Group Danone*, the applicants sought the *annulment* of the Commission decisions, on the grounds that their rights of defence had been infringed as a result of failures by the Commission to respect an essential procedural requirement, namely, the applicants' rights of access to the file.[78] In order to appreciate fully the relevance of the above cited case law, it is necessary for the present inquiry by the Ombudsman to underline, first, that not every procedural irregularity will be sufficient to vitiate a Commission decision. It is a general principle of Community law that an applicant seeking the annulment of an administrative decision on the grounds of a procedural irregularity must show at least a possibility that the outcome of the administrative procedure would have been different but for the procedural irregularity complained of.[79] As regards, specifically, rights of defence, an irregularity can only bring about the annulment of a decision, if it is such as to actually affect the applicant's rights of defence, and therefore the content of that decision.[80] Even if, for example, a party under investigation has not been given the opportunity to comment on certain inculpatory evidence, that defect will only entail the annulment of the decision in that respect, if the allegations concerned cannot be substantiated to the requisite legal standard on the basis of other evidence in the decision on which the party concerned was given the opportunity to comment.[81] The Ombudsman notes that the above-cited case law must be understood as referring to those procedural requirements which, if infringed, will lead to the *annulment* of the decision. It is clear that not every failure to disclose documents will lead the annulment of the whole or part of the Commission decision in question.[82] The Ombudsman notes, however, that *any* procedural irregularity may constitute an instance of maladministration, even if that procedural irregularity does not eventually, in a particular case, constitute grounds for the annulment of a decision. As such, the finding in paragraph 114 above is not, in any manner, called into question by the *TACA* and *Groupe Danone* case law.

117. The complainant alleges that the Commission's failure to make a proper note of the content of the meeting infringes his fundamental rights, namely, his rights of defence. While the mandate of the Ombudsman is to identify *any* instance of maladministration,[83] it is necessary to note at this stage, that the seriousness of a particular instance of maladministration will indeed be aggravated, if the instance of maladministration includes an infringement of a fundamental right, such as the rights of defence. Those rights are not only fundamental principles of Community law, but are also enshrined in Article 6 of the European Convention of Human Rights.

118. The Ombudsman notes that the applicants in *TACA* argued that their rights of defence had been infringed because the Commission failed to include in the case file minutes of discussions or telephone calls which it had had with a relevant third party. The Court of First Instance stated in *TACA* that:

"... the right of access to the file in competition cases is intended to enable the addressees of statements of objections to acquaint themselves with the evidence in the Commission's file. There is by contrast no general duty on the part of the Commission to draw up minutes of discussions in meetings or telephone conversations with the complainants which take place in the course of the application of the Treaty's competition rules."[84] (Emphasis added)

The Ombudsman understands, from the above, that the rights of access to the file, and by extension the rights of defence, will not *automatically* be infringed, if the Commission does not draw up minutes of meetings or telephone conversations which took place in the course of the application of the Treaty's competition rules. Infringements of the rights of access to the file, and by extension the rights of the defence, through a failure to draw up minutes of meetings or telephone conversations, must be examined in relation to the *specific circumstances* of each particular case.

119. The rights of defence of a party under investigation will certainly be infringed if the Commission fails to draw

up minutes of meetings or telephone conversations, and subsequently, in its decision, relies on inculpatory evidence provided orally in such meetings or telephone conversations.[85]

120. It follows that the rights of defence of a party under investigation will not be infringed, if the Commission fails to draw up minutes of meetings or telephone conversations in which no *information* is provided to the Commission. This may be the case where the purpose of the meetings or telephone conversations is to discuss purely procedural matters.[86]

121. It also follows that, even if, in the context of a meeting or telephone call, the Commission obtains inculpatory evidence, and fails to draw up and include in the file a record of such a meeting or telephone call, it will not infringe the rights of defence of the party under investigation, provided it does not, in its eventual decision, make use of that inculpatory evidence.[87]

122. It also follows that, if, in the context of a meeting or telephone call, the Commission obtains inculpatory evidence which is *already* included in the file (for example, because it has already been obtained from the same or another source), the Commission will not infringe the rights of defence of the party under investigation, if it fails to draw up and include in the file a record of such a meeting or telephone call. This will be the case, even if the Commission relies on the inculpatory evidence in its eventual decision.

123. It may also be the case that the Commission fails to make a record of inculpatory evidence obtained in a meeting or telephone call, but *subsequently* obtains the same inculpatory evidence (from the same or another source) and includes that (subsequently obtained) inculpatory evidence in the file. The Commission will not infringe the rights of defence of the party under investigation, even if it relies on the (subsequently obtained) inculpatory evidence in a statement of objections and in its eventual decision.[88]

124. As regards *exculpatory* evidence, an applicant cannot successfully argue that its rights of defence have been infringed, if it merely refers in general terms to the possibility that such exculpatory evidence was provided to the Commission by third parties. This implies that, in judicial proceedings, there is an obligation on a party that alleges that exculpatory evidence has been withheld from it to at least provide, in its pleadings before the Court, specific arguments as regards the existence of the exculpatory evidence and specific arguments that the exculpatory evidence was provided to the Commission (but not included in the Commission's file).[89]

125. The Ombudsman also notes that, even if specific arguments are put forward as regards the existence of exculpatory evidence, and specific arguments are put forward that the exculpatory evidence was provided to the Commission in the course of a (non-recorded) meeting or telephone call, the rights of defence of the party under investigation will not have been infringed, if that exculpatory evidence had already been in the file, when a meeting or telephone took place. Further, the rights of defence of the party under investigation will not be infringed, if the exculpatory evidence in question is subsequently obtained from another source, and then added to the file.

126. The Ombudsman recalls that the complainant's allegation is that (a) the Commission failed to take minutes of the meeting held with Dell representatives on 23 August 2006, despite the fact that the meeting was directly concerned with the subject-matter of its investigation of Intel, and that, as a result, (b) the Commission did not make a record of potentially exculpatory evidence (emphasis added).

127. The Ombudsman has carefully examined the evidence made available to him in the context of the present inquiry. After examining the Agenda, the note of 29 August 2006 and the written Dell follow-up to the meeting of 23 August 2006, the Ombudsman concludes that it cannot be excluded that, at least in part, the meeting of 23 August 2006 concerned [evidence][90] [91] of a nature to be potentially exculpatory of Intel.

128. The Ombudsman notes that, on 19 December 2008, the Commission gave Intel access to a redacted version of the note of 29 August 2006 and asked Intel to give its comments thereon.

129. The Ombudsman notes that the note of 29 August 2006 merely summarises the impressions of one of the case handlers present at the meeting of 23 August 2006. Apart from the written follow-up by Dell, the Commission has informed the Ombudsman that there are no other documents in the file relating to the meeting of 23 August 2006. The Ombudsman has not had sight of, and is not aware of, any other document in the file which would provide further information in relation to the precise content of the meeting of 23 August 2006.[92]

130. The Ombudsman has already indicated that a careful analysis of the written Dell follow-up to the meeting of 23 August 2006 indicates that there were indeed issues which were discussed in the meeting of 23 August 2006 that are not set out in the note of 29 August 2006, at least at the level of detail which the written Dell follow-up indicates they were discussed in the meeting of 23 August 2006.[93] After a careful examination of the documents made available to him, the Ombudsman notes, in particular, that the Commission asked a question in the context of the meeting of 23 August 2006 in relation to a discussion of Exhibit 12 of the FTC testimony of Mr A.[94] Exhibit 12 is an email from Mr G of Dell [redacted].[95]

131. To be sure, that information which was not included in the note of 29 August 2006 (at least in any detail), but which is referred to in the written Dell follow-up as having been discussed in the said meeting of 23 August 2006, is information which is in the file (it is located in the written follow up of Dell). The Ombudsman notes, however, that he cannot confirm whether Mr A discussed further relevant issues in the meeting of 23 August 2006. The Ombudsman wishes to emphasise that he cannot do so precisely because there is no exhaustive account of the meeting of 23 August 2006.[96]

132. The Ombudsman agrees with the complainant that, if the Commission had made a record or transcript of the meeting of 23 August 2006, there would have been no uncertainty as to precisely what Mr A said in the meeting of 23 August 2006, and, as a result, no debate over whether Mr A's statements would be relevant to the Commission's allegations and/or be exculpatory of Intel. The Ombudsman also recalls that the Community courts have stated that "*in adversarial proceedings established by the regulations for the application of Articles 81 EC and 82 EC, it cannot be for the Commission alone to decide which documents are of use for the defence of undertakings in proceedings involving infringement of the competition rules*".[97]

133. The Ombudsman, however, takes the view that a finding that rights of defence were infringed in a particular competition case would require a careful analysis of the entire file, carried out in conjunction with a careful analysis of the Statement(s) of Objections and, eventually, the decision.[98] Such a review of the file would seek to establish, *inter alia*, if there was any information, elsewhere in the file, which would clarify the precise content of the meeting of 23 August 2006. In the present inquiry, the Ombudsman has not reviewed the entire file or the Statements of Objection issued.[99] He thus cannot exclude, in the context of the present inquiry, that other documents may exist in the Commission's case file which would be relevant to the analysis.

134. As the Ombudsman noted in paragraph 115 above, any procedural irregularity may constitute an instance of maladministration, even if this procedural irregularity were not, in the context of the present inquiry, shown to constitute a breach of the rights of defence. The Ombudsman concluded above that the Commission did not make a proper note of the meeting of 23 August 2006. As such, and without making any conclusion in relation to a possible breach of Intel's rights of defence by the Commission,[100] the Ombudsman concludes that the Commission committed an instance of maladministration by not making a proper note of the meeting of 23 August 2006.

135. Article 3 (5) of the Statute of the Ombudsman states that "*[a]s far as possible, the Ombudsman shall seek a solution with the institution or body concerned to eliminate the instance of maladministration and satisfy the complaint*." In his letter opening the present inquiry, the Ombudsman asked the Commission whether it was still possible, on the basis of the notes drawn up by the Commission officials present at the meeting, to request Dell to sign minutes of the meeting of 23 August 2006. In its further opinion, the Commission responded that the note of 29 August 2006, which is the only document setting out what was discussed in the meeting of 23 August 2006, "*summarises the impressions of one of the case handlers present at the meeting*" (emphasis added). It went on to point out that the note was not drafted for the purpose of being countersigned or agreed by any other attendees of the meeting. It was not meant to become, at any point in time, part of the facts resulting from the investigation. Rather, the note of 29 August 2006 was simply an *aide memoire* for the case handler. Further, the Ombudsman notes, that the Commission has now, by decision of 13 May 2009, closed its investigation into Case COMP/37.990. As such, it cannot now correct those deficiencies. In this context, the Ombudsman does not consider that a friendly solution is possible in the present case. The Ombudsman will therefore close his inquiry by making a critical remark below.

B. The allegation, and related claim, that the Commission encouraged Dell and AMD to enter into an information exchange arrangement which had the effect of allowing AMD to circumvent the rules limiting AMD's right to have access to the Commission's investigation file ▲

Background

136. AMD was the complainant in Case COMP/37.990. A complainant in an investigation by the Commission for the purposes of applying Article 81 EC or Article 82 EC has no rights of access to the file during the investigation. The complainant only has access to a redacted version of the Statement of Objections (that is, a version of the Statement of Objections from which "confidential information", such as business secrets, has been removed), in order to allow it, that is, the complainant, to make its views known to the Commission.[101]

137. During the course of its inquiry, the Commission obtained various documents from Dell. Information from some of these documents was used by the Commission in the Statement of Objections sent to Intel on 26 July 2007. Intel and the Commission immediately began the process of determining the precise content of the redacted version of the Statement of Objections which would be sent to AMD. Intel argued that certain of the information obtained from Dell, and used in the Statement of Objections, should be classified as confidential business secrets of Intel. Intel thus opposed the inclusion of such information in the redacted version of the Statement of Objections.

138. On 10 December 2007, the Hearing Officer rendered his final decision on the acceptability of Intel's proposed redactions. Based upon this decision, the final non-confidential, redacted version of the Statement of Objections was created and then transmitted to AMD on or around 21 December 2007.

Arguments presented to the Ombudsman[102]

139. The complainant alleges that the Commission circumvented the applicable rules concerning access to the file by assisting and/or encouraging Dell and AMD to enter into a "file access agreement". According to the complainant, the **[agreement]** was illegal and gave AMD access to "confidential file documents" that Dell had, during the Commission's inquiry, provided to the Commission. The complainant alleges that, at the very least, the Commission, "tolerated" the AMD/Dell **[agreement]** by allowing AMD to use these documents at an oral hearing held subsequent to the issuance of the Statement of Objections to Intel.[103]

140. The complainant argued that, but for the Commission's intervention in identifying to Dell the Statement of Objections extracts it wished Dell to communicate to AMD, and the **[agreement]** it encouraged, AMD would never have gained access to certain key material it used at the Oral Hearing. In the complainant's view, **[the]** use of this material clearly violated Intel's rights of defence.

141. As evidence supporting his allegation, the complainant made reference to a letter from Dell's outside counsel to the Ombudsman dated 18 September 2008, in which Dell's counsel states that:

"[Dell] understood that a number of quotes from Dell documents provided to the Commission ... were used by the Commission in the Statement of Objections ... Dell was asked by the Commission and authorized the use of such quotes - some of which contained confidential business secrets - vis-à-vis Intel on the basis of a non disclosure agreement with Intel ... Dell also provided the Commission with a redacted and non-confidential version of those quotes for AMD and other third parties ... [In] order to avoid a lengthy debate over confidentiality claims, the Commission suggested to Dell to enter into a non disclosure agreement with AMD's counsels and economists for the sharing of Dell documents used in the [Statement of Objections]".

142. In the complainant's view, the Commission thus encouraged Dell to provide excerpts from the Statement of Objections to AMD, in violation of Article 8(1) of Regulation 773/2004 and Article 9 of the Hearing Officer's Mandate. In the complainant's view, this misconduct undermines the Commission's assertion that Dell acted on its own initiative. This was all the more serious because the Commission knew that, at the time it encouraged Dell to make this material available to AMD, Intel's confidentiality claims were still under review.

143. The complainant also provided the Ombudsman with an email from Dell's outside counsel (Mr C) dated 3 September 2007, in which Mr C informs a colleague that an official from the Commission (Mr D) had telephoned Mr C to ask whether Dell "would consider using an [information exchange agreement] with AMD similar the one [Dell] contracted with Intel for the [Statement of Objections] quotes".[104]

144. The complainant also provided the Ombudsman with a letter from Dell's outside counsel to the Commission dated 14 August 2007. According to the complainant, the letter confirms that, as early as 9 August 2007, the Commission provided Dell with a list of quotations from the confidential version of the Statement of Objections. In

the said letter, Dell's counsel explained to the Commission that the information for which Dell sought confidentiality relates, *inter alia*, to Dell's "confidential business dealings and negotiations with Intel." In other words, according to the complainant, the information for which Dell requested confidential treatment was not solely related to Dell, but rather concerned confidential dealings and negotiations between Dell and Intel. This reflected a claim that Intel also made in its discussions of the redaction of the Statement of Objections with both the case team and the Hearing Officer. According to the complainant, this letter proved that the Commission had already been informed by Dell that the selected quotations contained not only Dell business secrets, but also Intel business secrets and/or other confidential information (the disclosure of which to AMD, Dell was not in a position to authorise) when, on 3 September 2007, the Commission suggested that Dell enter into **[the agreement]** with AMD.

145. The complainant also provided the Ombudsman with an internal email from Mr C (a Dell outside counsel) dated 23 August 2007. The email relates to a telephone conversation between Mr C and a Commission official (Mr D) in which Mr C explained that "most quotes came from either confidential negotiations with Intel or [Dell's] own internal supply strategy assessments." According to the complainant, this email corroborates the conclusion that, at the time the Commission suggested that Dell enter into **[the agreement]** with AMD and provide it with selected quotations from the confidential version of the Statement of Objections, the Commission knew that the information to be disclosed to AMD under such agreement would also contain Intel business secrets or other confidential information.

146. The complainant also provided the Ombudsman with e-mails between Mr C and Mr D dated 25 and 26 September 2007. According to the complainant, this email exchange confirms that the Commission encouraged Dell to enter into the **[agreement]** with AMD and to provide it with confidential material from the Statement of Objections. In an email dated 26 September 2007, Mr D thanked Mr C "for your constructive help on this subject." In the complainant's view, Mr D's gratitude for Dell's "constructive help" establishes beyond dispute that the Commission welcomed the fact that Dell was willing to enter into **[the agreement]** with AMD, and indeed that the Commission had promoted and encouraged the agreement.

147. According to the complainant, on 16 October 2007, the Commission sent to Intel a counter-proposal for a redacted version of the Statement of Objections. In this same letter, the Commission explained to Intel that "some of the OEMs have decided" to provide AMD with confidential information which "may be quoted in the Statement of Objections and may be redacted in the version of the Statement of Objections that the Commission will provide to AMD". The complainant stated that, despite having already received a copy of the AMD/Dell agreement, the Commission informed Intel that "should the Commission be notified of such an exchange of information, it will no longer regard the concerned information as being confidential vis-à-vis AMD." Intel then emailed the Commission and contacted the Hearing Officer regarding the Commission's letter of 16 October 2007 and the implications such an approach would have on the confidentiality provisions governing the investigation.[105]

148. However, according to the complainant, when the Hearing Officer questioned the case team about the existence of such agreements, the case team denied that any such agreement had been communicated to it. This, in the complainant's view, was in blatant disregard of Mr D's prior correspondence with Dell. The Hearing Officer reported to Intel on 18 October 2007, nearly a month after Dell's submission of the final draft to Mr D, that no such **[agreements]** had "been notified in any form to the case-team, as it has been confirmed to me." According to the complainant, the Hearing Officer therefore declined to investigate further, dismissing Intel's claims as "purely hypothetical" and stating that further investigation could be warranted in the event such an agreement were ever executed. The complainant stated that, in any case, the Hearing Officer suggested to Intel that bilateral agreements between private parties to exchange certain information may be outside the scope of the administrative procedure.[106]

149. By way of evidence, the complainant also stated that, at the Oral Hearing on 12 March 2008, AMD's outside counsel stated the following:

"[Redacted]"

150. According to the complainant, the Court of Justice has mandated that "a third party who has submitted a complaint may not in any circumstances be given access to documents containing business secrets." [107] According to the complainant, it is indisputable that AMD was permitted to use confidential Dell file documents at the Oral Hearing **[redacted]**.

151. The complainant argued that the Commission did not take such a "relaxed approach" to other third-party

arrangements, when it believed that it suited its interests not to do so. Rather, the Commission very carefully supervised the file access agreements entered into between Intel and OEMs.[108]

152. Similarly, the Commission objected to Intel providing a copy of the Statement of Objections to the FTC in response to informal and formal requests from the FTC for a copy of the Statement of Objections. In both these cases, the Commission exercised its powers as a custodian of the file and guardian of the file's confidentiality, in marked contrast to the position it took concerning the AMD/Dell **[agreement]**.

153. The complainant argued that the Commission's failure to protect the confidentiality of its file, and to uphold the rules concerning file access provided for in Article 287 EC, Regulation 1/2003 and Regulation 773/2004, constitutes a grave and intentional breach of the Commission's duty to uphold the EC Treaty. In the complainant's view, this infringement of the Commission's Treaty obligations also constitutes a violation of Article 4 of the European Code of Good Administrative Behaviour (which requires officials to act according to law and to apply the rules and procedures laid down in Community legislation), as well as Article 10 (legitimate expectations), Article 8 (impartiality and independence) and Article 9 (objectivity).

154. In its opinions to the Ombudsman, dated 20 March 2009 and 10 June 2009, the Commission noted that it was Dell itself that exchanged its information with AMD bilaterally. It stated that nothing in the materials provided by Dell and Intel to the Ombudsman shows that the Commission has itself disclosed information to AMD in contravention of Article 287 EC. The Commission argued that Intel had not provided any evidence to the Ombudsman of why Intel has any legal interest in an exchange of information between Dell and AMD. Such proof would be necessary, since the Commission has not definitively accepted any confidentiality claims of Intel related to that information.

155. The Commission concluded that Dell had, of its own volition, decided to exchange what it considers to be its own proprietary information with AMD. It was immaterial for the assessment of maladministration whether Dell was itself inspired to do so by previous exchanges with Intel, where the Commission was only at first involved and which were then undertaken by Dell on its own initiative. The Commission argued that Dell was entirely free to provide the information in a non-confidential version under the Commission's normal procedure. However, it chose to exchange its information bilaterally with AMD. The Commission stated that Dell did not consult with the Commission before concluding the agreement with AMD. In the Commission's view, this left no room for any attribution of this exchange to the Commission, which would be of relevance under Article 287 of the EC Treaty.

156. On 14 April 2009 and 16 April 2009, the complainant submitted observations on the Commission's opinion of 20 March 2009. The complainant made reference to what, in his view, were the Commission's attempts to deny its role concerning the AMD/Dell **[agreement]**. He stated that, in its opinion of 20 March 2009, the Commission sought to question the description of the events contained in the 18 September 2009 letter of Dell's outside counsel. However, it did not offer any evidence supporting its claim. Rather, the Commission merely stated that it has "*checked its records*" and had "*no indication that any such suggestion has been made or even that any such phone call [as the one described from 3 September][109] would have taken place*". On this basis, the Commission went on to "*conclude*" that Dell entered into the agreement "*of its own volition*". This unsupported conclusion was, in the complainant's view, contradicted by the description of the events provided by Dell's outside counsel and by the emails exchanged between Dell's outside counsel and Mr D on 25-26 September 2007. Conversely, in the complainant's view, the Commission provided no evidence that it interviewed Mr D or other members of the case team regarding these events; it does not describe which records have been checked and whether they include the telephone records of the relevant case team members; and it provides no documentary evidence substantiating its "*conclusion*" that Dell's counsel, without apparent motive, would have invented or misrepresented the relevant facts.

157. The complainant also stated that although the Commission indicated, in its opinion of 20 March 2009, that it had prepared a note regarding a 30 August 2007 "*high level telephone conversation*" with Dell, the Commission did not explain how details of a conversation which took place on 30 August 2007 could refute plain evidence that it subsequently suggested, received, and reviewed the **[redacted] AMD/Dell [agreement]**.

158. The complainant also stated that, in its opinion of 20 March 2009, the Commission admits that (a) it did review the AMD/Dell agreement (thereby contradicting its claim to the Hearing Officer that no such document has been "*notified*" [sic] to it), (b) the document apparently was designed to grant AMD "*access to file*", and (c) the Commission subsequently attempted to communicate suggestions regarding the agreement to Dell. Given these facts, the Commission's "*conclusion*" that Dell did not "*consult with the Commission before concluding the agreement with AMD*" is simply not credible.

159. Finally, the complainant noted that, in its opinion of 20 March 2009, the Commission stated that it "has no indication that AMD has received anything but information corresponding to its right, namely extracts from the Commission's Statement of Objections of 26 July 2007". According to the complainant, the Commission's assertion is patently untrue, since (i) prior to the finalisation of the redaction of the Statement of Objections, in December 2007, AMD had no right to receive any Statement of Objections material; and (ii) AMD did, as is well known to the Commission, gain access to material that was, in fact, redacted from the Statement of Objections. According to the complainant, the Commission's actions, therefore, effectively served to eliminate the protection afforded to confidential information in Commission proceedings and to negate the role of the Hearing Officer as final arbiter of conflicting claims of confidentiality. Moreover, the Commission then compounded its misconduct by permitting AMD to use **[this material at the Oral Hearing]**.

160. In its second further opinion of 10 June 2009, the Commission explained that the legal framework for access to the file by addressees of a Commission Statement of Objections is provided for in Articles 27 (2) of Regulation 1/2003 and 15(2) of Regulation 773/2004. In accordance with these provisions, Intel had a right to access all information contained in the Commission's file "with the exception of internal documents, business secrets of other undertakings, or other confidential information." The establishment of the non-confidential versions referred to in Regulation 773/2004 is a complex exercise because the confidentiality of every piece of information has to be justified and has to be balanced against the respective rights of defence of the addressee of the Statement of Objections. The exercise was particularly difficult and intensive in the present case, as the case file contained several hundred thousand pages.

161. The Commission stated that, in the Intel case, it implemented the above provisions by applying a "negotiated procedure". Such a procedure was first used for Intel's access to file after the first Statement of Objections of 26 July 2007 (it was suggested to the Commission by another OEM which had provided information to the Commission in the course of its investigation).[110] The rationale for such a course of action was the fact that the OEM would otherwise have been obliged to devote significant time and resources to redacting its voluminous contribution to the Commission's file. The essential element of this procedure was that, instead of receiving access to only a redacted version of the submissions which certain "information providers" made available for inclusion in the Commission file, Intel made agreements to receive the entirety, or the main parts, of the submissions of these "information providers" in un-redacted format (that is, including confidential information in its entirety). In exchange, Intel agreed to limit access to this information to a restricted circle of persons (namely, Intel's outside counsels and economic advisers and in some cases certain in-house counsels). In sum, the solution agreed between Intel and the "information providers" excluded Intel's access to the information by employees dealing with the daily business of the company. Such agreements are, the Commission stated, widely used in US antitrust cases, such as in the one currently pending between Intel and AMD before the District Court of Delaware. The Commission noted that, in the Intel case, various reasons spoke for this approach, *inter alia* a) the voluminous file, which would have led to significant delays in the procedure and disproportionate costs for the information providers in establishing non-confidential versions of the documents provided, and b) discovery proceedings in the AMD/Intel litigation in the USA, where largely the same information was routinely exchanged under conditions that are similar to the agreements which Intel concluded in the Commission proceedings.[111]

162. The Commission stated that several parties had concluded such agreements with Intel. The agreement concluded between Intel and Dell was, however, different from the others in that the agreement covered only a limited part of the information provided by Dell. Shortly afterwards, the Commission noted, from Intel's submissions, that Dell had in fact provided Intel with a lot more information in un-redacted form. The Commission asked Dell why this was the case and learned that Dell had concluded another agreement with Intel.

163. In light of all of the above, the Commission noted that the possibility of the conclusion of information exchange agreements was an option that had been discussed and explored by Dell well before 30 August 2007, when, according to the Commission, a high level telephone call with Dell took place. At that time, or shortly after, Dell, on its own initiative, engaged in such exchanges of its information with AMD.

164. The Commission then made reference to the fact that, in its letter of 18 September 2008 to the Ombudsman, Dell's counsel states that "the Commission suggested that Dell also enter into [an information exchange agreement] with AMD's counsels and economists". According to the Commission, it should first be stressed that Dell was entirely free to opt for such an agreement. Dell's motives for concluding this agreement are not known to the Commission. One possible incentive for an OEM to enter into such an agreement was to avoid justifying and substantiating to the Commission each confidentiality request *vis-à-vis* AMD (it should be recalled, the Commission pointed out, that AMD had a right to receive a "meaningful" non-confidential version of the Statement of Objections). According to the Commission, other incentives are imaginable and might have played a role for Dell.

In any case, according to the Commission, it, that is, the Commission, did not oblige Dell to enter into an agreement with AMD. However, as was the case for bilateral agreements between Intel and information providers, the Commission could not simply ignore the possibility of such agreements.

165. According to the Commission, the Commission internally started to discuss the possibility of an agreement between Dell and AMD after a high level telephone call with Dell on 30 August 2007.[112] Mr B (Dell's General Counsel) and Dell's outside counsels (one of whom was the associate allegedly called by the Commission two working days later) took part in this call. The agenda for that telephone call, which was sent to Dell in advance of that meeting,[113] clearly shows that the Commission intended to discuss Dell's requests for confidentiality *vis-à-vis* AMD in detail and on the basis of the Commission's standard procedure under Regulation 773/2004. There was no mention of another option in this agenda. According to the Commission, various options were discussed during that phone call, including an information exchange agreement with which Dell was familiar, based on its already existing and recently concluded bilateral agreement with Intel. It is plausible that in this phone call, either Mr B, or Dell's outside counsel, first mentioned the option of a bilateral information exchange also with AMD, because the agenda drawn up by the Commission and sent to Dell in advance of the telephone call did not mention this point. In any event, it is certain that in that telephone call, the idea of an AMD-Dell information exchange agreement was floated. As confirmed by the internal emails of the Commission, only after this telephone call did the Commission start to internally discuss the various issues in the context of such an AMD-Dell exchange. This included discussions *inter alia* with the Legal Service of the Commission. Thus, Intel's description of how the idea of a Dell-AMD agreement came into being and its reliance on certain selective information submitted on a staggered basis by Dell misrepresents the facts in order to create the impression that the Commission would have suggested a Dell-AMD agreement. The reality is that the Commission was confronted with this option for the first time in the telephone call with Dell on 30 August 2007 and only then started analysing it internally.

166. According to the Commission, Dell sent a signed agreement to the Commission on 25 September 2007, that is, before the Commission had completed its internal analysis. This was the only version of an agreement the Commission had seen until 8 June 2009. However, this agreement was largely in contradiction to the more limited scope of a complainant's right to access to information under Community law. This was, in particular, because the agreement referred to "access to file" by AMD. However, AMD, as a complainant, did not have a right of access to the Commission file, but only a right to obtain a non-confidential version of the Statement of Objections. While "*terminological statements*" in such an agreement were legally not of direct concern to the Commission, it would have led the contracting parties to arrangements which were *prima facie* in contradiction with the administrative procedure. The Dell external counsel who sent it to Mr D of the Commission's case team explained that the agreement had not yet been executed. This is reflected in the internal email sent from Mr D to his superiors after the agreement had been received. The Commission communicated to Dell that the agreement received was in contradiction with its position in several telephone calls, but there is no written record of these communications.

167. According to the Commission, AMD informed the Commission, by letter of 13 November 2007, that it had entered into an information exchange agreement with Dell, without communicating to the Commission the executed agreement as such. This is consistent with the Hearing Officer's letter of 18 October 2007 to Intel, which states that "*the agreements [Intel] mention have not been brought to the attention of the Hearing Officer. Neither have they been notified in any form to the case-team, as it has been confirmed to me*" and the letter of the Hearing Officer to Intel of 7 May 2008 stating that "*such an agreement, the text of which has not been notified to me, concluded by a party that as such has no rights of defence or rights to access to file, is purely bilateral and neither obliges nor empowers the Commission.*"

168. In order to clarify the chain of events for the Ombudsman, the Commission, therefore, asked AMD to provide it with the final copy of the agreement that was eventually executed between Dell and AMD and under which information was exchanged between the two companies.[114] The Commission also asked AMD to describe the steps involved following the conclusion of the initial draft agreement between AMD and Dell and leading up to the subsequent signature and execution of the final agreement. AMD has done so by letter of 8 June 2009, which was inspected by the Ombudsman on 10 June 2009. [Redacted]. From the executed agreement attached to AMD's letter, it is clear that Dell and AMD then proceeded to conclude and execute a fundamentally different agreement from the one that was sent to the Commission by Dell three weeks earlier. [Redacted][115]

169. The Commission then proceeded to implement AMD's access to a non-confidential version of the Statement of Objections under the usual procedure. Under that procedure, AMD received a non-confidential version of the Statement of Objections by letter of 21 December 2007.

170. The Commission noted Intel's argument that, since the information which Dell gave to AMD constitutes "*Intel's*

business secrets", it has an interest in the information exchange agreement between Dell and AMD. The Commission first made detailed arguments to the Ombudsman concerning why, in its view, Intel's confidentiality arguments are not, in fact, well-grounded. The Commission then recalled that Dell was entirely free to dispose of its information as it wished. The Commission also noted that it did not oblige Dell to make its information available to AMD.

171. As regards Intel's claim of maladministration made in its observations of 10 July 2008, 18 September 2008 and 14 April 2009, the Commission stated that Intel alleged that the Commission gave AMD "access to its file", in contravention of Article 8 (1) of Regulation 773/2004, Article 28 of Regulation No 1/2003 and Article 287 of the EC Treaty. However, in its observations of 14 April 2009, Intel also alleges that the Commission encouraged Dell to provide extracts from the 26 July 2007 Statement of Objections to AMD in violation of Article 8 (1) of Regulation 773/2004 and Article 9 of the Hearing Officer's Mandate.

172. As regards the Commission's organisation of the oral hearing of 11-12 March 2008, the Commission noted that AMD was not allowed to attend the *in camera* sessions at which the facts submitted by Dell to the Commission were discussed with Intel. [Redacted][116]

173. The Commission went on to argue that the legal provisions quoted by Intel in support of its case contain a variety of rules and principles binding upon the Commission and that each of the rules and principles has conditions and limits. Article 287 of the EC Treaty, and relevant provisions in Regulation 1/2003 and Regulation 773/2004, [117] impose an obligation on Community officials not to disclose information covered by professional secrecy. Article 8(1) of Regulation 773/2004, which, according to the Commission, appears to be Intel's main basis for a maladministration claim, deals with the Commission's obligations in case of a rejection of a complaint. It is, therefore, not applicable in the present case, because the Commission's obligation to provide AMD with a non-confidential copy of the Statement of Objections resulted from Article 6 of Regulation 773/2004. Article 16 of Regulation 773/2004 determines the rules on the basis of which the Commission shall identify confidential information on its file, which "*shall not be communicated or made accessible by the Commission*". Finally, Article 9 of the Hearing Officer's mandate [118] establishes the procedure under which the Commission discloses information, if it finds that such information is not protected as a business secret, or if it finds that there is an overriding interest justifying disclosure despite its confidential nature, namely, through a procedure which, as a first step, requires a reasoned decision that is communicated to the undertaking concerned.

174. Intel does not contest that, in the present case, it was Dell, and not the Commission, that passed on information to AMD, and that thus the information exchange took place *inter partes*. All the obligations listed above clearly apply only to a situation in which the Commission itself discloses information. *Inter partes* exchanges of information regularly take place in parallel to antitrust proceedings. In the present case, the Commission has had knowledge of such potential exchanges and has expressed its view on their appropriateness [redacted]. This cannot, however, be seen as any action on the basis of which the actual exchange *inter partes* could be imputed to the Commission.

175. Accordingly, in the Commission's view, when Intel reproaches the Commission that "AMD gained access to confidential information to which it was not entitled to have access" or that "AMD had no right to receive any SO material", Intel confuses two issues, namely, actions outside the administrative procedure on the one hand, and rights and obligations within this procedure and the role of the Commission, on the other hand. To conclude from the fact that, as a result of certain information being exchanged bilaterally between Dell and AMD, the Commission acted illegally is incorrect and misleading. In fact, the confidential character of any information exists exclusively within the administrative procedure of the Commission. Beyond the procedure, there is no abstract "*entitlement*", be it positive or negative, to "*information*" as Intel's argument presupposes. The fact that, prior to any final decision of the Hearing Officer, AMD might not have been legally entitled to receive information within the administrative procedure and thus might have received information from Dell under the Dell-AMD information exchange agreement which it would not have received from the Commission, does not concern the Commission, since neither rights nor obligations for the Commission derived from the Dell-AMD agreement. As to the role of the Commission and its administrative procedure, the only question, according to the Commission, is whether the Commission in any way disclosed information in its possession. As is clear from the foregoing, the Commission at no point in time disclosed directly or indirectly any confidential information in the administrative procedure. Moreover, the Commission does not have any power, let alone any obligation, to prevent third parties from disclosing information which they have submitted to the Commission, but which was already in their possession before the Commission started its investigation. The Commission's only way to determine the validity of a confidentiality claim is by decision to either grant access to the information, and thereby to turn down the confidentiality request, or to deny such access. In case of such an *inter partes* exchange of information, there is no

legal basis for the Commission to interfere with the information provider's decision to share with other companies the information in its possession.

176. Finally, the Commission states that Intel's reference to Article 9 of the Hearing Officer's mandate does not support any claim of maladministration. Article 9 of the Hearing Officer's mandate does not constitute any obligation on the part of the Commission, but merely empowers the Hearing Officer to turn down confidentiality claims by reasoned decision. As is clear from the Hearing Officer's letter of 10 December 2007, this letter does not constitute a decision on the basis of Article 9 of the Hearing Officer's mandate. Hence, even if Intel's assertion that the Commission, beyond holding internal discussions on the feasibility of such an approach, had initiated or encouraged Dell's exchange of information with AMD were true, *quod non*, this would not have been in contravention of any of the norms quoted by Intel in support of its maladministration claim. Dell at all times remained free to decide whether it wished to enter into a bilateral agreement with AMD and it remained Dell's sole responsibility to respect possible confidentiality agreements *vis-à-vis* Intel, when doing so. The Commission cannot identify any other rules or principles which could even theoretically support Intel's purported claim.

177. The Commission also stressed that, as explained above, despite the fact that agreements between private parties are not directly related to the administrative procedure and the fact that the Commission took no active part in the conclusion of the Dell/AMD agreement, it, nevertheless, took active steps to discourage an agreement between Dell and AMD, the terminology of which referred to an "access to file" and to Article 15 of Regulation 773/2004. In this respect, the Commission noted that AMD, a complainant, had no rights of "access to the file" under Community law. Moreover, the Commission discouraged an agreement presented by Dell, through which the Commission's Hearing Officer would be involved as an arbiter and which made reference to Dell's possibility to waive its rights for access to file. In this context, the Commission stressed that it was not legally obliged to take such steps to discourage Dell from concluding such an agreement and that Dell and AMD would, nevertheless, have been entitled to engage in the intended information exchanges, leaving the Commission with no possibility to prevent that from happening. In view of the above, the Commission submits that Intel's claims regarding any purported "access to file" granted by the Commission in relation to the Dell/AMD information exchange agreement are manifestly unfounded.

178. As regards the issue of the Dell-AMD information exchange agreement, the Commission considered that, irrespective of preparatory internal discussions to this end, it, at no stage, "encouraged" Dell and AMD to conclude an information exchange agreement in order to ease its own procedures. In particular, the Commission has not obliged Dell to conclude an agreement with AMD. On the contrary, the Commission took active steps to discourage the execution of [a first draft of an] agreement between Dell and AMD [redacted]. At the same time, the Commission has not been under any obligation to interfere with any *inter partes* exchange of information between Dell and AMD, even when it learned about the companies' intention to conclude agreements to that effect. It was Dell's responsibility to heed possible confidentiality obligations *vis-à-vis* Intel when it passed on information to AMD. The Commission has provided AMD with a version of the Statement of Objections in which all Dell information was redacted. In view of the above, the Commission maintained that the complainant's allegations of maladministration are unfounded.

179. In his further observations dated 15 June 2009 and produced in response to the Commission's further opinion of 10 June 2009, the complainant made reference to three arguments raised by the Commission in its further opinion. These were that:

- (i) the [redacted] agreement was purely a "bilateral" agreement between Dell and AMD and the Commission therefore had no obligation to take any action;
- (ii) the Commission was not obligated to take any action because the agreement was not a "file access agreement", and;
- (iii) Intel had no confidentiality interest in the material provided to AMD and therefore was not injured.

In his view, the Commission's interpretation of these issues does not conform to the facts, and is thus incapable of excusing its serious breaches of Community law.

180. In his view, the Commission cannot excuse its failure to ensure respect for the procedures set forth in Articles 6 and 16 of Regulation 773/2004, and Article 9 of the Hearing Officer's Mandate, by claiming that the agreement, whose conclusion it had encouraged and of which it was fully aware, was merely "bilateral". He argued that the

Commission is the "guardian" of the case file. As such, it is charged with the obligation to ensure that rules relating to file access are fully respected and the confidentiality of information contained in the case file preserved. Those rules include Intel's rights under Articles 6 and 16 of Regulation 773/2004 and Article 9 of the Hearing Officer's Mandate. These provisions are intended to ensure that, information claimed to be confidential by Intel "shall not be communicated or made accessible by the Commission in so far as it contains business secrets or other confidential information of any other person" until such time as the Hearing Officer has "found that the information is not protected and may therefore be disclosed" and that finding has been communicated to the defendant. At the relevant time, the Commission was on notice that Intel had invoked the procedure provided for in the above-mentioned legislation in respect of the materials the Commission wished Dell to provide to AMD. Dell's letter of 14 August 2007 put the Commission on further notice that the quotations at issue contained Intel confidential information, and, as a result of its discussions with Intel, the Commission had actual notice that Intel had asserted confidentiality claims in respect of this material. Nevertheless, despite this knowledge, the Commission encouraged, and then permitted, AMD to obtain access to this material before the Hearing Officer could make a determination as to its confidentiality. By so acting, the Commission violated Articles 6 and 16 of Regulation 773/2004 and Article 9 of the Hearing Officer's Mandate.

181. The Commission cannot, in the complainant's view, excuse its failure to protect Intel's rights by asserting that the agreement was bilateral or that the discussions between AMD, Dell and the Commission concern exclusively the legal situation in relation to AMD's right under Article 6 Regulation 773/2004. In light of its initiation of, and direct involvement in, procuring the AMD/Dell agreement, the Commission cannot maintain that the agreement was merely "bilateral." It is undisputed, in the complainant's view, that (i) the Commission provided Dell with a selection of quotations from the confidential Statement of Objections and (ii) suggested or requested that Dell provide these quotations to AMD in un-redacted form. In its opinion to the Ombudsman, the Commission does not deny that it suggested that Dell should "consider using an [information exchange agreement] with AMD similar to the one [Dell] contracted with Intel for the [Statement of Objections] quotes"[119]. Moreover, he states that the Commission now admits that, when Dell provided it with a final, signed draft of such an agreement for its review, it suggested that the agreement needed to be restructured. Given these facts, he states that the Commission is "disingenuous" when it argues that "the Commission took no active part in the conclusion of the Dell/AMD [information exchange agreement]". In particular, he argues that the Commission's claim that "any involvement of the Commission or reference to it in the context of the bilateral exchange has been removed in the new version of the agreement that was in the end executed bilaterally between Dell and AMD" neither changes the fact that the Commission encouraged and played an active role in the conclusion of the [redacted] agreement, nor relieves the Commission of its custodial obligations as guardian of the case file.

182. The complainant argues that the Commission's claim that the [redacted] agreement touches exclusively on Article 6 of Regulation 773/2004 ignores the fact that it is precisely the procedure provided for under Article 6 (as well as under Article 16 of Regulation 773/2004 and Article 9 of the Hearing Officer's mandate) that was circumvented by the Commission's encouragement and active participation in the conclusion of the AMD/Dell information exchange agreement.

183. In the complainant's view, the Commission's claim that it "does not have any power, let alone any obligation to prevent third parties from disclosing information which they have submitted to the Commission" bears no relation to what actually occurred, because it ignores the "direct and active role" played by the Commission in the conclusion of the AMD/Dell agreement. In the complainant's view, the question before the Ombudsman is not the legality of an independent, *inter partes* agreement executed by third parties without the Commission's knowledge. Rather, the question is whether the Commission, with knowledge that Intel's confidentiality claims to the material had not yet been resolved and indeed that the material in question "may be redacted in the version of the Statement of Objections that the Commission will provide to AMD", acted improperly by actively encouraging and participating in the conclusion of an agreement giving AMD impermissible access to file material, thereby circumventing Intel's procedural rights to have its claims to confidentiality resolved by the Hearing Officer. As the guardian of the case file, the Commission was obligated to prevent the conclusion and implementation of any such agreement, particularly where it had been given a draft of the agreement and had concluded that it was "prima facie in contradiction with the administrative procedure".

184. In the complainant's view, the Commission was also required to prevent AMD from using the information it had [redacted] obtained at the Oral Hearing. This is especially true, since the Hearing Officer's final confidentiality determinations showed that the information was in fact confidential and that AMD would not have gained access to the material in question under a properly-supervised procedure. Nevertheless, the Commission permitted AMD to introduce this "[redacted] material" [redacted], even after AMD put the Commission and Hearing Officer on notice at the beginning of the Oral Hearing that it intended to use the confidential material in question.

185. For similar reasons, the Commission is not excused by its claim that it intervened to transform the communicated agreement from a "file access agreement" to an agreement "executed bilaterally between Dell and AMD". First, as shown above, the Commission's involvement in providing the material and suggesting that it be shared in un-redacted form with AMD, as well as its admission that it became intimately involved in restructuring the agreement, only confirm that the Commission played an active role in bringing about an agreement that was designed to, and actually did, circumvent Articles 6 and 16 of Regulation 773/2004 and Article 9 of the Hearing Officer's Mandate. Second, the presence or absence in the agreement of references to "waivers of Dell's or AMD's respective rights under Regulation 773/2004" or provision "for an involvement of the Hearing Officer as an arbiter in case documents" does not alter the purpose or effect of the original agreement [redacted]; nor does it decrease the Commission's direct involvement in the procurement of the agreement and the infringement of those procedures. Third, the notion that the classification of the agreement as a "bilateral exchange" rather than a "file access agreement" could excuse the Commission from informing Intel or the Hearing Officer of the existence of the agreement is overly formalistic: it ignores the fact that the agreement which Dell communicated to the Commission on 25 September 2007 and the one communicated to the Commission on 13 November 2007 by AMD had the identical purpose and effect.

186. The complainant also noted that, although the Commission states that it made Intel "aware" of AMD's notification of the agreement on 13 November 2007, it failed to mention that it waited until 23 July 2008 to provide Intel with a copy of that letter, which it included as part of Intel's access to the file in connection with the Supplementary Statement of Objections. This was some eight months after the notification of 13 November and four months after AMD's use of the confidential material at the Oral Hearing.

187. Last, in addition to Intel's interest in the protection of its procedural rights, Intel also had demonstrable confidentiality rights in the actual quotations which AMD used [redacted] at the Oral Hearing. Whilst the import and veracity of the material in the documents in question could not be determined at the time the redaction exercise took place, examination of the actual extracts confirms that - as the Hearing Officer ruled - they merited confidential treatment in that they purported to relate to Intel's commercial negotiations with Dell, a subject plainly appropriate for protection vis-à-vis Intel's primary competitor. This conclusively refutes the Commission's claims that the quotations in question did not contain any Intel business secrets.

The Ombudsman's assessment

188. The complainant's second allegation is that the Commission "encouraged" Dell and AMD to enter into an information exchange arrangement, which had the effect of allowing AMD to circumvent the rules limiting AMD's right to have access to the Commission's investigation file.

189. As a first preliminary point and in order to define clearly the nature of the allegation against the Commission, the Ombudsman considers it necessary to deal first with the complainant's argument that Intel's "rights of defence" were infringed by AMD's use in the oral hearing of what Intel claimed to be Intel's "confidential information".

190. A complainant in a competition case has limited rights to obtain from the Commission information contained in the Commission's investigation file. It has no right of "access to the file" during the Commission investigation. It only has access to a non-confidential version of the Statement of Objections. (The Ombudsman notes, in this regard, that Commission is required to send a non-confidential version of the Statement of Objections to the complainant for the purpose of allowing the latter to make written and oral submissions to the Commission in relation thereto).[120] The purpose of redacting a non-confidential version of the Statement of Objections is to ensure that the complainant in the competition case does not, through its right to obtain a version of the Statement of Objections, obtain knowledge of confidential information relating to third parties.[121] If the Commission were (because of an error) to include in the version of the Statement of Objections sent to a complainant, information which should be classified as "confidential", it would potentially breach the Commission's obligations pursuant to Article 287 EC,[122] Article 28 of Regulation 1/2003[123] and Article 16 of Regulation 773/2004,[124] and potentially make the Community extra-contractually liable for any damage incurred. However, while any such erroneous transmission of confidential information by the Commission might affect the legitimate business interests of a third party,[125] the (erroneous) transmission of such information will not, *as such*, [126] affect the "rights of defence" of the party under investigation.[127] Certainly, a complainant may have greater knowledge of the content of a Statement of Objections sent to the party under investigation as a result of receiving confidential information relating to a third party. However, this fact alone does not imply that the ability of the party under investigation to defend itself against the allegations set out in the Statement of Objections is affected.

191. If the Commission cannot infringe the "rights of defence" of a party under investigation, even if it were (because of an error) to transmit to a complainant confidential information contained in the Statement of Objections, it follows that it could not infringe the "rights of defence" of a party under investigation, if it were ever found that it suggested, or even encouraged, a third party to transmit confidential information to a complainant. [128] In sum, the Ombudsman does not agree, as a point of principle, with the argument put forth by the complainant, that the rights of defence of a party under investigation would be infringed, if the complainant in the competition case were provided with, or otherwise obtained, information which that complainant might use to formulate arguments to be communicated to the Commission in the context of a Commission investigation.[129]

192. As a second preliminary point, the Ombudsman is of the view that the fact that a third party (such as Dell) provides information to the Commission, in the context of the Commission's investigation of an infringement pursuant to Article 81 EC or Article 82 EC, does not give the Commission any power to prevent that third party from deciding, on its own, to make use of that information in a manner which that party sees fit.[130] In principle, absent the possibility that an exchange of information between undertakings might itself constitute an infringement under Article 81 EC, the fact that a party (such as Dell) provides information to the Commission in the context of the Commission's investigation of an infringement pursuant to Article 81 EC or Article 82 EC, does not bestow on the Commission any power to prevent that third party from exchanging the very same information with a third party.

193. The principle that the Commission is not empowered, *by the mere fact that information has been transmitted to it by a third party*, to prevent that third party from using the same information for other purposes, applies, even if the information provided to the Commission is classified as "confidential information" for the purposes of the Commission's investigation based on a request for confidentiality submitted by the party under investigation. In such circumstances, it cannot be for the Commission to protect any interests the party under investigation may have in relation to that information.

194. As a third preliminary point, the Ombudsman notes that the Commission, when complying with its obligation to provide a complainant with a redacted version of the Statement of Objections, will not breach any applicable rule or principle, *unless* it includes "confidential information" in the redacted version of the Statement of Objections information. Indeed, it is not in dispute, in the context of the present inquiry, that the Commission did not directly transmit to AMD any confidential information relating to Intel. If the Commission decides, because, for example, it has been informed of an information exchange agreement between the complainant and a third party, *to refrain* from including certain information in the redacted version of the Statement of Objections, this course of action will not constitute a breach of confidentiality by the Commission.

195. As a fourth preliminary point, the Ombudsman is of the view that the ruling in *AKZO Chemie BV v Commission*,[131] that a third party who has submitted a complaint may not "*in any circumstances be given access to documents containing business secrets*" (emphasis added) should be interpreted as meaning that the rules on access prevent *the Commission* from giving a complainant access to confidential information *in any circumstances*. This could be understood to include the Commission requesting, encouraging or facilitating a third party to give a complainant access to that information. The ruling in *AKZO* does not, however, imply that the Commission has an obligation to prevent third parties giving information which, *independently of the Commission*, they possess, to a complainant.

196. The Ombudsman is also of the view that, should a complainant obtain, through an information exchange agreement with a third party, information which the Commission may have classified as "confidential information" for the purposes of its investigation file, the Commission does not have the power to prevent that third party from referring to, or otherwise making use of that information, when making written or oral submissions to the Commission.[132] The Ombudsman observes that a complainant which makes written or oral submissions to the Commission in relation to a Statement of Objections can rely on facts and arguments presented in the non-confidential version of the Statement of Objections. He also observes that a complainant can also rely on any other facts or arguments which it received from other sources and which it considers relevant for the formulation of its comments in relation to the Statement of Objections. Provided the complainant did not receive such information from the Commission (see paragraphs 189, 190 and 191 above and 198 below), it is not for the Commission to question how the complainant may have obtained such facts or arguments.

197. As a fifth preliminary point, the Ombudsman is of the view that the Commission is entitled to give its views to third parties as regards the procedural issues that might arise in relation to the correct handling of its procedures, in the event a third party that has provided information to the Commission informs the latter that it intends to enter into, or that it has entered into, an information exchange agreement with a complainant. As such, should the Commission be informed of a draft information exchange agreement, or even of a finalised information exchange

agreement, that purports to grant a complainant, "access to the file", the Commission is entitled to inform that third party that complainants do not have any rights of "access to the file" in a Commission procedure applying Article 81 EC or Article 82 EC.[133] Further, the Commission would, in such circumstances, be entitled to take into account any such agreements when drafting non-confidential versions of Statements of Objections.

198. Notwithstanding the above, the Ombudsman is of the view, that, while the consequence of an *erroneous* transmission of information to a complainant by the Commission in the context of an investigation may only be that the Community may become extra-contractually liable for any damage incurred, the same cannot necessarily be concluded as regards any *intentional* transfer of confidential information to a complainant by the Commission. The Ombudsman is of the view that any *intentional* transfer of confidential information to a complainant by the Commission could also, potentially, call into question the overall impartiality of the Commission in its investigation, in contravention of principles of good administration.[134] This would especially be the case, if the express intention of the Commission, when transferring confidential information to a complainant, were to be to reinforce the position of one party in the administrative proceedings which the Commission was in charge of.

199. In line with this reasoning, the Ombudsman is also of the view that it would not be in accordance with principles of good administration for the Commission to request, encourage or facilitate an information exchange agreement between third parties, especially if the Commission were aware of a risk that the agreement would involve the transfer of confidential information of another third party. While the Ombudsman takes no view as to the validity of the confidentiality claims made by Intel in the context of Case COMP/37.990, he notes that the Commission did not exclude that certain of those confidentiality claims might have been valid. In such circumstances, it would not have been in accordance with principles of good administration for the Commission, as a public authority, to have requested, encouraged, or facilitated a third party to take measures which would (even potentially) have infringed the rights of another third party to protect its confidential information.[135]

200. Furthermore, were the Commission to request a third party to disclose to a complainant in a competition case confidential information, to which that complainant would otherwise not have access in the context of the application of Article 6 of Regulation 773/2004, this might also call into question the overall impartiality of the Commission in the context of the investigation.[136]

201. The complainant in the present inquiry argues that the Commission encouraged the information exchange agreement between Dell and AMD by providing Dell, as early as 9 August 2007, with a list of quotations from the confidential version of the Statement of Objections. The Ombudsman understands, from the letter of 14 August 2007, that the purpose of the letter of 9 August 2007 was to inform Dell of the various quotations contained in the Statement of Objections, which may have contained information of, or relating to, Dell. The provision of this list of quotations from the Statement of Objections to Dell would permit Dell to identify what it considered to be confidential information which should not be disclosed to AMD in the context of the provision to AMD of the redacted version of the Statement of Objections. The purpose of Dell's response of 14 August 2009 was to convince the Commission that it should not include, in the redacted version of the Statement of Objections to be sent to AMD, information that Dell considered to be confidential. This understanding is confirmed by the Ombudsman's examination of an email of 23 August 2007 from a Dell outside counsel (Mr C) to a colleague, in which Mr C states that an official from the Commission (Mr D) discussed with him the redaction from the Statement of Objections of quotations that Dell considered to be confidential.

202. The Commission's letter and Dell's response were thus part of the "normal procedure", whereby the Commission seeks to determine what information should be redacted from the confidential version of the Statement of Objections in order to create a non-confidential version of the Statement of Objections. As a result, the Ombudsman does not consider that the letter of 14 August 2007 constitutes evidence that the Commission requested, encouraged or facilitated an information exchange agreement between Dell and AMD.

203. The complainant in the present inquiry also argues that the email of 3 September 2007, in which a Dell outside counsel (Mr C) informs a senior colleague that an official from the Commission (Mr D) had telephoned Mr C to ask whether Dell "would consider using an [information exchange agreement] agreement with AMD similar to the one [Dell] contracted with Intel for the [Statement of Objections] quotes" constitutes proof that the Commission did request Dell to enter into an information exchange agreement with AMD for the purposes of providing AMD with information which AMD would not have access to in the redacted version of the Statement of Objections. The complainant also makes reference to an 18 September 2008 letter from Dell's counsel to the Ombudsman, where Dell's outside counsel states that "the Commission suggested to Dell to enter into a non disclosure agreement with AMD's counsels and economists for the sharing of Dell documents used in the SO".

204. The Ombudsman notes that the Commission does not agree that it suggested to Dell to enter into an information exchange agreement with AMD. The Commission states that it only started to discuss internally the possibility of an information exchange agreement between Dell and AMD after a high level telephone call with Dell on 30 August 2007, in which such an information exchange agreement was discussed. The Commission argues that, since the agenda drawn up by the Commission and sent to Dell in advance of the telephone call did not mention an information exchange agreement between Dell and AMD,[137] it is "*plausible that in this phone call, either Mr B,[138] or Dell's outside counsel, first mentioned the option of a bilateral information exchange also with AMD.*"

205. The Commission confirms categorically that an information exchange agreement between Dell and AMD was actually discussed during that phone call.

206. On the basis of this agenda for the telephone call,[139] the Ombudsman agrees that the Commission's intention, at the outset of the telephone call of 30 August 2007, was to discuss the redaction of Dell quotations from the Statement of Objections. However, the Ombudsman can draw no conclusion, from the mere fact that the agenda does not mention an information exchange agreement between Dell and AMD, as to whether it was the Commission or Dell that raised the issue.

207. The Ombudsman notes that the Commission does not state categorically that it was Dell that raised the possibility of an information exchange agreement, nor does it state categorically that it was not the Commission that raised the possibility of an information exchange agreement. Rather, it maintains that it was "*plausible*" that the issue was first mentioned by Dell.

208. The Ombudsman recognises that, *ab initio*, it is "*plausible*" that either the Commission or Dell would raise the issue of an information exchange agreement in such a telephone call. The Ombudsman understands that such agreements may present advantages to a party that is required by the Commission to supply the latter with redacted versions of evidence previously submitted to the Commission.[140] Indeed, the Ombudsman has, in the course of his inspection of the Commission's file, had sight of correspondence between the Commission and another OEM,[141] in which that other OEM makes the Commission aware of (a) the burden associated with supplying the Commission with redacted versions of the (numerous) documents of that OEM contained in the Commission's file and (b) the advantage (for that OEM) of avoiding such costs by entering into an information exchange agreement (with Intel). It would not be unusual for a party, which is requested by the Commission to discuss, during a "*high level*" telephone call with the latter, the details of the redaction of information supplied to the Commission, to suggest to the Commission an alternative which would be less onerous for that party. The Ombudsman understands that the Commission also might see "*advantages*" in such information exchange agreements taking place. The existence of an information exchange agreement between a party that has provided information to the Commission and a complainant may make it unnecessary for the Commission, when it is attempting to produce a "*meaningful*" non-confidential version of the Statement of Objections, to verify, and take a position on, confidentiality claims from the party under investigation relating to that information. This understanding of the Ombudsman is, in his view, confirmed by the Commission's subsequent actions. In sum, despite not being convinced of the validity of Intel's confidentiality claims, the Commission redacted from the Statement of Objections the Dell quotations which Intel claimed also contained confidential information relating to Intel. The reason, the Ombudsman understands, that the Commission did not pursue further the issue of whether such claims were or were not valid was because the Commission was aware that, for AMD, the redacted version of the Statement of Objections was meaningful, given that AMD had access, through the information exchange agreement, to the contested Dell quotations.

209. When presented with two divergent accounts of facts, both of which are *ab initio* plausible, the Ombudsman will seek to verify, if there is any evidence which gives greater credence to one account of the facts over the other.

210. The Ombudsman first notes that the 3 September 2007 email reflects Mr C's[142] understanding of a conversation with Mr D (a Commission official). As such, it cannot be certain that the email reflects *precisely* the words used by Mr D in that conversation. However, it can be understood that the email reflects Mr C's honest understanding, especially in light of the fact that the email was drafted *in tempore non suspecto*, that is, without thought having been given as to whether it would subsequently be of use as evidence.[143] As such, the Ombudsman concludes that it is sufficiently proven that the issue of an information exchange agreement was mentioned in the telephone conversation of 3 September 2007.[144]

211. In light of the above, the Ombudsman considers that the fact that Mr C and Mr D discussed an information

exchange agreement in the telephone conversation of 3 September 2007 does not imply that this was the first occasion that this issue was discussed between the Commission and Dell.[145] The Ombudsman notes that Mr D is a (relatively) junior member[146] of the case team. The Ombudsman considers it unlikely that, if the Commission wished to communicate to Dell's outside counsel an important development in its procedure with Dell, it would have left such an initial discussion to a junior member of the case team. Rather, the Ombudsman considers it more likely that the issue was previously discussed in the context of what the Commission calls a "high level" telephone call on 30 August 2007, in which Dell's most senior in-house counsel, Dell's senior outside counsel, and the senior members of the Commission's case team participated.

212. As regards whether, in the context of the "high level" telephone call of 30 August 2007, it was the Commission or Dell (or Dell's outside counsel) that first raised the issue of the information exchange agreement, the Ombudsman notes that the Commission refers to an "internal note" concerning the "high level" telephone call of 30 August 2007. The Ombudsman has examined this note in the context of his inspection. The note purports to contain the impressions of the Commission officials present at the meeting of 30 August 2007. The note in question, however, does not appear to be a contemporaneous account of the "high level" telephone call in question. The note states that it is certain that the idea of an information exchange agreement was "floated" at the meeting. It does not state precisely who "floated" that idea (at most, it could suggest that it was "plausible" that Dell or Dell's outside counsel suggested that Dell use an information exchange agreement).

213. The complainant also referred to e-mails between Mr C and Mr D dated 25 and 26 September 2007. He argued that this email exchange confirms that the Commission encouraged Dell to enter into the [agreement] with AMD and to provide it with confidential material from the Statement of Objections. The Ombudsman notes that Mr D, in an email of 26 September 2007, thanked Mr C "for your constructive help on this subject." In the complainant's view, Mr D's gratitude for Dell's "constructive help" established beyond dispute that the Commission welcomed the fact that Dell was willing to enter into [an agreement] with AMD, and indeed that the Commission had promoted and encouraged the agreement.

214. The Ombudsman has, in the context of his inspection of the file, had sight of internal emails provided to him by the Commission, which indicate that the references to "constructive help on this subject" made by Mr A were not made in relation to the "encouragement" of an information exchange agreement between Dell and AMD, but rather to Dell's cooperative attitude as regards the modification of a draft information exchange agreement sent by Dell to the Commission. The modifications which the Commission considered necessary (in order to comply with the rules of access to file) related to the removal of references to a right of AMD to have "access to file".[147] Indeed, internal emails suggest that, throughout September 2007, the Commission was actively pursuing the traditional procedure of redacting the Statement of Objections.

215. In light of the above, the Ombudsman does not consider that the e-mails between Mr C and Mr D dated 25 and 26 September 2007 constitute conclusive evidence that the Commission encouraged Dell to enter into an information exchange agreement.

216. The Ombudsman is of the view that, if the Commission had, in accordance with principles of good administration, drafted, at the relevant time, an internal note of the significant elements of the telephone call of 30 August 2007, it would have been able to provide important evidence as regards who first suggested an information exchange agreement between Dell and AMD.[148] The Ombudsman regrets that the failure to draft an internal note of the telephone call at the relevant time allows for uncertainty to exist in relation to its precise content. The Ombudsman also considers that, had the Commission drafted such an internal note at the time, it would also have been able to deal properly with the accusations that its officials inappropriately first raised the issue of an information exchange agreement.

217. Since the complainant did not raise any allegation or argument in respect to the failure to draft an internal note of the telephone call of 30 August 2007, the Ombudsman will, therefore, not pursue the issue in the present inquiry, but will instead make a further remark.

218. The Ombudsman considers it likely that the possibility of an information exchange agreement between Dell and AMD was first raised in the telephone call of 30 August 2007. Given that no contemporaneous documentary evidence of the content of that telephone call exists, and taking into account the Ombudsman's findings in relation to the evidence submitted to him (see paragraphs 201 to 215 above), the Ombudsman considers that the available evidence is not sufficient for him to take a position as regards whether it was the Commission that first suggested to Dell that the latter enter into an information exchange agreement with AMD. As the Ombudsman does not

consider that his inquiries would uncover further evidence that might clarify the precise content of the telephone conversation of 30 August 2007, he, therefore, concludes his inquiry with a finding that no further inquiries by the Ombudsman in relation to this allegation are justified.

C. Conclusions ▲

On the basis of his inquiry into the first allegation, the Ombudsman closes his inquiry with the following critical remark:

By failing to make an adequate written note of the meeting of 23 August 2006, for the purposes of establishing agreed minutes of that meeting, the Commission infringed principles of good administration.

On the basis of his inquiry into the second allegation, the Ombudsman finds that no further inquiries by the Ombudsman are justified. He therefore closes his inquiry.

The complainant and the European Commission will be informed of this decision.

FURTHER REMARK ▲

It would be in the interests of good administration for the Commission to instruct its staff to ensure that a proper internal note, which should be placed in the file, is made of the content of the meetings or telephone calls with third parties concerning important procedural issues.

P. Nikiforos DIAMANDOUROS

Done in Strasbourg on 14 July 2009

[1] Article 82 EC prohibits the abuse of a dominant position.

[2] See Joined Cases T-191/98 and T-212/98 to T-214/98 *Atlantic Container Line and Others v Commission* [2003] ECR II-3275 (otherwise known as *TACA*).

[3] A copy of this document was submitted to the Ombudsman by the complainant.

[4] The Hearing Officer is a Commission official whose role is to enhance the impartiality and objectivity of Commission competition proceedings. The mandate of the Hearing Officer is set out in Commission Decision 2001/462 of 23 May 2001 on the terms of reference of hearing officers in certain competition proceedings (OJ L 162, 19 June 2001, pages 21-24).

[5] See Cases T-457/08 R *Intel v Commission* (not yet reported) and T-457/08 *Intel v Commission* (not yet reported).

[6] See Order of the President of the Court of First Instance of 27 January 2009 in Case T-457/08 R, *Intel Corp v Commission* (not yet reported).

[7] See footnote 6 above.

[8] In its opinion of 20 March 2009, the Commission took the view that it is not certain that the fact that Intel withdrew its application in Case T-457/08 automatically renders Intel's complaint to the Ombudsman admissible again. However, without prejudice to its position in future cases, the Commission stated that, in this specific instance, it will not pursue further the issue of the potential inadmissibility of the complaint.

[9] In his 16 February 2009 letter to the Commission, the Ombudsman stated that the very short deadline was justified, given that the Commission had been aware of the allegations since 22 July 2008 and of all of the evidence since 26 September 2008.

[10] The complainant states that the written post-meeting follow-up, sent from Dell to the Commission, suggests that the Agenda was indeed followed.

[11] A Statement of Objections is a formal step in Commission competition law investigations, in which the Commission informs the parties concerned in writing of the objections raised against them. The addressee of a Statement of Objections can reply (in writing) to the Statement of Objections, setting out all facts known to it which are relevant to its defence against the objections raised by the Commission. The addressee may also request an oral hearing to present its comments on the case. The Commission may then take a decision on whether the conduct addressed in the Statement of Objections is compatible or not with the EC Treaty's competition law rules (Articles 81 and 82 EC). Sending a Statement of Objections does not prejudge the final outcome of the procedure. The Commission may also choose to send one or more Supplementary Statements of Objections.

[12] A full copy of this testimony was provided to the Ombudsman by the complainant.

[13] The complainant states that, on 22 January 2008, Intel wrote to the Commission's Hearing Officer concerning a number of requests for access to the file. Those requests included a request for a copy of the interview with Mr A. On 19 February, 2008, the Hearing Officer responded saying that "*I have no knowledge of the interview with [Mr A] dated 23 August 2006 and have asked the Case Team to react on this request.*"

[14] The complainant states that, on 21 February 2008, the case team sent an email confirming that Mr A had indeed attended a meeting with the Commission on 23 August 2006, but that "*the Commission did not interview [Mr A] during this meeting, and no minutes of the meeting were taken.*" On 10 March, 2008, the Hearing Officer responded that, according to the information she had received from the case team, "*no interview according to Article 19 of Regulation 1/2003 took place, nor were any minutes taken during or after the meeting which form part of the file.*" She indicated, however, that she would inquire into the matter.

[15] The complainant states that Intel wrote again to the Hearing Officer on 14 April 2008, explaining the significance of the case team's approach to the interview with Mr A, and expressing its concern that the case team had not made a detailed record of such an important meeting. In a letter dated 7 May 2008, the Hearing Officer acknowledged that a case team member had produced a "*note to the file*" concerning the 23 August 2006 meeting. The Hearing Officer stated that the note in question should have been put on the case file. However, she also ruled that Intel did not have a right of access because the note was an "*internal note*" and "*apparently*" had not been relied on in the Statement of Objections addressed to Intel.

[16] Article 11 (Fairness) states that "*[t]he official shall act impartially, fairly and reasonably.*"

[17] Article 12 (Courtesy) reads as follows

"1. The official shall be service-minded, correct, courteous and accessible in relations with the public. When answering correspondence, telephone calls and e-mails, the official shall try to be as helpful as possible and shall reply as completely and accurately as possible to questions which are asked.

2. If the official is not responsible for the matter concerned, he shall direct the citizen to the appropriate official.

3. If an error occurs which negatively affects the rights or interests of a member of the public, the official shall apologise for it and endeavour to correct the negative effects resulting from his or her error in the most expedient way and inform the member of the public of any rights of appeal in accordance with Article 19 of the Code."

[18] Articles 7, 8 and 9 of the European Code of Good Administrative Behaviour require, respectively, that a European institution or body should "*avoid using [its] powers for purposes which have no basis in the law or which are not motivated by any public interest,*" should be "*impartial and independent and refrain from any arbitrary action adversely affecting members of the public,*" and should "*take into consideration the relevant factors and give each*

of them its proper weight in the decision."

[19] The Ombudsman understands that these documents concerned Mr A's testimony before the FTC in 2003.

[20] Access to the file is an important procedural step in competition and merger cases. It allows the addressee of a Statement of Objections (see footnote 11 above) to have sight of all of the evidence, whether it is incriminating or exonerating, in the Commission's file. A party can then understand the facts which led the Commission to send a Statement of Objections, and draw the Commission's attention to elements of the file which the party believes have not been given sufficient weight. This is a fundamental procedural safeguard which ensures the rights of defence of companies. The Commission has published a Notice on the rules for access to the Commission file (Official Journal C 325, 22 December 2005, p. 7-15).

[21] The Commission's emphasis.

[22] Cited at footnote 20 above.

[23] Cited at footnote 2 above.

[24] See Case T-38/02 *Groupe Danone v Commission* [2005] ECR II-4407.

[25] The Commission noted that the investigation period covered by the Statement of Objections of 26 July 2007 relates to the period starting from December 2002, while Mr A's testimony before the FTC of March 2003 mostly relates to the period proceeding December 2002.

[26] The Ombudsman understands that the Commission refers to the Agenda (see Paragraph 36 above).

[27] In the light of the Statements of Objections communicated by the Commission to Intel on 27 July 2007 and 17 July 2008, the Commission is of the view that Mr A's testimony before the FTC in 2003, on which Intel relies and which it considers to be exculpatory, does not support Intel's claim that the rebates paid to Dell were not conditioned upon exclusivity.

[28] The Ombudsman recalls that the Commission's opinion was submitted in March 2009. It adopted a decision in May 2009.

[29] Cited in footnote 2 above.

[30] Cited in footnote 24 above.

[31] See Case T-30/91 *Solvay v Commission* [1995] ECR II-1775 at paragraph 81.

[32] See Decision in Case COMP/37.990 of 13 May 2009 (not yet reported).

[33] In this respect, the complainant made reference to Case T-314/01 *Avebe v. Commission* [2006] ECR. II-3085 at paragraph 66; Case T 30/91 *Solvay v Commission* [1995] ECR II-1775, paragraph 81 *et seq.*; Joint Cases C-204/00 P, C-205/00 P, C-211/00 P, C-213/00 P, C-217/00 P and C-219/00 P *Aalborg Portland A/S and others v. Commission* [2004] ECR I-123 at paragraph 75.

[34] The Community Courts have stated that "*the guarantees afforded by the Community legal order in administrative proceedings include, in particular, the principle of sound administration, which entails the duty of the competent institution to examine carefully and impartially all the relevant aspects of the individual case*". See Case T-339/04 *France Télécom v Commission* [2007] ECR II-521 at paragraph 94. See also *TACA*, cited at footnote 2 above, at paragraph 404. In contrast, *before* it decides to open an investigation, the Commission is only obliged to take into consideration the factual and legal elements brought to its attention by the complainant (for the purposes of deciding whether there is a sufficient Community interest to open an investigation). See *Automec Srl v Commission (Automec II)* [1992] ECR II- 2223 at paragraph 86. See also Case 210/81, *Oswald Schmidt, trading as Demo-Studio Schmidt v Commission* [1983] ECR 3045 at paragraph 19; Case C-119/97 P *Union française de l'express (Ufex) and Others v Commission* [1999] ECR I-1341 at paragraph 86.

[35] See Joined cases 43/82 and 63/82, *VBVB and VBBB v Commission*, [1984] ECR 19 at paragraph 18.

[36] See *Microsoft v Commission* Case T-201/04 [2007] ECR II-3601 at paragraph 1275.

[37] Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, OJ L 1, 4 January 2003, pages 1-25.

[38] The Ombudsman notes that Regulation 1/2003 entered into force after the decisions which gave rise to the rulings of the Court of First Instance in *TACA* and *Groupe Danone* (cited above at footnotes 2 and 24 respectively).

[39] Council Regulation No 17/62 (1962) OJ 204.

[40] See paragraphs 56 to 60 above.

[41] Paragraph 12 of the Notice states that:

"There is no obligation on the Commission departments to draft any minutes of meetings with any person or undertaking. If the Commission chooses to make notes of such meetings, such documents constitute the Commission's own interpretation of what was said at the meetings, for which reason they are classified as internal documents".

[42] Cited in footnote 2 above.

[43] Cited in footnote 24 above.

[44] See Joined Cases 16/62 and 17/62 *Confédération nationale des producteurs de fruits et légumes and others v Council* (ECR English special edition page 471); Case 45/86 *Commission v Council* [1987] ECR 1493; Case C-300/89 *Commission v Council* [1991] ECR I-2867 paragraph 10; and Case C-295/90 *Parliament v Council* [1992] ECR I-4193 at paragraph 13.

[45] Case C-322/88 *Salvatore Grimaldi v Fonds des maladies professionnelles* [1989] ECR 4407 at paragraph 14.

[46] Interviews may take many forms, such as meetings, telephone calls or video conferencing (see Article 3(2) of Regulation 773/2004).

[47] For example, meetings which take place in the context of the assessment of block exemption regulations or meetings which take place in the context of the assessment of policy "guidelines".

[48] Arguably, an interview which is conducted prior to the formal commencement of an investigation (such as an interview with a complainant) is not an "interview" pursuant to Article 19 of Regulation 1/2003. It may still constitute good administrative practice to make an appropriate record of such meetings.

[49] This rule is derived from the wording of Article 19 of Regulation 1/2003 itself, which states that "*the Commission may interview any natural or legal person who consents to be interviewed*", and the case law (see Joined Cases 43/82 and 63/82, *VBVB, and VBBB v Commission*, [1984] ECR 19 at paragraph 18, which states that "*the Commission has a reasonable margin of discretion to decide how expedient it may be to hear persons whose evidence may be relevant to the inquiry*").

[50] See, for example, the Decision of the European Ombudsman on complaint 1056/25.11.96/STATEWATCH/UK/IJH against the Council at paragraph 3.5.

[51] The Commission could record the Article 19 interview by drafting a note, or through an audio recording or a video recording. The Ombudsman is of the view that the Commission should use the most appropriate means to record the Article 19 interview, given the specific object, content and context of an interview. Thus, if the interview relates to a very complex set of facts, which would be difficult to transcribe accurately *in situ*, the Commission should choose to make an audio or video recording of the interview.

[52] In contrast, Article 14.8 of Regulation 773/2004 (Conduct of oral hearings) clearly creates an obligation on the Commission to ensure that the statements made by each person at the oral hearings are recorded. It states that "[i]f the statements made by each person heard shall be recorded." (Emphasis added)

[53] While it is arguable, on the basis of the *wording* of Article 3, that it is unclear whether there exists a legal obligation to make a record of an "Article 19 interview", it is also arguable that a teleological interpretation of Article 3 of Regulation 773/2004 leads to the conclusion that it should be interpreted as requiring that a record, in some form, must be made of an Article 19 interview. In sum, the purpose of Article 19 is to allow the Commission to gather information in relation to the subject-matter of an investigation. The purpose of Article 19 would, arguably, be undermined if the Commission did not make a record of the information it gathers. It is also arguable that a contextual interpretation of Article 19 of Regulation 1/2003, in conjunction with Article 3 of Regulation 773/2004, would lead to the conclusion that there is indeed an obligation to make a record of an Article 19 interview. The wording of Article 19 of Regulation 1/2003 is similar to the wording of Article 18 and Article 20 insofar as Article 18 and Article 20 also give the Commission the power, but not the obligation, (respectively) to make requests for information and to carry out inspections. It could not be disputed that, whenever the Commission *chooses* to exercise the powers set out in Articles 18 and 20, the results of the exercise of these powers (the response of the party to whom an Article 18 request is made and the documents obtained in an inspection along with the "explanations" made in relation thereto) *must* be placed in the case file. A further contextual argument in favour of interpreting Article 3 of Regulation 773/2004 to include an obligation to record an "Article 19 interview", can be derived from Article 3 itself. Article 3.1 of Regulation 773/2004 states that the Commission must "*inform the person interviewed of its intention to make a record of the interview*". Thus, the Commission must have, at least, the intention of making a record of an Article 19 interview when the interview commences. It would appear incongruous for Article 3.3 to be interpreted as allowing the Commission, without good reason, to refrain thereafter from making a record of the "Article 19 interview".

[54] Of course, the use of the word "*any*" could also be understood as implying that while the Commission must have the intention of making a record of any statement made in relation to the subject-matter of the investigation, and *must* follow through with that intention if any statement is actually made in relation to the subject-matter of the investigation, there is no certainty, *ab initio*, that the party being interviewed will, in response to the questions posed by the Commission, actually respond with information in relation to the subject-matter of the investigation. If no information were actually provided in relation to the subject-matter of an investigation, no record pursuant to Article 19 of Regulation 1/2003 would be possible.

[55] The Ombudsman notes that the Community Courts have not yet had the opportunity to rule on the correct meaning of Article 19 of Regulation 1/2003 or Article 3 of Regulation 773/2004. It must be recalled that the highest authority on the meaning and interpretation of Community law is the Court of Justice (see, for example, Decision of the European Ombudsman on complaint 1056/25.11.96/STATEWATCH/UK/IJH against the Council at paragraph 3.5).

[56] See paragraph 1.7 of the Ombudsman's Decision on complaint 995/98/OV and paragraph 2.8 of the Ombudsman's Decision on complaint 1999/2007/FOR (available on the website of the European Ombudsman).

[57] The Ombudsman underlines that he does not necessarily agree with this assumption. He also notes that the Community Courts have not yet had an opportunity to give an "authentic" interpretation of this aspect of Article 3 of Regulation 773/2004. See footnote 90 above.

[58] In such a note, the Commission should sufficiently identify the information which is already in the file. It should also evaluate whether, the drafting of an "Article 19 Note" and the subsequent transformation of that note into an "Article 19 Statement" would be necessary in order to corroborate or verify information which is already in the file.

[59] Whether these risks materialise will depend on whether the information which was provided in the Article 19 interview was, in fact, subsequently included in the case file *in time* to allow the party under investigation to exercise its rights of defence during the administrative process.

[60] It cannot be excluded that, despite the fact that the persons being interviewed will have given their consent to be interviewed in relation to the "*subject-matter of an investigation*", they may not in fact provide during the interview any "*information relating to the subject-matter of an investigation*".

[61] See Joined Cases T-67/00, T-68/00, T 71/00 and T 78/00 *JFE Engineering Corp. v Commission* [2004] ECR

II-2501 at paragraph 206 (by analogy).

[62] *Idem* at paragraph 207. The Ombudsman notes that, *inter alia*, Mr A's FTC testimony, and the exhibits attached thereto, confirm that Mr A was a "direct witness" of the events he described.

[63] *Idem* at paragraph 208 (by analogy).

[64] *Idem* at paragraphs 209 and 210.

[65] The approval can be explicit or implicit. Article 3.3 states that a copy of the interview note must "be made available to the person interviewed for approval." It goes on to state that "[w]here necessary, the Commission shall set a time-limit within which the person interviewed may communicate to it any correction to be made to the statement." The Ombudsman, therefore, understands this provision to mean that, if a party does not communicate corrections to the Commission within the time-limit set, the Commission is empowered to consider that the record it has made is accurate.

[66] There is nothing which prevents the Commission's services from drafting, at the same time, and in addition to an "Article 19 interview note", separate internal notes which contain the assessments and personal views of the Commission's services in relation to the interview. Indeed, depending on the nature of the Article 19 interview, it may be appropriate for the Commission's services also to make such internal notes.

[67] See Paragraph 36 above.

[68] A careful analysis of the written follow-up of Dell to meeting of 23 August 2006 indicates that there were indeed issues that were discussed in the meeting of 23 August 2006, which are not set out in the note of 29 August 2006, at least at the level of detail which the written follow-up by Dell indicates they were discussed in the meeting of 23 August 2006. For example, in response to Question 4, Dell states the following:

"The Commission asked this question in the context of a discussion of Exhibit 9 of the Testimony which includes an email from [Mr A] to [Mr F] of Intel in April 2002 in which the performance of [an AMD product] is discussed. [Mr A's] view, based on a performance analysis conducted by his team at the time, was that [the AMD product] would outperform [an Intel product]. The Commission is seeking the benchmarks that were used to conduct this analysis."

The Ombudsman notes that, while this excerpt from the written follow-up of Dell refers specifically to a discussion which took place in the meeting of 23 August 2006, the note of 29 August 2006 does not contain such detailed references. A similar conclusion can be drawn from an analysis of Dell's response to Question 6.

[69] See footnote 5/ above.

[70] Of course, if Article 3.3 of Regulation 773/2004 were interpreted as imposing a legal requirement to make a record of *all* interviews in which information concerning the subject-matter of an investigation was provided to the Commission, this would imply that principles of good administration would also impose such a requirement. In effect, principles of good administration cannot impose a standard which is *lower* than the legal standard.

[71] The Ombudsman refers here to the non-confidential version of the note provided to the Ombudsman by the complainant.

[72] The Ombudsman has not examined the entire Commission file, which, he understands, consists of several hundred thousand pages. However, he has examined Mr A's 2003 FTC testimony.

[73] The fact that these questions were posed orally to Dell by the Commission is confirmed by the fact that the follow up from Dell is not the result of a response to an "Article 18 letter" (Article 18 of Regulation 1/2003 empowers the Commission to pose questions in writing to third parties).

[74] See footnote 72.

[75] See paragraphs 56 to 60 above.

[76] Cited in footnote 2 above.

[77] Cited in footnote 24 above.

[78] The Ombudsman notes that access to the file is not an end in itself, but rather is intended to protect the rights of defence (Case C-51/92 P *Hercules Chemicals v Commission* [1999] ECR I-4235 at paragraph 76) In particular, the purpose of access to the file is to enable the addressee of a statement of objections to acquaint itself with the evidence in the Commission's file, so that, on the basis of that information, it can express its views effectively on the conclusions reached by the Commission in its statement of objections. It follows that, with the exception of confidential documents, the Commission has an obligation to make available to the undertakings, to which a statement of objections has been addressed, all documents, whether in their favour or otherwise, which it has obtained during the course of the investigation (see Joined cases T-45/98 and T-47/98 *Krupp Thyssen Stainless and Acciai speciali Terni v Commission* [2001] ECR II-3757 at paragraphs 45 and 46). In this respect, the Ombudsman notes that, under Article 27(2) of Regulation No 1/2003, a party under investigation is entitled to have access to the Commission's file, subject to the legitimate interest of undertakings in the protection of their business secrets.

[79] See Case 90/74 *Deboeck v Commission* [1975] ECR 1123, Case 30/78, *Distillers Company v Commission* [1980] ECR 2229 at paragraph 26, and Case T-50/91 *De Persio v Commission* [1992] ECR II-2365 at paragraph 24.

[80] See for example, T-75/06 Judgment 9 September 2008 *Bayer Crop Science and Others v Commission* at paragraph 131 (not yet reported). A decision cannot be annulled, in whole or in part, on the grounds of a lack of proper access, unless it is found that that lack of proper access to the investigation file has prevented the undertakings, during the administrative procedure, from perusing documents which were likely to be of use in their defence (see Joined cases C-204/00 P, C-205/00 P, C-211/00 P, C-213/00 P, C-217/00 P and C-219/00 P *Aalborg Portland and Others v Commission* [2004] ECR I-123 at paragraph 101).

[81] See Joined Cases T-109/02, T-118/02, T-122/02, T-125/02, T-126/02, T-128/02, T-129/02, T-132/02 and T-136/02 *Bolloré and Others v Commission* [2007] ECR II-947 at paragraphs 80-81. See also TACA, cited above at footnote 2, at paragraph 196; See also Case T-86/95 *Compagnie générale maritime and Others v Commission* [2002] ECR II-1011 at paragraph 447.

[82] See Case T-25/95 *Cimenteries CBR v Commission* [2000] ECR II-491 at paragraph 156.

[83] See Article 195 EC.

[84] See TACA, cited in footnote 2 above, at paragraph 351.

[85] See TACA, cited in footnote 2 above, at paragraph 352.

[86] In TACA (cited in footnote 2 above), the applicant argued that the Commission infringed its rights of defence by not making a record, for inclusion in the file, of the content of a telephone conversation between the complainant's lawyers and the Commission. The Court of First Instance noted that the purpose of the particular telephone call between the complainant's lawyers and the Commission was to discuss whether information contained in the statement of objections should be classified as "confidential information". The Court of First Instance noted that, given its purpose, such a telephone conversation manifestly does not infringe the rights of defence of the applicant. (TACA 355) In effect, the Ombudsman understands, the information that was discussed in that telephone conversation was, necessarily, *already* in the file. The sole purpose of the call was the *categorisation* of that information as being either "confidential" or "non-confidential" information. As such, in those specific circumstances, the failure to make and include in the file, a record of that telephone conversation could not have had the effect of denying from the applicant information which would be relevant for the applicant's defence. As noted in Paragraph 87 above, a meeting which has as its aim and content the organisation of a procedural step in the context of the investigation, does not constitute an "interview" pursuant to Article 19 of Regulation 1/2003.

[87] The applicant in TACA also argued that the Commission infringed its rights of defence by not making a record

of the meeting, in which the member of the Commission responsible for competition matters and a third party were present. However, the Court of First Instance observed that rights of defence cannot be infringed, if the Commission does not rely, in its decision, on any inculpatory evidence supplied in the meeting (see *TACA*, cited in footnote 2 above, at paragraph 387).

[88] Of course, access to any new inculpatory evidence would have to be provided before a party was required to respond to a Statement of Objections (see T-67/01, *JCB Service v Commission* [2004] ECR II-49, Paragraphs 50-52).

[89] The applicants in *TACA* did not even claim that that certain evidence relating to the meeting in question could have been used by them as exculpatory evidence.

[90] [Redacted]

[91] [Redacted]

[92] In his observations, the complainant raised the argument that the Commission's failure to record properly the meeting of 23 August 2006 was evidence of a lack of impartiality. The Ombudsman is of the view that, if the Commission were to receive exculpatory information in the course of an investigation, and failed to record that exculpatory information *somewhere* in the file, this failure would, even if it were not intentional on the part of the Commission's services, constitute an objective factor which might call into question the impartiality of an investigation. As noted in paragraph 133 below, the Ombudsman reaches no conclusion, in the context of the present inquiry, as regards whether there are in fact other documents in the Commission's file which would provide further information in relation to the precise content of the meeting of 23 August 2006.

[93] See footnote 68 above.

[94] See Question 6 of the written follow-up of Dell.

[95] [Redacted]

[96] See, by analogy, Case T-264/04 *WWF European Policy Programme v Council* ECR [2007] II-911 paragraphs 61 *et seq.*

[97] See Case T-30/91 *Solvay v Commission* [1995] ECJ II-1775 at paragraph 81. The Commission has stated that it is of the view that the testimony of Mr A before the FTC in 2003, on which Intel relies as being exculpatory, does not support Intel's claim that the rebates paid to Dell were not conditioned upon exclusivity. Even if this were eventually true, this would, in itself, still not justify depriving Intel of the *possibility* to consider invoking evidence in its defence which *may* have influenced, to its advantage, the course of the proceedings and the content of the eventual decision (see *Aalborg Portland A/S and others v. Commission*, cited in footnote 33 above, at paragraph 74; see also *Solvay v Commission*, cited above, at paragraph 89).

[98] In abstract, it could not be excluded that, *prior* to the adoption of a decision, allegations/inculpatory evidence set out in a Statement of Objections would not be included in the eventual decision. If it were the case that allegations/inculpatory evidence set out in a Statement of Objections were not included in an eventual decision, any deficiency in relation to access to the file concerning those allegations/inculpatory evidence would not affect the rights of defence of the party concerned. As such, a finding of the Ombudsman made prior to the adoption of a decision by the Commission, could at most be a finding that the error creates a *potential* for an infringement of the rights of defence. Any such finding would, of course, leave open the possibility for the Commission to remedy that breach, if that were still possible, before adopting a decision. The Ombudsman underlines that it falls within his mandate to examine allegations of procedural errors which create a risk or a potential for the rights of defence to be infringed (if not remedied before a final decision is adopted).

[99] The Commission has argued that the investigative measures following the note of 29 August 2006 triggered voluminous submissions by Dell that were, in its view, made fully available to Intel. The Commission specifically states that, between the meeting of 23 August 2006 and the sending of the first Statement of Objections to Intel on 26 July 2007, Dell made eight additional submissions to the Commission pertaining to the key issues of the investigation. These documents were not provided to the Ombudsman by the complainant and were not examined

by the Ombudsman in the context of his inspection.

[100] The Ombudsman also notes, in this context, that no excuse based on technical and legal difficulties could be invoked for the failure to produce an exhaustive account of a meeting which *might* have resulted in a third party providing exculpatory information to the Commission. Indeed, as the Court of First Instance ruled in *Solvay* (see Case T-30/91 *Solvay v Commission* [1995] ECJ II-1775 at paragraph 102), "*respect for the rights of the defence should not be allowed to conflict with technical and legal difficulties which an efficient administration can and must overcome.*" Principles of good administration thus also require that the Commission take appropriate steps to record properly any meeting in which such information *might* be provided to it.

[101] Article 6 of Regulation 773/2004.

[102] The complainant in the present inquiry provided the Ombudsman with new evidence in relation to the second allegation during the course of the inquiry. This required the Ombudsmen to carry out further inquiries in order to seek the Commission's views on the new evidence. For the sake of clarity, the Ombudsman will, herein, consolidate the various facts and arguments of the complainant and the Commission.

[103] The complainant stated that AMD was permitted to make use of three of these documents at the Oral Hearing held by the Commission on 12 March 2008.

[104] This email was provided to the Ombudsman in the complainant's further observations of 16 April 2009. As this evidence was not available to the Commission when the latter submitted its opinion of 20 March 2009 to the Ombudsman, the Ombudsman provided the Commission with an opportunity to comment on this new evidence, which it did through its opinion of 10 June 2009.

[105] The complainant stated that Intel had, in total, written to the Commission on 16, 18, 19 and 25 October 2007, and to the Hearing Officer on 17 October 2007 and 28 November 2007 and 14 April 2008, seeking information about the Dell/AMD **[agreement]**. **[Redacted]**

[106] In her letter of 7 May, 2008, the Hearing Officer took the position that the **[agreement]** "*concluded by a party that as such has no rights of defence or right to access to file, is purely bilateral and neither empowers nor obliges the Commission.*"

[107] See Case 53/85 *AKZO Chemie BV v Commission* [1986] ECR 1965 at paragraph 28.

[108] According to the complainant, these OEMs wished to make un-redacted file documents available to Intel's outside counsel so as to avoid the expense and time that would have been involved in preparing redacted versions.

[109] The complainant's paraphrasing.

[110] The OEM in question was **[redacted]**.

[111] During the course of the inspection of 28 May, 29 May and 10 June 2009, the Ombudsman's services had sight of a letter of **[redacted]** dated 11 January 2007.

[112] This is confirmed by the emails that the Ombudsman inspected on 28 and 29 May 2009 and 10 June 2009.

[113] The agenda for the call was inspected by the Ombudsman on 28 and 29 May 2009 and 10 June 2009.

[114] Letter of the Commission to AMD of 2 June 2009, inspected by the Ombudsman on 10 June 2009.

[115] **[Redacted]**

[116] The Commission made reference to the hearing transcript provided by Intel as Annex 10 to its complaint to the Ombudsman of 10 July 2008.

[117] Article 28 of Regulation (EC) 1/2003 states:

"Without prejudice to the exchange and to the use of information foreseen in Articles 11, 12, 14, 15 and 27, the Commission and the competition authorities of the Member States, their officials, servants and other persons working under the supervision of these authorities as well as officials and civil servants of other authorities of the Member States shall not disclose information acquired or exchanged by them pursuant to this Regulation and of the kind covered by the obligation of professional secrecy."

[118] Commission Decision 2001/462 of 23 May 2001 on the terms of reference of hearing officers in certain competition proceedings OJ L 162, 19 June 2001, p. 21.

[119] The Ombudsman notes that this quotation is from Mr C's email dated of 3 September 2007.

[120] Article 6 of Regulation 773/2004 (Participation of complainants in proceedings) reads as follows:

"1. Where the Commission issues a statement of objections relating to a matter in respect of which it has received a complaint, it shall provide the complainant with a copy of the non-confidential version of the statement of objections and set a time-limit within which the complainant may make known its views in writing.

2. The Commission may, where appropriate, afford complainants the opportunity of expressing their views at the oral hearing of the parties to which a statement of objections has been issued, if complainants so request in their written comments. This obligation also applies to all representatives and experts of Member States attending meetings of the Advisory Committee pursuant to Article 14."

[121] These parties include the party under investigation and any other third party that has a valid claim that the Commissions' file contains confidential information pertaining to it.

[122] Article 287 EC reads as follows:

"The members of the institutions of the Community, the members of committees, and the officials and other servants of the Community shall be required, even after their duties have ceased, not to disclose information of the kind covered by the obligation of professional secrecy, in particular information about undertakings, their business relations or their cost components."

[123] Article 28 of Regulation 1/2003 (Professional secrecy) reads as follows:

"1. Without prejudice to Articles 12 and 15, information collected pursuant to Articles 17 to 22 shall be used only for the purpose for which it was acquired.

2. Without prejudice to the exchange and to the use of information foreseen in Articles 11, 12, 14, 15 and 27, the Commission and the competition authorities of the Member States, their officials, servants and other persons working under the supervision of these authorities as well as officials and civil servants of other authorities of the Member States shall not disclose information acquired or exchanged by them pursuant to this Regulation and of the kind covered by the obligation of professional secrecy."

[124] Article 16 of Regulation 773/2004 sets out in detail the rules concerning the treatment of confidential information by the Commission.

[125] A party entitled to claim that information should be classified as confidential could be the party under investigation, or any other party (such as a party which provided the Commission with information in response to a request for information submitted pursuant to Article 18 of Regulation 1/2003). A party can also seek confidentiality in relation to information provided to the Commission by another party (See Case 53/85, *AKZO Chemie BV v Commission* [1986] ECR 1965 at paragraph 28 where the Court of Justice states that the Commission is required "to have regard to the legitimate interest of undertakings in the protection of their business secrets. Business secrets are thus afforded very special protection. [The applicable rules on access applying to complainants] must be regarded as the expression of a general principle which applies during the course of the administrative procedure. It follows that a third party who has submitted a complaint may not in any circumstances be given

access to documents containing business secrets.") It is also worth noting that the potential negative effects of such an erroneous transmission are not dependent on the use of this information in the Commission's proceedings, such as when a complainant makes written comments or a submission in the oral hearing. Rather, the negative impact of such a transmission of confidential information commences immediately upon the receipt, by the third party, of that information. In this respect, the Ombudsman is of the view that, should the Commission erroneously send confidential information to a complainant, it should, as soon as it becomes aware of its error, inform the complainant of the error and ask the complainant to return to it that version of the Statement of Objections.

[126] It is arguable, however, that the party under investigation should be made aware of the information that has been provided to a complainant by the Commission in order to allow the party under investigation to formulate properly its arguments during the administrative proceedings, including during the oral hearing. As such, the party under investigation should be allowed to obtain a copy of the redacted version of the Statement of Objections on request.

[127] As such, an erroneous transmission of confidential information to a complainant can at most, if it were shown the Commission were responsible for that transmission, constitute a relevant factor in an action for damages against the Commission.

[128] In contrast, the Ombudsman would not exclude the possibility that the rights of defence of a party under investigation could be infringed, if the Commission were to make efforts to prevent the party under investigation from obtaining from other sources, such as through information exchange agreements with third parties, information which the party under investigation would use in its defence.

[129] For example, when the complainant makes written comments in relation to the Statement of Objections or makes a presentation in the Oral hearing.

[130] However, the Commission may decide that a party that provides the Commission with information in relation to an application for leniency may lose, or diminish, its right to leniency under the Leniency Notice (see Article 12 of the Commission Notice on Immunity from fines and reduction of fines in cartel cases, OJ C 298, 8 December 2006, p. 17-22) if it discloses the fact, or any of the content, of its application for leniency before the Commission has issued a statement of objections in the case. See also pending action brought on 19 January 2006, *Deltafina v Commission* (Case T-12/06).

[131] Cited in footnote 125 above.

[132] Assuming that such information was initially classified as "*confidential information*", such information would, if it is (again) included in the file as a result of declarations by the complainant in its written or oral submissions to the Commission continue to be classified, in the Commission's investigation file, as "*confidential information*".

[133] See paragraph 136 above.

[134] See Article 41.1 of the Charter of Fundamental Rights of the European Union (Right to good administration) which states that "*[e]very person has the right to have his or her affairs handled impartially ...*" See also Articles 8 and 11 of the European Code of Good Administrative Behaviour.

[135] As noted above in paragraph 191, such actions would not infringe the rights of defence of a party under investigation. However, and notwithstanding this fact, the Commission should not actively seek to undermine the interests a party under investigation may have in protecting its confidential information.

[136] See paragraph 198 and footnote 134 above. This may be the case, if the Commission's intention was to reinforce the position of one party in the administrative proceedings which the Commission was in charge of.

[137] The agenda mentioned only issues relating to the redaction of the Statement of Objections.

[138] Mr B was a senior in-house counsel for Dell.

[139] The Ombudsman's services inspected the Agenda during the inspection which took place on 28 May 2009,

29 May 2009 and 10 June 2009.

[140] See Article 16(3) of Regulation 773/2004.

[141] The OEM in question was [redacted].

[142] To recall, in his email, Mr C, a Dell outside counsel, informs a colleague that an official from the Commission (Mr D) had telephoned Mr C to ask whether Dell "*would consider using an [information exchange agreement] agreement with AMD similar the one [Dell] contracted with Intel for the [Statement of Objections] quotes*".

[143] See Case T-59/02 *Archer Daniels Midland Co. v Commission* [2006] ECR II-3627 at paragraphs 275 to 277 and 290. See also Case T-151/94 *British Steel plc v Commission* [1999] ECR II-629 at paragraph 429.

[144] The Ombudsman also notes that the letter of Dell's outside counsel of 18 September 2008 reflects Dell's understanding as regards the meaning of the conversation held between Mr C and Mr D.

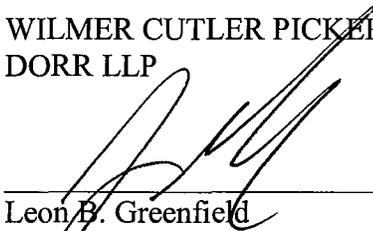
[145] Indeed, the fact that the complainant makes arguments relating to the relevance of discussions between the Commission and Dell in August 2007 (see paragraph 201 above) seems to indicate that the complainant was of the view that the Commission had the intention of encouraging an information exchange agreement between Dell and AMD by as early as 9 August 2007.

[146] It is noted in the file that Mr D is a case handler.

[147] The Ombudsman notes that a discussion on the issue of the modification of the draft information exchange agreement, designed to remove references of a right of AMD to have "*access to the file*", is also contained in the Commission opinion sent to the Ombudsman.

[148] If drafted at the time, the internal note would, as well as being more accurate, have benefited from the principle of *in tempore non suspecto*.

WILMER CUTLER PICKERING HALE AND
DORR LLP



Leon B. Greenfield
1875 Pennsylvania Ave, N.W.
Washington, D.C. 20006
Phone: (202) 663-6000
Fax: (202) 663-6363
Leon.Greenfield@wilmerhale.com

Attorney for Intel Corporation

Dated: April 12, 2010