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TRIBUNAL GENERAL DE LA UNIÓN EUROPEA
TRIBUNÁL EVROPSKÉ UNIE
DEN EUROPÆISKE UNIONS RET
GERICHT DER EUROPÄISCHEN UNION
EUROOPA LIIDU ÜLDKOHUS
ΓΕΝΙΚΟ ΔΙΚΑΣΤΗΡΙΟ ΤΗΣ ΕΥΡΩΠΑΪΚΗΣ ΕΝΩΣΗΣ
GENERAL COURT OF THE EUROPEAN UNION
TRIBUNAL DE L'UNION EUROPÉENNE
CÚIRT GHINEARÁLTA AN AONTAIS EORPAIGH
TRIBUNALE DELL'UNIONE EUROPEA
EIROPAS SAVIENĪBAS VISPĀRĒJĀ TIESA
EUROPOS SĄJUNGOS BENDRASIS TEISMAS
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EUROPEISKA UNIONENS TRIBUNAL

LUXEMBOURG

REPORT FOR THE HEARING*

(Competition – Abuse of dominant position – Microprocessors market – Decision finding infringements of Article 82 EC and Article 54 of the EEA Agreement – Exclusivity agreements, quantity commitments and loyalty rebates – Naked restrictions – As-efficient-competitor test – Fine)

In Case T-286/09,

Intel Corp., established in Wilmington, Delaware (United States), represented by N. Green QC, M. Hoskins QC, K. Bacon, Barrister, S. Singla, Barrister, I. Forrester QC, A. Parr, Solicitor and R. Mackenzie, Solicitor,

applicant,

supported by

Association for Competitive Technology, Inc., established in Washington, D. C. (United States), represented by J.-F. Bellis, lawyer,

intervener,

v

European Commission, represented by T. Christoforou, V. Di Bucci, N. Khan and M. Kellerbauer, acting as Agents,

defendant,

supported by

Union fédérale des consommateurs – Que choisir (UFC – Que choisir), established in Paris (France), represented by J. Franck, lawyer,

intervener,

ACTION for annulment of Commission Decision C(2009) 3726 final of 13 May 2009 relating to a proceeding under Article 82 [EC] and Article 54 of the EEA

* Language of the case: English.

Agreement (case COMP/C-3/37.990 – Intel) (summary publication OJ 2009 C 227, p. 13), or, alternatively, annulment or reduction of the fine imposed on the applicant.

Background to the dispute

1 The applicant, Intel Corp., is a US-based company that designs, develops, manufactures, and markets central processing units ('CPUs'), chipsets, and other semiconductor components, as well as platform solutions for data processing and communications devices.

2 At the end of December 2008, Intel employed about 94 100 people worldwide. In 2007, Intel had net revenues of USD 38 334 million and a net income of USD 6 976 million. In 2008, Intel had net revenues of USD 37 586 million and a net income of USD 5 292 million.

I – *Administrative procedure*

3 On 18 October 2000, Advanced Micro Devices ('**AMD**') submitted a formal complaint to the Commission under Article 3 of Council Regulation (EC) No 17/62, First Regulation implementing Articles [81 EC] and [82 EC] (OJ English special edition, Series I Chapter 1959/1962, p. 87), which was further supplemented with new facts and allegations, in particular in November 2003.

4 In May 2004, the Commission launched a round of investigations relating to elements in AMD's supplementary complaint of 26 November 2003. Within the framework of that investigation, in July 2005, the Commission, assisted by several national competition authorities under Article 20(4) of Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles [81 EC] and [82 EC] (OJ 2003 L 1, p. 1), carried out on-the-spot inspections at four Intel locations in [geographic areas], as well as at the locations of several Intel customers in [geographic areas].

5 On 17 July 2006, AMD filed a complaint with the Bundeskartellamt (the German national competition authority), in which it claimed that Intel had engaged in exclusionary marketing arrangements and other practices with Media-Saturn-Holding GmbH ('**MSH**'), a European retailer of microelectronic devices and the largest desktop computer distributor in Europe. The Bundeskartellamt exchanged information with the Commission on this subject, pursuant to Article 12 of Regulation (EC) No 1/2003.

6 On 23 August 2006, the Commission interviewed [an executive] of Dell Inc. ('Dell'). The Commission did not place the agenda for the meeting on the case file and did not take minutes of it. By decision of 14 July 2009, the European Ombudsman concluded that that failure constituted an instance of maladministration by the Commission.

7 On 26 July 2007, the Commission notified a statement of objections (**'the SO of 2007'**) concerning Intel's conduct *vis-à-vis* five major original equipment manufacturers (**'OEMs'**), namely Dell, Hewlett-Packard Company ('HP'), Acer Inc. ('Acer'), NEC Corp. ('NEC') and International Business Machines Corp. ('IBM'). Intel replied to that statement of objections on 7 January 2008, and an oral hearing was held on 11 and 12 March 2008. Access to the file was granted three times to Intel (on 31 July 2007, 23 July 2008 and 19 December 2008).

8 The Commission undertook several investigative measures relating to the relevant AMD allegations, including on-the-spot inspections at the sites of several computer retailers and of Intel in February 2008. In addition, several written requests for information were addressed to a number of major OEMs.

9 On 17 July 2008, the Commission issued a supplementary statement of objections concerning Intel's conduct *vis-à-vis* MSH. That statement of objections (**'the SSO of 2008'**) also covered Intel's conduct *vis-à-vis* Lenovo Group Limited ('Lenovo') and included new evidence on Intel's conduct *vis-à-vis* some of the OEMs covered by the SO of 2007, which had been obtained by the Commission after the publication of the latter.

10 The Commission originally set Intel a deadline of eight weeks to submit its reply to the SSO of 2008. On 15 September 2008, that deadline was extended to 17 October 2008 by the Hearing Officer.

11 Intel did not reply to the SSO of 2008 within the prescribed period. Instead, on 10 October 2008, Intel lodged an application with the Court of First Instance (now the 'General Court') asking it, inter alia, to order the Commission to obtain several categories of additional documents from, amongst other sources, the file of the private litigation between Intel and AMD in the US State of Delaware. Intel further applied for interim measures to suspend the Commission's procedure pending a ruling of the General Court on its substantive application and to grant Intel 30 days from the date of that ruling to reply to the SSO of 2008.

12 On 19 December 2008, the Commission sent Intel a letter drawing its attention to a number of specific items of evidence which the Commission intended to use in a potential final Decision ('the **Letter of Facts of 2008**'). Intel did not reply to that letter by the deadline of 23 January 2009.

13 On 27 January 2009, the President of the General Court rejected Intel's application for interim measures and its request for extension of the deadline to reply to the SSO of 2008 (Order of the President of 27 January 2009 in Case T-457/08 R *Intel* v *Commission*, not published in the ECR). Following that order, on 29 January 2009, Intel proposed to file its reply to the SSO of 2008 and to the Letter of Facts of 2008 within 30 days of the Order of the President of the General Court.

14 On 2 February 2009, the Commission informed Intel by letter that the Commission services had decided not to grant an extension of the deadlines to reply to the SSO of 2008 or to the Letter of Facts of 2008. The letter also stated that the Commission services were nevertheless willing to consider the possible relevance of belated written submissions, provided that Intel served such submissions by 5 February 2009. Finally, the letter stated that the Commission services considered that the proper conduct of the administrative procedure did not necessitate an oral hearing.

15 On 5 February 2009, Intel served a written submission including observations relating to the SSO of 2008 and the Letter of Facts of 2008, which it classed as a 'reply to the SSO [of 2008]' and a 'reply to the [Letter of Facts of 2008]'.

16 On 10 February 2009, Intel wrote to the Hearing Officer and asked to be granted an oral hearing in relation to the SSO of 2008. The Hearing Officer replied by letter of 17 February 2009, rejecting that request.

17 On 13 May 2009, the Commission adopted Decision C(2009) 3726 final relating to a proceeding under Article 82 [EC] and Article 54 of the EEA Agreement (Case COMP/C-3/37.990 – Intel) (summary OJ 2009 C 227, p. 13) ('**the Decision**').

II – *The Decision*

18 According to the Decision, 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, AMD, from the market for x86 microprocessors.

A – *Relevant market*

19 The products concerned by the Decision are CPUs. The CPU is a key component of any computer, both in terms of overall performance and cost of the system. It is often referred to as a computer's 'brain'. The manufacturing process of CPUs requires expensive high-tech facilities.

20 CPUs used in computers can be sub-divided into two categories: CPUs of the x86 architecture ('**x86 CPUs**') and CPUs of a non-x86 architecture. x86 architecture is a standard designed by Intel for its CPUs. It can run both the Windows and Linux operating systems. Windows is primarily linked to the x86 instruction set. Prior to 2000, there were several manufacturers of x86 CPUs. However, most of these manufacturers have exited the market. The Decision states that, since then, Intel and AMD have been essentially the only two companies still manufacturing x86 CPUs.

21 The Commission's enquiry led to the conclusion that the relevant product market was not wider than the market of x86 CPUs. The Decision leaves open the question whether the relevant product market definition could be subdivided

between x86 CPUs for desktop computers, x86 CPUs for notebook computers and x86 CPUs for servers since, given Intel's market shares under either definition, there is no difference to the conclusion on dominance.

22 The geographical market has been defined as worldwide.

B – *Dominant position*

23 The Decision finds that, in the 10-year period examined by the Decision (1997-2007), Intel consistently held market shares in excess of 70%. Furthermore, according to the Decision, there are significant barriers to entry and expansion in the x86 CPU market. They arise from sunk investments in research and development, intellectual property and the production facilities that are necessary to produce x86 CPUs. In consequence, all Intel's competitors, except AMD, have exited the market or are left with an insignificant share.

24 On the basis of Intel's market shares and the barriers to entry and expansion, the Decision concludes that at least in the period covered by the Decision (October 2002 to December 2007), Intel held a dominant position in the market.

C – *Abuse*

25 The Decision describes two types of Intel conduct *vis-à-vis* its trading partners, namely conditional rebates and 'naked restrictions'.

26 First, according to the Decision, Intel awarded four OEMs (Dell, Lenovo, HP and NEC) rebates which were conditioned on these OEMs purchasing all or almost all of their x86 CPUs from Intel. Similarly, Intel awarded payments to MSH, which were conditioned on MSH selling exclusively computers containing Intel's x86 CPUs.

27 The Decision concludes that the conditional rebates granted by Intel constitute fidelity rebates. With regard to Intel's conditional payments to MSH, the Decision establishes that the economic mechanism of these payments is equivalent to that of the conditional rebates to OEMs.

28 The Decision also conducts an economic analysis of the capability of the rebates to foreclose a hypothetical competitor as efficient as Intel (as-efficient-competitor, '**AEC**'), albeit not dominant. In essence, the test establishes at what price a competitor as efficient as Intel would have to offer CPUs in order to compensate an OEM for the loss of an Intel rebate. The same kind of analysis was conducted for the Intel payments to MSH.

29 The evidence gathered by the Commission led it to the conclusion that Intel's conditional rebates and payments induced the loyalty of the key OEMs and of MSH. The effects of these practices were complementary, in that they significantly diminished competitors' ability to compete on the merits of their x86

CPUs. Intel's anticompetitive conduct thereby resulted in a reduction of consumer choice and in lower incentives to innovate.

30 Secondly, with regard to naked restrictions, the Commission states that Intel awarded three OEMs (HP, Acer and Lenovo) payments which were conditioned on these OEMs postponing or cancelling the launch of AMD-based products and/or putting restrictions on the distribution of those products. The Decision concludes that Intel's conduct directly harmed competition, and did not constitute normal competition on the merits.

31 The Commission concludes in the Decision that, in each instance, Intel's conduct *vis-à-vis* the OEMs mentioned above and MSH constitutes an abuse under Article 82 EC, but that each of those individual abuses are also part of a single strategy aimed at foreclosing AMD, Intel's only significant competitor, from the market for x86 CPUs. They are therefore part of a single infringement of Article 82 EC.

D – *Fine and operative part*

32 In accordance with the Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003 (OJ 2006 C 210, p. 2; '**the 2006 Guidelines**'), the Commission determined that the basic amount of the fine is related to a proportion of the value of sales, depending on the degree of gravity of the infringement, multiplied by the number of years of the infringement.

33 When determining the proportion of the value of sales to be used to establish the basic amount of the fine, the Commission took into account, in particular, the nature, the market share and the geographic scope of the infringement. The Commission also took into account the facts that Intel had committed a single infringement, that the intensity of that single infringement differed across the years and that most of the individual abuses concerned are concentrated in the period ranging from 2002 to 2005, that the abuses differ in their respective likely anticompetitive impact, and that Intel took measures to conceal the practices established in the Decision. In consequence, the Commission fixed that proportion at 5%.

34 Regarding the duration of the infringement, the Commission noted that the abuse commenced in October 2002 and continued until at least December 2007. It therefore lasted 5 years and 3 months, which, in accordance with paragraph 24 of the 2006 Guidelines, means the basic amount should be multiplied by 5.5 to take account of that duration.

35 In view of the foregoing, the Commission found that the basic amount of the fine to impose on Intel was to be EUR 1 060 000 000. It found no mitigating or aggravating circumstances.

36 The operative part of that Decision reads as follows:

'*Article 1*

Intel Corporation has committed a single and continuous infringement of Article 82 [EC] ... from October 2002 until December 2007 by implementing a strategy aimed at foreclosing competitors from the market of x86 CPUs which consisted of the following elements:

a) Granting rebates to Dell between December 2002 and December 2005 at a level that was conditional on Dell obtaining all of its x86 CPU supplies from Intel;

b) Granting rebates to HP between November 2002 and May 2005 at a level that was conditional on HP obtaining at least 95% of its corporate desktop x86 CPU supplies from Intel;

c) Granting rebates to NEC between October 2002 and November 2005 at a level that was conditional on NEC obtaining at least 80% of its client PC x86 CPU supplies from Intel;

d) Granting rebates to Lenovo between January 2007 and December 2007 at a level that was conditional on Lenovo obtaining all of its notebook x86 CPU supplies from Intel;

e) Granting payments to Media Saturn Holding between October 2002 and December 2007 at a level that was conditional on Media Saturn Holding selling only computers incorporating Intel x86 CPUs;

f) Granting payments to HP between November 2002 and May 2005 conditional on: (i) HP directing HP's AMD-based x86 CPU business desktops to Small and Medium Business and Government, and Educational and Medical customers rather than to enterprise business customers; (ii) precluding HP's channel partners from stocking HP's AMD-based x86 CPU business desktops such that such desktops would only be available to customers by ordering them from HP (either directly or via HP channel partners acting as sales agent); and (iii) HP delaying the launch of its AMD-based x86 CPU business desktop in the [Europe, Middle East and Africa] region by six months;

g) Granting payments to Acer between September 2003 and January 2004 conditional on Acer delaying an AMD-based x86 CPU notebook;

h) Granting payments to Lenovo between June 2006 and December 2006 conditional on Lenovo delaying and finally cancelling its AMD-based x86 CPU notebooks.

Article 2

For the infringement referred to in Article 1, a fine of EUR 1 060 000 000 is hereby imposed on Intel...

Article 3

Intel ... shall immediately bring to an end the infringement referred to in Article 1 in so far as it has not already done so.

Intel ... shall refrain from repeating any act or conduct described in Article 1, and from any act or conduct having the same or equivalent object or effect.

....'

III – *Proceedings in other jurisdictions*

37 Intel's conduct has also been the object of procedures conducted by other public regulatory authorities. On 8 March 2005, the Japan Fair Trade Commission ('JFTC') found that Intel's conduct infringed Section 3 of the Japanese Antimonopoly Act. It concluded that since May 2002 Intel had made the five major Japanese OEMs refrain from adopting competitors' CPUs for all or most of the PCs manufactured and sold by them or all of the PCs that belong to specific groups of PCs referred to as 'series', by making commitments to provide the five OEMs with rebates and/or certain market development funds ('MDFs').

38 On 4 July 2008, the Korean Fair Trade Commission ('KFTC') found that, in the period from 2002 to 2005, Intel had tried to exclude AMD from the market by providing various rebates to local OEMs, including Samsung Electronics and Sambo Computers (TriGem), contingent upon them not purchasing CPUs from AMD. The KFTC imposed a corrective order and a fine of KRW (Korean won) 26 billion (approximately EUR 16.5 million) on Intel.

39 The Federal Trade Commission of the United States of America ('the FTC') and the Attorney General of the State of New York also initiated an investigation of Intel's commercial practices.

Procedure and forms of order sought

40 By application lodged at the Court Registry on 22 July 2009, the applicant brought the present action.

41 By document lodged at the Registry on 14 October 2009, AMD sought leave to intervene in the present proceedings in support of the Commission. However, on 16 November 2009, AMD informed the General Court that it was withdrawing its intervention in the case. In consequence, by order of the President of the Eighth Chamber of the General Court of 5 January 2010, AMD was removed from the case as intervener.

42 By document lodged at the Registry on 30 October 2009, the Union fédérale des consommateurs – Que choisir (UFC – Que choisir) (**'UFC'**) sought leave to intervene in the present proceedings in support of the Commission. By order of 7 June 2010, the President of the Eighth Chamber of the Court granted leave. By letter lodged at the Registry on 22 September 2010, UFC informed the Court that it would not be lodging a statement in intervention but that it would make oral submissions at the hearing.

43 By document lodged at the Registry on 2 November 2009, the Association for Competitive Technology (**'ACT'**) sought leave to intervene in the present proceedings in support of Intel. By order of 7 June 2010, the President of the Eighth Chamber of the Court granted leave. ACT submitted its statement in intervention within the prescribed period, and the main parties submitted their observations on that statement.

44 Intel and the Commission requested that certain confidential matters contained in the application, the defence, the reply, the rejoinder and their respective observations on the statements in intervention not be communicated to the interveners. They produced a common non-confidential version of those various procedural documents. Only that non-confidential version of the procedural documents was communicated to the interveners, who raised no objections in that regard.

45 Following a change in the composition of the Chambers of the General Court in September 2010, and following the election of the Judge-Rapporteur as President of the Seventh Chamber, the present case was assigned to that chamber.

46 By decision of 18 January 2012, the Court referred the case to the Seventh Chamber sitting in extended composition, pursuant to Article 14 and Article 51(1) of the Rules of Procedure of the General Court.

47 The applicant, supported by ACT, claims that the Court should:

- annul the Decision in whole or in part;
- in the alternative, annul or substantially reduce the amount of the fine imposed;
- order the Commission to pay the costs.

48 The Commission contends that the Court should:

- dismiss the action;
- order the applicant to pay the costs.

Pleas in law and arguments of the parties

I – *Summary of the pleas in law and arguments put forward by the applicant*

49 The pleas in law and arguments advanced by the applicant in its application may be summarised as follows:

50 First, it claims that the Commission erred in law by:

- finding that the conditional rebates granted by Intel to its customers were abusive per se by virtue of them being conditional without establishing that they had an actual or potential capability to foreclose competition;
- 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;
- failing to analyse whether Intel's rebate arrangements with its customers were implemented in the territory of the European Community and/or had immediate, substantial, direct and foreseeable effects within the latter.

51 Secondly, the applicant claims that 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 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 rebates. In particular, the Commission fails:

- 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;
- to establish a causal link between what it finds to be conditional rebates and the decisions of Intel's customers not to purchase from AMD;
- to analyse the evidence of the impact of Intel's rebates upon consumers.

52 Thirdly, the applicant submits that the Commission fails to prove that Intel engaged in a long-term strategy to foreclose the competitors.

53 Fourthly, the applicant submits that the Commission infringed essential procedural requirements during the administrative procedure, and infringed Intel's rights of defence. In particular, the Commission failed:

– to grant Intel an oral hearing in relation to the SSO of 2008 and the Letter of Facts of 2008, even though they raised entirely new allegations and referred to new evidence which feature prominently in the Decision;

– to procure certain internal documents from AMD for the case file, when requested to do so by the applicant notwithstanding that, in the applicant's opinion, the documents were directly relevant to the Commission's allegations against Intel, were potentially exculpatory of Intel and had been identified with precision by Intel;

– 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.

54 The applicant also challenges the level of the fine imposed upon it on three main grounds:

– First, it claims that the fine of EUR 1 060 000 000 is manifestly disproportionate given that the Commission fails to establish any consumer harm or foreclosure of the competitors;

– Secondly, the applicant submits that it did not intentionally or negligently infringe Article 82 EC. The Commission's AEC analysis is based on information that Intel could not know at the time it was granting rebates to its customers;

– Thirdly, the applicant contends that in setting the fine the Commission failed to apply the 2006 Guidelines correctly, and takes into account irrelevant or inappropriate considerations.

55 For the purposes of this report for the hearing, however, the presentation of the pleas and arguments in the application should be restructured in order to draw a clearer distinction between, on the one hand, the heads of claim for annulment of the Decision and those seeking annulment or reduction of the fine, and on the other hand, the pleas concerning horizontal questions and the internal and external legality of the Decision. It is also appropriate to adopt a standardised structure given that the Decision, the application and the defence are each structured differently.

II – *Admissibility of certain documents and annexes*

56 The applicant submits that in the defence the Commission commits new procedural violations by (i) setting out a significant number of facts and arguments in the annexes to the defence rather than in the defence itself; (ii) relying on three documents for the first time even though they could have been obtained during the administrative procedure; and (iii) relying on a document from Dell dated 23 June 2009 (Annex B.27), even though it post-dates the Decision and is heavily redacted. In particular, sections 2 and 3 of Annex B.1 and

Annex B.31, to which the defence makes only very general references, and three documents which were not on the case file during the administrative procedure, should be excluded as inadmissible and not given consideration by the General Court.

57 The Commission, for its part, contends that Annexes C.9, C.11, C.12, C.13, C.16, C.17, C.18, C.19, C.20, C.21, C.23, C.24, C.56, C.57, C.58, C.59, C.60, C.61, C.62, C.63, C.64 and C.65 are inadmissible by virtue of Article 48(1) of the Rules of Procedure, since the belated production of documents from the proceedings in Delaware cannot be explained as a consequence of the settlement of that litigation.

58 The Commission maintains that its use of the annexes in the defence was very similar to Intel's use of annexes in the application, and that its arguments relating to the existence of consumer harm, the existence of a single strategy to exclude AMD and the AEC analysis are addressed in detail in the defence. As to the three documents which were not in the file during the investigation, the Commission submits that those documents were not used in the defence to incriminate Intel. Furthermore, the Commission points out that Intel itself submitted hundreds of pages of new documents from the Delaware proceedings which were not on the case file. Finally, the email sent by a Dell executive merely corroborates the interpretation the Commission gives to [a Dell executive's] evidence.

III – *The heads of claim for annulment of the Decision*

59 The heads of claim seeking the annulment of the Decision are based on three main groups of pleas in law, alleging that the Commission was not competent for lack of jurisdiction (extraterritoriality), that formal and essential procedural requirements were breached, and that errors were made in the appraisal of facts in respect of the findings made in the Decision. As a preliminary point, the applicant puts forward observations on certain horizontal issues.

A – *Preliminary issues*

1. The burden and standard of proof and the scope of judicial review

60 The applicant points out that the Commission must prove the existence of an infringement of Article 82 EC, in particular by establishing 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. 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 proof and the presumption of innocence apply. In reviewing the evidence, the Court is required to give the Commission's factual and economic analysis a full review. That responsibility has been significantly heightened by the entry into force of the Charter of Fundamental Rights of the European Union.

61 The Courts of the European Union 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 of competition rules. Relying on Case T-201/04 *Microsoft* v *Commission* [2007] ECR II-3601 ('the judgment in *Microsoft*'), paragraph 89, the applicant submits that the Court is entitled and required to engage in an intensive review of the Commission's factual and economic analysis, and that where there is doubt in the Court's mind, it must be resolved in favour of the applicant.

62 The applicant submits, further, that unlike cartel cases, in which all the participants act unlawfully and therefore have an incentive to conceal their activities, Intel's customers had no incentive to conceal records evidencing its commercial conduct. If the Commission has not found sufficient evidence to substantiate an infringement, it is because the infringement did not take place, and not because of an attempt at concealment.

63 The Commission asserts that, in view of Intel's efforts to conceal the anticompetitive practices established in the Decision, it has been very difficult to unearth direct contemporaneous evidence for each and every element of Intel's anticompetitive conduct. Therefore, the Commission submits that the secret nature of Intel's arrangements must be taken into account when assessing the standard of proof that applies in this case. An analogy with cartel cases is appropriate since it is because of Intel's market power that its customers acquiesced in the concealment of its unlawful practices.

64 Since direct evidence proving anticompetitive behaviour clearly and in a comprehensive manner is inevitably scarce, it is necessary to examine the individual elements of evidence together, and, by an overall assessment, deduce certain details. It is not necessary for every item of evidence produced by the Commission to satisfy the required standard of proof in relation to every aspect of the infringement. It is sufficient that the body of evidence relied on by the institution, viewed as a whole, meets that requirement.

2. Conditions for the application of Article 82 EC and the unlawfulness '*per se*' of certain conduct

65 The applicant, supported by ACT, submits that, in light of the relevant case-law (in particular Case 85/76 *Hoffmann-La Roche* v *Commission* [1979] ECR 461 ('the judgment in *Hoffmann-La Roche*'), and Case T-203/01 *Michelin* v *Commission* [2003] ECR II-4071 ('the judgment in *Michelin II*') and the Communication from the Commission – Guidance on the Commission's enforcement priorities in applying Article 82 [EC] to abusive exclusionary conduct by dominant undertakings (OJ 2009 C 45 p. 7; 'the Commission **Guidance**'), any approach which condemns as an abuse a rebate regardless of its effect (a *per se* approach) is wrong.

66 In that regard, though the Commission purports not to have taken a *per se* approach in the Decision (see footnote no 1231 of the Decision), it finds that a rebate agreement like those at issue in the present case may be abusive by virtue only of its being conditional and without regard to its effects or capability to restrict competition. Further, according to Intel, the Commission suggests that an infringement of Article 82 [EC] may also result from the anti-competitive object of the practices pursued by a dominant undertaking. According to the case-law, it is necessary to show that the relevant conduct 'tends to' have or 'is capable of' having a restrictive (or foreclosing) effect on competition. Accordingly, even if the Court finds that the Commission has accurately assessed the nature of the rebates offered by the applicant, it must then assess whether the Commission has proved that the rebates were capable of restricting competition. In particular, the Court must consider whether the AEC analysis in the Decision has been carried out in accordance with the applicable rules. The relevance of such an analysis has been confirmed recently by Advocate General Mazák in his Opinion in Case C-280/08 P *Deutsche Telekom* v *Commission* [2010] ECR I-0000, point 49.

67 According to the applicant, in order to decide 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 rebate, and to investigate whether, in providing an advantage not based on any economic service justifying it, the rebate tends to remove or restrict the buyer's freedom to choose his sources of supply and to bar competitors from access to the market (Case C-95/04 P *British Airways* v *Commission* [2007] ECR I-2331, paragraph 67). The applicant submits that an essential part of considering 'all the circumstances' is to analyse the causal link between the abusive conduct and buyers' decisions. Accordingly, to establish an abuse, the Commission must prove the nexus between the conduct and the effect on competition.

68 In its reply, the applicant adds that the finding of infringement in the judgment in *Hoffmann-La Roche* depended upon the existence of a system of fidelity rebates that in most cases imposed on customers a *de jure* (and in others at least a *de facto*) obligation to buy all or most of their supplies from the dominant undertaking. In the present case, the finding of infringement rests on unsupported claims that Intel gave an 'impression' that OEMs would experience disproportionate rebate reductions if they switched to AMD, even if this was an 'empty threat'. While the Decision claimed that Intel 'would have reduced' rebates disproportionately if an OEM had switched to AMD, the Commission now abandons that assertion in its defence, implicitly conceding that it has failed to meet its burden of proof.

69 The applicant also points out that the defence acknowledges the case-law (Case T-271/03 *Deutsche Telekom* v *Commission* [2008] ECR II-477, paragraph 192) according to which the unlawfulness of fidelity rebates cannot depend on whether the customer believes in the dominant company's communications of

conditionality, since the extent to which the customers actually believe in the disproportionate reduction of rebates is a matter that is typically unknown to the dominant company. According to the applicant, that admission is fatal to the legal validity of the Decision.

70 The Commission submits that there is no requirement in the case-law to demonstrate actual foreclosure in order to prove an infringement of Article 82 EC. Further, with regard to conduct which amounts to granting fidelity rebates, there is no requirement in the case-law even to demonstrate capability of foreclosure. An infringement of Article 82 EC may also result from the anticompetitive object of the practices pursued by a dominant undertaking.

71 In that regard, the Commission wishes to specify that, in footnote no 1231 of the Decision, it rejected the concept of a *per se* approach since conduct which is in principle considered abusive under Article 82 EC can be objectively justified in an individual case. On that basis it asserts that it is conceptually wrong to say that certain practices are unlawful *per se*. However, the case-law recognises that, if there is no objective justification, certain conduct is in principle unlawful and that, in that context, the Commission does not need to show that the conduct is capable of producing anticompetitive effects in an individual case.

72 In the present case, the Commission maintains that it does not need to prove the potential effects of the applicant's practices. According to the Commission, the unlawfulness of Intel's practices follows from the fact that they constitute fidelity rebates within the meaning of the judgment in *Hoffmann-La Roche* (paragraph 65 above) and the fact that they pursued an anticompetitive object or were part of an anticompetitive strategy. At paragraph 68 of the judgment in *British Airways v Commission* (paragraph 67 above), the Court concluded that the examination of potential exclusionary effects is only required for rebates other than fidelity rebates within the meaning of the judgment in *Hoffmann-La Roche*. The Commission submits that the judgment in *Michelin II* (paragraph 65 above) does not contain a general statement according to which abuse within the meaning of Article 82 EC is an objective concept based upon the effect on normal competition. Finally, in the absence of an obligation on the Commission to demonstrate potential or actual effects in order to establish the unlawfulness of the practices at issue, those judgments cannot require the Commission to prove a causal link between the practice at stake and such effects.

73 Nevertheless, in the Decision, the Commission demonstrated that, on top of fulfilling the conditions of the case-law, the conditional rebates that Intel granted to Dell, HP, NEC and Lenovo, and the conditional payments granted to MSH, were capable of causing or likely to cause anticompetitive foreclosure. One possible way of showing whether the rebates and exclusivity payments were capable of causing or likely to cause anticompetitive foreclosure was to conduct an AEC analysis. The Commission notes that, on the basis of such an analysis, it concluded in the Decision that the conditional rebates to the OEMs, as well as

Intel's conditional payments to MSH, were an abuse. However, the efforts devoted to the AEC analysis are not to be taken as an indication that the Commission intended to depart from long-standing case-law on fidelity rebates or that the AEC analysis was part of the legal assessment made to establish the abusive nature of Intel's practices. The Hearing Officer stated in his final report that 'it is important to note that during the Hearing the Commission made it clear to Intel, and Intel understood, that the economic assessment was not a condition for a finding of abuse'.

74 In the rejoinder, the Commission adds that Intel's claim that fidelity rebates must be equivalent to *de facto* obligations rather than representing an 'empty threat' is equally fallacious. It is sufficient if the dominant company gives the impression that it will reduce rebates disproportionately if customers switch to its competitor. Moreover, if it were necessary to prove that fidelity rebates were reduced, it would be impossible to sanction the abuse in cases where customers decided not to switch purchases to the dominant company's competitor.

3. Foreclosure effect

75 The applicant states that, in the present case, it is not possible merely to assume, without analysing the relevant circumstances, that Intel's rebates 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. The applicant points out that, whereas in *Hoffmann-La Roche* v *Commission* (paragraph 65 above), in which the duration of most of the contracts was for an indefinite period, and where the contracts were clearly designed to establish trading relations for several years, the rebates granted by Intel generally related to periods of months and some were terminable on 30 days' notice. Furthermore, the OEMs are powerful, multi-national corporations, able to exert considerable pressure on both Intel and AMD to offer attractive terms.

76 The applicant submits that even if all the Commission's findings are accepted, the foreclosure claimed is well under 1% of the x86 CPU market segment during half of the relevant period, and never exceeds 2% during the entire period covered. Given that foreclosure must be viewed in the overall market context, the Commission's assertion in recital 921 of the Decision 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 either.

77 Finally, the applicant submits that the fact that, over the period covered by the Decision, AMD significantly increased its CPU revenues, profitability and market share, and the fact that quality adjusted CPU prices declined substantially, is inconsistent with the expected features of a market supposedly characterised by foreclosure of one of the two main competitors.

78 The Commission points out that the above claims are made on the assumption that the Commission must prove that Intel's exclusivity rebates and payments were capable of foreclosing AMD in the context of the relevant market. The Commission refers to its previous comments and repeats that that assumption is erroneous in law. It submits that the range of CPU products or the number of OEMs affected by the fidelity rebates may be relevant to determining the scope of the infringement and its gravity, but is irrelevant to the existence of an unlawful abuse.

79 In the rejoinder, the Commission adds that Hoffmann-La Roche's strategy might have extended over ten years, but the period retained for the Commission's Decision in that case was about five years, similar to that in the present case, and the contracts under which Hoffmann-La Roche pursued its strategy were of different durations, many being annual contracts, tacitly renewed each year. Most recently, the Court explicitly held that even if fidelity rebates are concluded for a short duration only, this does not exclude their anticompetitive nature (Case T-66/01 *Imperial Chemical Industries* v *Commission* [2010] ECR II-0000, paragraph 310).

80 Further, unlawful fidelity rebates can also be found to exist if rebates cover only a small segment of a market and it is sufficient if disproportionate volumes of rebates are lost, even where that loss is less than total.

4. Application of the AEC test

81 The applicant submits that the Commission made a series of errors of law and assessment regarding the AEC test which concern, horizontally, all Intel's agreements with the OEMs and MSH. The Decision biased every element of each of its AEC tests against Intel by (i) inflating Intel's average avoidable cost ('AAC'), (ii) depressing the contestable share, and (iii) inflating the conditional rebate amount.

82 As a preliminary point, the applicant submits that the AEC analysis is the only evidence that the Commission offers to show that Intel's rebates were capable of causing or likely to cause anticompetitive foreclosure. However, the Commission's approach of basing its determination of the contestable share, and the conditional part of rebates, on internal documents of Intel's customers is inadequate, since an undertaking can only conduct business based upon information within its knowledge (*Deutsche Telekom* v *Commission* (paragraph 69 above), paragraph 192).

83 Regarding Intel's AAC, the Commission's calculation includes a number of cost categories that are plainly unavoidable (fixed) over the one-year period used in the Decision. As the Foster report showed, the Commission therefore used an inflated value for the AAC.

84 The applicant further submits that the Commission made a fundamental mistake of logic concerning the sales and marketing costs. On the price side of the ledger, the Commission calculated Intel's incremental revenues based upon the 'effective' price, which it calculated by allocating the entire conditional rebate to the contestable portion of Intel's sales, thereby depressing the effective price. But on the cost side of the ledger, it calculated the sales and marketing costs as if Intel had obtained the much higher average price for the contestable sales. In other words, the Commission erroneously assumes different selling prices in different parts of its AEC analysis, to Intel's detriment. This mistake results in a very significant overstatement of Intel's expenses for sales incentives and the Intel Inside program.

85 In the defence, the Commission does not respond directly to those preliminary observations but examines them in the context of its own observations regarding each OEM. In the rejoinder, it adds that it did not inflate Intel's costs since the AEC analysis does not have to assume that the as-efficient competitor has the same unit production cost, given that, in the semiconductors industry, significant economies of scale obtain.

5. 'Naked' restrictions

86 The applicant submits that, in using the terms 'naked restrictions', the Commission, though it suggests at recital 1463 of the Decision that that concept derives from the judgment in Case T-228/97 *Irish Sugar* v *Commission* [1999] ECR II-2969, wishes to create a novel category of exclusionary abuse for which no analysis of foreclosure is required. However, EU competition law does not recognise this novel category of abuse, and because the Decision based its finding of a naked restriction on facts known only to the OEMs, that theory is incompatible with *Deutsche Telekom* v *Commission* (paragraph 69 above).

87 In its reply, the applicant contests the Commission's assertion in its defence that the question whether Intel was 'responsible' for the decision to delay the launch of AMD-based products is irrelevant to the existence of an abuse. The defence impermissibly ignores the element of causation that forms an integral part of the Decision's finding of an abuse.

88 Instead, the applicant requests that the Court consider whether the Commission has proved that Intel offered payments to HP, Acer or Lenovo in order for these OEMs to delay, cancel, or restrict the commercialisation of certain AMD-based products. Next, 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. According to the applicant, the Commission cannot avoid analysis of the economic impact of the conduct by asserting that consumers were deprived of a choice which they would otherwise have had.

89 The Commission submits that the situation in the present case is directly analogous to that at issue in the judgment in *Irish Sugar* v *Commission* (paragraph 86 above). The applicant's conduct prevented a competitor's product from coming to market to the advantage of its own products, thereby undermining effective competition. Intel's claims as to the differences between the *Irish Sugar* v *Commission* case and the present case are legally irrelevant.

90 In any event, the Commission submits that the naked restrictions amply satisfy Intel's own standard that actual foreclosure need not be shown where, on the facts, the practice is likely to foreclose. Paying an OEM to cancel or delay an AMD equipped computer is, self-evidently, likely to foreclose AMD's access to the market.

B – *Extraterritoriality*

91 The applicant, supported by ACT, points out that Articles 81 and 82 EC do not have unlimited territorial scope and that, accordingly, in order to assume jurisdiction over conduct occurring outside the European Union, the Commission must, in accordance with the case-law, establish a direct causal connection with the territory of the European Union, by adducing strong evidence of the actual implementation of the conduct at issue leading to a substantial effect on competition within the European Union (Joined Cases C-89/85, C-104/85, C-114/85, C-116/85, C-117/85 and C-125/85 to C-129/85 *Ahlström Osakeyhtiö and Others* v *Commission* [1988] ECR 5193 ('the judgment in *Wood Pulp*')). It is also established that where trade with third countries is involved, even where implementation takes place within the European Union, the Commission must also prove that its effects within the European Union are immediate, substantial, direct and foreseeable (Case T-102/96 *Gencor* v *Commission* [1999] ECR II-753, paragraphs 90 and 92).

92 According to the applicant, the Decision fails to satisfy these criteria in challenging Intel's agreement with Lenovo in the second half of 2006 regarding a notebook computer for the domestic [geographic area] market. Further, in relation to all those agreements involving entities located outside the EC (including Dell, HP, NEC, Acer, and Lenovo), the Decision fails to establish that the Commission has jurisdiction. In particular, the Commission failed to consider necessary questions, namely (i) whether those agreements were implemented within the European Union, (ii) whether they affected sales made within the European Union and (iii) whether any effects in the European Union were substantial, direct and foreseeable.

93 It its reply, the applicant adds that the Commission's approach would mean that the Commission had worldwide jurisdiction whenever an abuse could be established, even if there were no impact of any kind on the European Union. Even if the Commission's approach to rebates and naked restraints were correct, the Commission is required to demonstrate an effect on the European Union to

establish jurisdiction since the issue of territorial jurisdiction is separate and distinct, arising from public international law. The failure to address the issue of extra-territoriality in the Decision is particularly pronounced in the case of the Lenovo agreement in the second half of 2006, which focused on the domestic [geographic area] market.

94 The Commission first observes that its jurisdictional competence was never questioned by Intel during the administrative procedure. In any event, the Decision applied European competition law to practices presenting a close and genuine link to the European Union. The judgments in *Woodpulp* and *Gencor* v *Commission* (paragraph 91 above) make clear that the application of European competition law is justified by the implementation of a practice within the European Union, which does not require more than mere sales within the European Union, irrespective of the location of the sources of supply and the production plant. Neither of the judgments requires that actual or potential effects within the EU be shown. According to the Commission, given that the applicant's infringements of Article 82 EC may be established without reference to their effects on competition, it cannot follow from the cases relied on by Intel that the Decision had to prove effects within the European Union to establish the Commission's competence.

95 In any event, the Commission submits that the Decision establishes a direct connection between Intel's infringing practices and the territory of the European Union. The Commission submits that many of the computers containing the x86 CPUs affected by Intel's practices were sold in the EEA. More specifically, Europe was a significant market for Lenovo.

C – *Procedural irregularities*

96 The applicant submits 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 of 2008 and the Letter of facts of 2008; (ii) procure relevant and potentially exculpatory documents from AMD for the case file when requested to do so by Intel; and (ii) make a proper note of its meeting with a key Dell witness, [one of its executives], who had previously provided highly relevant exculpatory testimony to the FTC in 2003.

1. Refusal to grant a second hearing

97 The applicant, supported by ACT, submits that the Commission unlawfully refused Intel an oral hearing in relation to the SSO of 2008 and the Letter of Facts of 2008, even though those documents raised entirely new allegations concerning, in particular, conditional rebates and naked restrictions involving Lenovo and the granting of rebates to MSH. Intel point outs that under Article 12 of Commission Regulation (EC) No 773/2004 of 7 April 2004 relating to the conduct of

proceedings by the Commission pursuant to Articles 81 and 82 [EC] (OJ 2004 L 123, p. 18), the Commission is to 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. The Commission itself recognised this in the covering letter to the SSO of 2008.

98 According to the applicant, the Commission's reasoning – according to which Intel was not entitled to an oral hearing as a matter of right because its reply to the SSO of 2008 did not fall within the meaning of Article 10(2) of Regulation No 773/2004, due to the fact that Intel chose not to reply by the extended deadline of 17 October 2008 – is flawed. By expressly agreeing to consider Intel's written submissions if served by 5 February 2009, the Commission itself extended the time-limit to 5 February 2009. Intel did not serve its reply to the SSO of 2008 and to the Letter of Facts of 2008 before 5 February 2009 because it was at that time applying to the General Court for annulment of the Hearing Officer's decision not to grant an extension of time and an interim order suspending the expiry of the time-limit.

99 Finally, the applicant submits that the failure to grant an oral hearing was material to the conclusions reached in the Decision.

100 The Commission submits, first, that Intel had no right to be heard orally concerning the Letter of Facts of 2008. According to Articles 10 and 12 Regulation No 773/2004, a right to an oral hearing only exists where the Commission issues a statement of objections.

101 Regarding the SSO of 2008, the Commission asserts that Intel forfeited its right to a second oral hearing by failing to request an oral hearing within the deadlines duly set. The combined provisions of Articles 10(2) and 12 of Regulation No 773/2004 establish that addressees of a statement of objections enjoy the right to an oral hearing only if they request such a hearing within the time-limit prescribed for the presentation of their written submissions. If the addressees of a statement of objections could choose to provide their comments orally whenever they wished, they could easily circumvent that time-limit.

102 The Commission submits that the applicant could, while still exercising its right of access to the Court, have submitted provisional comments on the SSO of 2008 and the Letter of Facts of 2008 and requested an oral hearing. As the President of the General Court noted at paragraph 87 of his order (paragraph 13 above), Intel could easily have done so on the basis of the information in its possession at the time and without prejudice to supplementing these comments at a later stage if it turned out that it was entitled to further information or to an extended time-period.

103 The Commission further states that during the administrative procedure as well as in the Decision itself, the Commission explicitly ruled out that Intel's belated submissions would be accepted as a timely reply or that the consideration of these

belated submissions could be construed as an extension of these time-limits. The claim that the Hearing Officer's refusal to grant a second oral hearing was unreasonable and disproportionate rests on the fallacious assertion that Intel had produced a timely reply to the SSO of 2008 and was thereby entitled to a hearing.

104 Finally, the Commission submits that even if Intel's right to be heard orally had been breached by the refusal to grant it a second oral hearing, Intel would need to explain how the outcome of the administrative procedure might have been influenced in Intel's favour if Intel had been heard orally for a second time.

2. Refusal to procure documents from AMD

105 The applicant points out that, on 21 May 2008, the Commission issued a request for further information to Intel and AMD in respect of the documents which they had cited in their pre-trial briefs in the US proceedings. According to Intel, these documents demonstrated the existence of additional AMD documents which were (i) directly relevant to the allegations in the SO of 2007 and SSO of 2008, 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. On 4 September 2008, Intel wrote to the Commission concerning the incompleteness of the case file and sent the Commission a schedule listing 87 points ('the **List**') corresponding to documents or categories of documents which it asked the Commission to procure from AMD ('the **AMD Delaware documents**'). However, the Commission decided to ask AMD for only seven of the AMD Delaware documents.

106 According to the applicant, the missing documents were very relevant to its defence. In refusing to procure such additional documents from AMD, the Commission failed to address relevant evidence and infringed an essential procedural requirement. The applicant submits that the case-law – according to which 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 wh'ich 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 (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, paragraphs 74 and 75) – applies equally in the present case, where the Commission failed even to procure relevant and exculpatory documents.

107 Next, the applicant examines the grounds relied on by the Commission to justify its refusal, and concludes that all those arguments are misconceived. In particular, it submits that its request was not too broad and that the relevance of the AMD Delaware documents was obvious and was set out in both the List and the covering letter to the request. The defence claims that Intel itself could have

obtained permission to use the AMD Delaware documents, but there was no possibility that AMD, Intel's opponent in the litigation and the complainant before the Commission, would have agreed to assist Intel before the Commission while its US litigation against Intel was pending.

108 In its reply, the applicant adds that, since the filing of its application, as a consequence of the settlement of the Delaware case between Intel and AMD, Intel has obtained the right to submit to the General Court a further small subset of the relevant AMD Delaware documents, which refute the defence's claim that AMD had resolved its performance and credibility problems at Dell by December 2002 and that Dell was interested in using AMD's Opteron (also called 'Hammer') CPUs in 2003.

109 The Commission submits that the argument about the AMD Delaware documents rests wholly on the assertion that the Commission was obliged to procure those documents. The Commission submits, however, that the judgments relied on merely grant the addressees of a statement of objections a right of access to documents that are already in the investigation file. The case-law relied on by the applicant provides no support for the very different proposition that the Commission is required to gather documents that are not in the investigation file merely because the addressee of the statement of objections believes that they might be exculpatory. In its judgment in Case T-161/05 *Hoechst* v *Commission* [2009] ECR II-3555, paragraph 167, the General Court explicitly held that a breach of the rights of defence can be excluded if, at the stage of notification of the statement of objections, the addressee had had access to all the elements which the file contained at that time. *A fortiori*, a company cannot claim a breach of its rights of defence for documents that are not even in the Commission's possession.

110 The principle of equality of arms is limited to documents contained in the investigation file as that principle ensures that the Commission and the addressee of the statement of objections have the same information at their disposal.

111 The Commission submits that it did not need the AMD Delaware documents to have a full and unbiased picture of the subject-matter of the proceeding. Following the publication online of pre-trial briefs by both Intel and AMD, on 21 May 2008, the Commission requested both Intel and AMD to submit all the documents written by or received by Intel and AMD and which were cited in their respective pre-trial briefs. The Commission submits that the information requested covers the main evidence from the US proceedings since the order of the Delaware court indicated that the pre-trial briefs should contain each party's main factual contentions in support of each of the elements of its claims or defences.

112 The Commission adds that Intel's request for these documents was unduly broad and following up on it would have significantly delayed the Commission proceedings. The List contained 87 points which, in reality, are generally not individual documents but categories of documents. Had the Commission acceded

to Intel's request, AMD could have provided hundreds of thousands of documents in response.

113 The Commission also argues that, given that Intel has not shown that it had exhausted the possibilities open to it to obtain the documents itself, its complaint about the AMD Delaware documents must be dismissed. The Commission points out that Intel does not explain why it did not make a request to the Delaware court to lift the Protective Order. In any event, Intel's claim that AMD was unwilling to allow documents to be released under the Protective Order is also factually wrong. In a letter of 10 June 2010 to Intel, AMD stressed its willingness to provide a waiver to use certain AMD Delaware documents at any time, subject only to reciprocity.

114 Finally, the Commission points out that, since Intel had full access to the AMD Delaware documents (though it claims that it was prevented from using these documents), Intel could have explained how the AMD Delaware Documents would have been useful for its defence against the Commission's allegations. The Commission states that, to establish the existence of an infringement of Article 102 TFEU, proof of (actual) foreclosure of AMD is not required.

3. Meeting with [a Dell executive]

115 The applicant observes that on 23 August 2006, the Commission interviewed [a Dell executive], [designation of position]. The applicant adds that the Commission accepted that the meeting had taken place only after Dell showed the existence of the meeting agenda, but denied that any minutes had been taken. Some months later, the Hearing Officer acknowledged that a case team member had produced a note of the meeting, but ruled that it was an internal note to which Intel did not have a right of access. A redacted version of this internal note was, finally, provided to Intel on 19 December 2008 (paragraph 6 above).

116 The applicant submits that according to the case-law, the rights of the 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 as exculpatory evidence (Joined Cases T-191/98 and T-212/98 to T-214/98 *Atlantic Container Line and Others* v *Commission* [2003] ECR II-3275, paragraph 396). In this context, [the Dell executive] was very likely to have given evidence exculpatory of Intel at this meeting. The Commission's failure therefore constitutes an infringement of an essential procedural requirement.

117 The Commission submits, first, that the issue is irrelevant to the lawfulness of the Decision. Further, the Commission contends that, under paragraph 13 of Commission Notice on the rules for access to the Commission file in cases pursuant to Articles 81 and 82 [EC], Articles 53, 54 and 57 of the EEA Agreement and Council Regulation (EC) No 139/2004 (OJ 2005 C 325, p. 7), and under paragraph 351 of the judgment in *Atlantic Container Line and Others* v

Commission (paragraph 115 above), it was not under a legal obligation to draw up minutes of its meeting with Dell. In any event, the Commission submits that it did adequately record the contents of the meeting, in that one of the Commission officials attending the meeting drew up a four-page note to the file describing in detail the content of the interview.

118 However, paragraph 13 of the notice on the rules for access to the file also indicates that that internal note was not covered by the right of access to the file. Similarly, the General Court has considered that an obligation to render accessible minutes or notes taken of meetings only arises where the Commission intends to use these documents as inculpatory information against the addressee of a statement of objections. A non-confidential version of the note was provided to Intel as a matter of courtesy.

119 The Commission further submits that that it can be excluded that the meeting with Dell covered exculpatory information. The implausibility of that assumption of Intel's is evident from the fact that Dell and [the Dell executive] himself had the opportunity to provide the Commission with exculpatory information throughout the administrative procedure, but did not do so. Finally, the Commission submits that the Ombudsman's decision (paragraph 6 above) contains no indication that the Commission breached Intel's rights of defence by withholding exculpatory evidence.

D – *Errors in the assessment of the conditional nature of the rebates and their effects*

120 The applicant submits that, in respect of each alleged abuse, the Court must first [title a) in each part below] consider whether, on the facts, the Commission has established the matters set out in recital 926 to the Decision, namely whether Intel (i) granted rebates to Dell, HP, NEC and Lenovo, 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, and (ii) granted payments (equivalent to rebates) to MSH which were *de facto* conditional upon that company selling exclusively PCs equipped with Intel CPUs.

121 According to the applicant, 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 existence of conditional agreements will not have been established. If the Commission were to prove those facts, the second question [title b) in each part below], would then arise, namely whether, in each case, those rebates were capable of foreclosing competitors.

1. Dell

a) Errors in the assessment of the conditional nature of the rebates

122 Regarding the assessment of the conditionality of the agreements with Dell, the Decision sets out the following matters: (i) from December 2002 to December 2005, Intel granted rebates to Dell under a meet competition programme ('the **MCP**'); (ii) Dell was free to start sourcing x86 CPUs also from AMD, but this would have entailed the loss of a significant and disproportionate part of the Intel MCP rebates; (iii) the rebates were therefore wholly or largely *de facto* conditional on Dell sourcing its CPUs and chipsets exclusively from Intel; and (iv) Dell was aware that the rebate arrangement was subject to this condition.

The applicant's arguments

123 According to the applicant, the Commission's finding on conditionality of the rebates granted to Dell is not based upon a reading of formal, express terms and conditions of any actual agreement between Intel and Dell, but solely upon inferences drawn by the Commission. The finding of conditionality rests on discredited internal speculation by a lower-level Dell employee. There is no evidence that Intel ever told Dell that it would impose disproportionate rebate reductions or that Dell believed that Intel would do so if Dell sourced from AMD. Dell in fact did switch to AMD in 2006 and suffered no adverse consequences.

– Dell's commercial strategy and its reasons for sourcing from Intel

124 The evidence on the file shows that until May 2006 Dell purchased its CPUs only from Intel, for reasons quite independent of any supposed fear of disproportionate rebate reductions if it sourced from AMD. Dell chose to source solely from Intel because of the lower cost of supplying only the Intel platform as against a dual-source policy. It believed that Intel's microprocessors were generally superior to those of AMD and that to purchase from AMD would create significant logistical problems; it doubted AMD's reliability as a supplier and its capacity to meet Dell's high volume requirements. The applicant asserts that Dell was of the view that it did not need actually to buy from AMD to benefit from the competition between Intel and AMD, because the threat of switching to AMD would force Intel to offer increased rebates.

125 The applicant submits that Dell's strategy, whereby it continuously evaluated the possibility of sourcing from AMD, is inconsistent with the theory in the Decision that Dell feared it would suffer a disproportionate response if it switched to AMD. According to the applicant, Dell's actual switch to AMD is further proof that Dell did not fear a disproportionate response from Intel. The evidence on the file demonstrates that Dell reviewed AMD's products repeatedly in the period from 2002 to 2005, notably the Opteron CPU and an AMD-based server (codenamed [CONFIDENTIAL]), but always faced multiple problems which prevented it from adopting a dual-source policy. Thus, Dell's decisions not to purchase from AMD

were caused by Dell's perceptions of its own self-interest and of AMD's acknowledged weaknesses and failures, not by any fear of disproportionate rebate reductions by Intel.

– The allegedly exculpatory testimony of Dell executives

126 The applicant claims that the Commission ignores the exculpatory testimony of Dell executives. The Commission ignores that testimony upon the spurious ground that it is 'far less probative' evidence than one of Dell's responses to a request for information from the Commission under Article 18 of Regulation No 1/2003 ('the **Article 18 response**'). According to the applicant, the testimony of senior corporate officials is deemed to be of greater probative force than mere unsworn corporate submissions. The Commission falls back on a single statement in the Article 18 response, where Dell states that 'the Dell team ... did not rule out the possibility that such reduction might be disproportionate to the reduction in the volume of Dell's purchases from Intel'. The applicant asserts that this is at most mere speculation and makes clear that Dell had no such knowledge or understanding.

127 In that regard, the applicant points out that in the context of the US proceedings, [a Dell executive], answered in the [CONFIDENTIAL] the following question: [CONFIDENTIAL]. Similarly, he is said to have added [CONFIDENTIAL]. Finally, he answered in the [CONFIDENTIAL] the question whether he could have announced in October 2003 that [CONFIDENTIAL]. Further, the testimony given by [another Dell executive] in his March 2003 deposition to the FTC, according to which '[t]here are no dollars that come from Intel that incent[ivise] us not to use any of their competitors' products' is also directly inconsistent with the Commission's conditionality theory. All of this evidence directly contradicts the Commission's findings that Intel's rebates to Dell were in some way *de facto* conditional upon exclusivity.

128 In the reply, the applicant adds that the assertion that Dell was convinced that the level of its MCP payments were based on Dell's status as an exclusive Intel vendor is irrelevant, in accordance with the principle of legal certainty. The defence departs from the Decision by asserting a new theory that an abuse does not depend on whether or not the customer believes in the dominant company's communications on conditionality. The claim that Intel warned Dell orally that its MCP payments would diminish disproportionately if Dell were to discontinue its exclusivity with Intel is also unsupported by the evidence, and ignores the testimony of Dell's key decision makers.

– The meeting of 23 August 2006

129 The applicant submits that, at the meeting of 23 August 2006 (see paragraph 6 above), [a Dell executive] is likely to have given evidence exculpatory of Intel and that, accordingly, the Commission's failure to take a proper record of that

meeting, and take due account of that evidence, constitutes a breach of Intel's rights of defence.

– The uncertainty of prices during negotiations and other evidence (internal Dell and Intel documents and documents relating to Dell's switch to AMD)

130 According to the applicant, the Decision erroneously suggests that the lack of any 'transparent and objective criteria' with respect to future rebates from Intel is somehow probative of an abuse by Intel. However, 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.

131 The applicant asserts that the remaining evidence relied on by the Commission, namely internal Dell documents, internal Intel documents and evidence regarding Dell's decision to source in part from AMD in 2006, do not corroborate the Commission's allegations.

132 First, most of the internal Dell documents on which the Commission relies were drafted by [CONFIDENTIAL], a Dell employee who did not participate in the key meetings regarding pricing between Intel and Dell. The applicant points out that in January 2009, [the Dell employee] gave sworn testimony in the US proceedings, that, inter alia, he sought to be [CONFIDENTIAL] and that his predictions as to what Intel would do if Dell were to source from AMD were [CONFIDENTIAL]. The Commission thus relies heavily on snippets of evidence from persons who did not have direct knowledge of the events, while ignoring the evidence of persons who were directly involved.

133 An example of the Commission's selectivity is highlighted by the Decision's treatment of an internal email sent by [the Dell employee] on 26 February 2004, claiming that Intel was 'prepared for [all-out war] if Dell joins the AMD exodus'. In fact, [the Dell employee] explained: [CONFIDENTIAL]. The Decision also omits to mention that Dell's own Article 18 response explained that [CONFIDENTIAL].

134 Secondly, regarding Intel's internal documents, none of these documents provides any answer to the question whether Dell's rebates would drop disproportionately if it sourced from AMD. A presentation by [an Intel executive] of 10 January 2003 merely states that Dell would receive 'less [MCP] dollars'. Because Dell would most likely switch to AMD the CPUs that faced the greatest competitive exposure downstream, the switch could have an impact on the appropriate MCP level unrelated to the volumes switched and without being punitive. The applicant adds, further, that whereas the Decision cites an email of [another Intel executive] of 18 June 2006 as proof that the Dell MCP rebates would be [CONFIDENTIAL] if Dell were to switch to AMD, Intel did not invalidate the MCP program and Dell's executives testified that Intel did not retaliate against Dell when it switched to AMD.

135 Thirdly, Intel's actual reaction when Dell decided, in May 2006, to start sourcing in part from AMD refutes the Commission's findings since, if Dell had feared a disproportionate reaction it would not have switched to AMD, and since, when Dell did switch, no disproportionate loss of rebates ensued. On the contrary, Intel agreed to an increase in its rebates to Dell in June 2006, only a month after Dell had announced that it would purchase AMD CPUs. Insofar as the Commission attempts to dismiss this evidence as of minor importance compared to the supposed fact that during the period under investigation Dell knew that it would lose a significant amount of its rebates, the applicant points out that the documents relied upon by the Commission cover only the first 15 months of the period of the alleged infringement.

136 The applicant asserts that, while the Dell rebate did decline during the fiscal year of 2007, this was absolutely not caused by Dell's decision to source from AMD but primarily by a dramatic reduction in Intel's list prices to align them more closely with transactional prices and by a substantial reduction in the volumes of CPUs purchased by Dell from Intel, as Mr Dell's testimony confirmed. The Commission's own data show that the rebate amount in the first quarter of the fiscal year of 2007 was far higher than in any other quarter discussed in the Decision, so that it could not be considered an adequate reference period. Finally, the Commission ignores the fact that the new rebate agreement which Dell entered into with Intel during this period was adopted at the request of Dell, not Intel.

The Commission's arguments

– Preliminary observations on the findings and evidence in the Decision

137 First of all, the Commission submits that, contrary to Intel's representations, the Commission does not have to prove that Dell's rebates would in fact have been reduced disproportionately if it had switched to AMD. The anticompetitive mechanism of fidelity rebates results from their potential to restrict customers' freedom to switch to the dominant company's competitor and it is sufficient if the dominant company gives the impression that the customer switching parts of its purchases to a competitor would result in a disproportionate loss of rebates. The unlawful nature of fidelity rebates does not depend on whether or not the customer believes in the dominant company's communications on conditionality.

138 Though Intel's oral communications on conditionality dependent on exclusive sourcing were characterised by their secret nature, the Commission argues that that conditionality is proven by the body of consistent evidence regarding, in particular, the fact that: (i) Dell was convinced that the level of its MCP payments and other incentives provided were based on Dell's status as an exclusive Intel vendor; (ii) internal communications within Intel show that Intel made clear to Dell in oral communications at working and higher levels that its MCP payments would disproportionately diminish if Dell were to discontinue its exclusivity with Intel; (iii) Intel left Dell in a state of uncertainty as to the disproportionate level of

the rebates that would be lost if it switched a part of its supplies to AMD, and as to whether these rebates would be granted to competing OEMs instead in such a scenario.

– Dell's commercial strategy and its reasons for sourcing from Intel

139 The Commission submits that the explanations as to Dell's reasons for purchasing from Intel (according to which Dell chose to buy from Intel for independent business reasons, and Dell's strategy of constant evaluation of switching to AMD is inconsistent with the Decision's theory) are legally irrelevant, unsubstantiated and cannot call into question the Commission's findings of conditionality.

140 Those contentions are irrelevant because in order to find an infringement of Article 82 EC it is sufficient if a dominant company grants rebates 'in order to give the buyer an incentive to obtain its supplies exclusively from the undertaking in a dominant position' (*British Airways* v *Commission* (paragraph 67 above) paragraph 62).

141 Furthermore, Intel's contentions are unfounded since, even if the factors enumerated in paragraph 124 et seq. above had an impact on Dell's decision to buy only from Intel, this would not imply that the conditionality of Intel's rebates would not have had a decisive impact on Dell's decision as well.

142 According to the Commission, though Dell constantly envisaged switching to AMD, the fact that, despite its interest in AMD's product, Dell did not buy from AMD during the period of the infringement indicates the conditionality of Intel's rebates and does not call into question the Decision's findings.

143 Finally, the references to AMD's allegedly poor performance *vis-à-vis* Dell relate, in the Commission's submission, to an execution incident in September 2002 and thus concern a period preceding the infringement.

– The allegedly exculpatory testimony of Dell executives

144 The Commission asserts that the extracts from the testimonies sworn under US law of certain Dell executives referred to by Intel represent no more than a couple of isolated statements taken out of context that do not tell the full story of Intel's rebate system applied *vis-à-vis* Dell and which were not submitted to the Court in accordance with Article 43(5) of the Rules of Procedure.

145 The Commission submits that the veracity of the statements of [a Dell executive] relied on by Intel (paragraph 127 above) is defendable on the basis of an understanding that the rebates were not a premium for exclusivity, but a compensation for Dell's disadvantage against its competitors that sold both Intel and AMD-based computers. This becomes obvious when [the Dell executive's] testimonies are read in conjunction with the deposition of [another Dell executive], who stated: [CONFIDENTIAL]. The Commission submits that the

somewhat contradictory depositions of these executives cannot call into question Dell's Article 18 response, which states: 'there was a general consensus [within Dell] that such a change [to AMD] would result in a reduction in MCP'. The reference, in that response, to the 'negative financial impact on Dell' that the reduction of rebates would result in shows that Dell expected a loss of rebates disproportionate to the volume of Dell purchases switched to AMD.

146 Finally, regarding [a Dell executive's] testimony in his deposition to the FTC in March 2003 (paragraph 127 above), the Commission submits that [this executive] altered fundamentally his statement that 'no dollars that come from Intel that [incentivise] us not to use any of their competitors' products' by saying that those dollars would disappear if Dell were to source from a competitor. In like manner, [this executive] confirmed that a message of [an Intel executive] [CONFIDENTIAL] meant that if Dell switched to AMD, Intel would change its competitive support, meaning it would give Dell less money.

147 In the rejoinder, the Commission adds a complaint of the US Securities and Exchange Commission ('SEC') reveals that there is evidence that not only did Dell and its senior executives have a corporate and personal interest in concealing the nature of Intel's rebates, but they actually did conceal their true nature.

– The other evidence (internal Dell and Intel documents and documents relating to Dell's switch to AMD)

148 First, regarding internal Dell documents, the internal Dell documents referred to in the Decision constitute self-standing evidence the probative value of which cannot be eroded by the interpretation subsequently given to it by some of Dell's executives in the Delaware proceedings. The relevance of most of the internal Dell documents adduced in the Decision, and in particular of [a Dell employee's] emails, was confirmed by Dell in a submission to the Commission under Article 18 of Regulation No 1/2003 dated 17 April 2007. In a chart attached to that submission, Dell highlighted the excerpts of the documents which it considered to be 'the most relevant', including the email of 26 February 2004 mentioning the word '[all-out war]' (paragraph 133 above).

149 Furthermore, contrary to Intel's contentions, [the Dell employee] was well informed of the rebate and pricing discussions between Intel and Dell during the period of the infringement. The quotes from [this employee's] testimony in the Delaware litigation do not disprove that he had contact with Intel executives that gave him ample knowledge of the business relationship between the two companies. When asked how he knew that Intel was 'ready for [all-out war]', [this employee] replied: [CONFIDENTIAL]. Later, when asked if [CONFIDENTIAL], [this employee] replied [CONFIDENTIAL].

150 The Commission would also point out that Dell's dependence on Intel's rebates made it necessary for Dell to analyse the worst case scenarios when assessing the

consequences resulting from switching part of its supplies to AMD. In any event, most documents referred to in the Decision describe several possible scenarios, the best of which still amounts to a disproportionate reduction of Intel rebates in case of switching part of Dell's supplies to AMD. Against this background, the Commission submits that the scenarios reflected by Dell to illustrate this range of possible outcomes, including [the Dell employee's] emails, are relevant evidence for the assessment of conditionality also given the absence of any properly documented and comprehensive agreements on this point between the two companies.

151 Secondly, regarding internal Intel documents, the Commission would first recall that Intel does not contest the email of [an Intel executive] of 17 February 2006 in which he commented on a news report which stated that Dell had announced that it had no plans to begin using chips from AMD, with the words 'the best friend money can buy'.

152 The Commission asserts that Intel's suggestion that [an Intel executive's] presentation of 10 January 2003 referred merely to a proportionate reduction of Intel's rebates in case of a switch is implausible, since the fact that Intel would not continue to pay rebates to Dell for units that Dell would have switched to AMD is obvious. According to the Commission, on Intel's view of the evidence, no explanation can be given why Intel would need high level meetings to enable Dell's [designation of position] 'clearly [to] understand', or to convey to him 'with *finesse*', such an obvious point.

153 Indeed, the applicant itself admits that the rebate cuts alluded to in [an Intel executive's] presentation were meant to be disproportionate to the volume of units purchased from AMD when it asserts that a Dell switch 'could have an impact on the appropriate MCP level unrelated to volumes switched [to AMD]'. In other words, Intel admits that if Dell had also decided to introduce AMD-based products in a product segment, Intel would have considered that Dell's 'competitive exposure', and therefore the need for a 'competitive response' had disappeared at least on that segment. The Commission asserts that if a dominant company rewards customers that do not purchase from its competitor for the consequent 'competitive exposure', competition on the merits is distorted. In that regard, the terms 'competitive exposure' are simply a euphemism for 'exclusivity'.

154 As regards [an Intel executive's] email of 18 June 2006 (paragraph 134 above), the Commission submits that Intel cannot play down the importance of a clear statement on the conditionality of Intel's rebates made by Intel's own [designation of position]. What is more, Intel's explanation as to the aim of this communication amounts to an explicit admission of the case established in the Decision since [this Intel executive's] email was sent to the competitor 'to encourage [it] to source its products [only] from Intel'.

155 Thirdly, regarding Intel's reaction to Dell's switch to AMD in 2006, the Commission submits that Intel's contentions are legally irrelevant and factually incorrect.

156 They are irrelevant because Dell's switch of part of its orders to AMD, announced in May 2006, took place after the period of the infringement found in the Decision *vis-à-vis* Dell and because the Commission's case rests on the incentive created by Intel's rebates for purchasers and the announcement that sourcing with AMD would result in the loss of a disproportionate amount of rebates. According to the Commission, even if Intel eventually decided not to reduce its rebates to Dell, this merely means that its announcement was an 'empty threat'.

157 Intel's arguments are also factually wrong in that the level of MCP rebates decreased immediately after the announcement of Dell's switch, from USD [CONFIDENTIAL] in the last quarter preceding the announcement to respectively USD [CONFIDENTIAL], USD [CONFIDENTIAL] and USD [CONFIDENTIAL] in the three following quarters (a reduction of [CONFIDENTIAL] %). Intel's assertion that it actually increased rebates after Dell's switching announcement was therefore rebutted in the Decision.

158 The drop in Intel's rebates granted to Dell cannot be explained by the smaller amount of units purchased from Intel and an overall decrease in Intel's prices. In that regard, Dell's total purchases from Intel in terms of revenue during these three quarters declined by [CONFIDENTIAL] % and Intel does not provide any quantitative data in support of its assertion that an alleged drop of list prices would have compensated for the rebate reduction.

159 Insofar as Intel asserts that the Commission does not rely on contemporaneous evidence showing the conditionality of its rebates to Dell for the period from April 2004 to December 2005 (paragraph 135 above), the Commission points out that there is relevant contemporaneous evidence for the conditionality of Intel's exclusivity rebates of 7 December 2004 in the deposition of [a Dell executive] (paragraph 146 above). Finally, contemporaneous evidence from within Intel from 2006 (paragraph 154 above) allows for an assessment of the nature of the business relationship between Dell and Intel. Further, according to the Commission, it would seem highly implausible that for the period between April 2004 and December 2005, Intel temporarily ceased to grant its rebates to Dell subject to exclusivity. Finally, the fact that Dell was aware of the nature the exclusivity requirement on which the level of Intel's rebates was conditional in 2004 and 2005 is also evidenced by the continuous delay and eventual cancellation of the [code name] project (paragraph 125 above).

b) Errors in the assessment of the effects of the rebates

The applicant's arguments

160 The applicant submits that if the Court concludes that Intel's rebates to Dell were conditional, the next issue would be whether the rebates were capable of foreclosing competitors to the detriment of consumers. The Decision attempts to demonstrate this through the AEC test, but its application of that test to Dell is fatally flawed.

161 The applicant asserts that the Decision admits that Intel's rebates to Dell satisfied the AEC test in the first four quarters at issue (between December 2002 and October 2003). Despite this, the Decision inexplicably concludes that Intel's rebates 'from December 2002 to December 2005' were 'capable of having or likely to have anticompetitive foreclosure effects'. The Decision does not even attempt to explain or justify that inconsistency in its reasoning.

162 The Commission also errs in assessing each of the three key factual inputs to the AEC test, namely (i) the contestable share, (ii) the conditional portion of the rebates and (iii) Intel's costs (AAC). The Decision underestimates the contestable portion of Dell's purchase volume, overstates the allegedly conditional portion of the rebates, and inflates Intel's sales and marketing costs and thus its AAC.

– Contestable share

163 The applicant asserts that, based upon a single document, the Commission concludes that Dell's contestable share was only [CONFIDENTIAL] %. However, the Decision errs in rejecting evidence from Dell's senior executives demonstrating that the contestable share was far higher (between [CONFIDENTIAL] % and [CONFIDENTIAL] %), as well as evidence demonstrating that Intel believed Dell's contestable share to be in the [CONFIDENTIAL] % to [CONFIDENTIAL] % range.

164 The applicant points out that in an email addressed to [two of Dell's executives], [another Dell executive] stated that [CONFIDENTIAL]. That statement is categorical, and at no point mentions an initial period of delay before the [CONFIDENTIAL] period.

165 According to the applicant, the Commission considers that the evidence consisting of Dell's actual switch to AMD in 2006 is irrelevant because the contestable share [had] increased somewhat over time. Yet the Commission never adjusts its contestable share assessment over the relevant period to reflect this asserted increase in AMD's viability.

166 The Salop-Hayes report explains that, using reasonable assumptions about the rate of ramp-up to 100% sales levels, Dell's projection of [CONFIDENTIAL] % translates to a contestable share of [CONFIDENTIAL] % for the first year (or

[CONFIDENTIAL] % using the Commission's approach). Under either approach, Intel's rebates pass the AEC test in every quarter at issue even before correcting the Commission's other errors.

167 [CONFIDENTIAL], Intel's account executive for Dell, believed that if Dell were to add AMD as a second source, it would likely source [CONFIDENTIAL] % to [CONFIDENTIAL] % of its CPUs from AMD in the first year. That estimate is in line with Dell's own internal estimate, so it cannot be dismissed as implausible.

168 Finally, the applicant observes that the figure of [CONFIDENTIAL] % is derived from a single spreadsheet of January 2004 which was neither reliable nor knowable by Intel. However, as the Shapiro report demonstrates, that figure is based upon only eight months of sales of AMD CPUs, and thus substantially understates the contestable share for the initial 12-month sales period. Moreover, the Commission refuses to use the conditional rebate figure derived from the very same spreadsheet.

– The conditional portion of the rebates

169 The applicant points out that the Decision concludes that 50% of Intel's rebates to Dell were conditional on exclusivity; that conclusion is not supported by the evidence.

170 In the applicant's submission, according to Prof. Shapiro's calculations, the January 2004 spreadsheet used by the Commission to assess the applicant's contestable share at [CONFIDENTIAL] % (paragraph 168 above) leads to a projected conditional rebate amount of [CONFIDENTIAL] %. According to the applicant, using that amount, Intel passes the AEC test for every one of the quarters at issue, even before correcting any of the Commission's other errors. The Commission has not shown why the basic assumptions from which it calculates an amount of 50% are more reliable than the assumptions from which the applicant calculates the figure of [CONFIDENTIAL] %.

171 To the extent that the Decision relies on internal Dell documents, the applicant submits that none of those documents was written by Dell's senior decision-makers; most of them were written by [a Dell employee], who was not privy to the negotiations between the Intel and Dell decision-makers and was merely speculating on a [CONFIDENTIAL]. On the other hand, the Commission disregards the testimony of [a Dell executive], who stated that he [CONFIDENTIAL] whether sourcing from AMD [CONFIDENTIAL] in terms of its consequences on the level of Intel rebates, and that he believed that in that case [CONFIDENTIAL].

– The assessment of Intel's costs (AAC) and the Commission's 'alternative' calculation

172 The applicant points out that the Commission concluded that Intel's AAC connected with producing CPUs is [CONFIDENTIAL] % of Intel's Average Selling Price ('**ASP**'). As the Foster report demonstrated, the Commission erred in treating certain costs as avoidable and therefore used an inflated value for AAC. The Decision also suffers from a basic computational mistake pertaining to Intel's sales and marketing costs (paragraph 84 above). The Decision's own reasoning establishes that those costs should have been calculated by reference to incremental revenue rather than (as the Commission assumed) average revenue. Standing alone, that mistake improperly inflates the AAC value by a substantial margin.

173 According to the applicant, the Commission also puts forward an 'alternative' method of calculation based upon the premise that Intel provided Dell with conditional rebates of USD [CONFIDENTIAL] in order to retain USD [CONFIDENTIAL] in business in Dell's fiscal year of 2002. The Commission's calculation of the rebate is inflated by USD [CONFIDENTIAL]. According to the applicant, even accepting the Commission's erroneous effective price calculation, Intel would still pass the AEC test. The Commission's cost calculation is inflated by its error in calculating sales and marketing costs as a percentage of ASP rather than a percentage of effective price. Correcting for that error alone, Intel's rebates pass the as-efficient-competitor test.

– The Commission's other errors

174 The applicant asserts that actual outcomes further undermine the Commission's analysis. As the Salop-Hayes report explains, the Commission's conclusions are fatally undermined by its admission that, under its factual assumptions, the required share for Dell's fourth quarter of the 2006 fiscal year (namely the minimum share of Dell's business that would have been necessary for an equally efficient competitor profitably to sell CPUs to Dell) is above the share of Dell business which AMD actually captured in the subsequent year, where Dell partially switched to AMD. That result shows that the Commission's data are out of step with reality.

175 The applicant concludes that it is sufficient to correct either of the Commission's erroneous calculations – either of contestable share, or of the conditional rebate amount – while leaving the other errors untouched, for Intel's rebates to pass the AEC test in all the quarters at issue. The Commission's attempts to buttress its inadequate analysis with reinforcing factors change nothing in that regard.

The Commission's arguments

176 As a preliminary point, the Commission asserts that it was under no obligation to show that Intel's exclusivity rebates were capable of foreclosing an as-efficient

competitor. Nevertheless, the Commission submits that the Decision shows that the exclusivity rebates *vis-à-vis* Dell were capable of foreclosing AMD.

177 The Commission also contends that the Decision does not state that Intel's rebates to Dell satisfied the AEC analysis between December 2002 and October 2003.

– The contestable share

178 The Commission submits that the January 2004 spreadsheet is a surer basis for the assessment of the contestable share than the email of [a Dell executive] to [two other Dell executives]. In a submission to the Commission, Dell explained that that document was 'the model used for the assessment conducted by Dell in connection with the potential business impact of choosing to be sourced [in part] by AMD'. Intel's calculations use only optimistic assumptions which are favourable to Intel. Using also hypotheses that are not favourable, it can be shown that the contestable share which results from the data in the email from [a Dell executive] ranges between [CONFIDENTIAL] % and [CONFIDENTIAL] %, which is consistent with the Decision's figure of [CONFIDENTIAL] %.

179 As to the events following Dell's announcement of its partial switch to AMD in May 2006, the Commission submits that a proper analysis of the development of AMD's sales to Dell in the period following that announcement confirms the Decision's findings that the Intel rebates to Dell were capable of having a foreclosure effect on an as-efficient competitor.

180 Regarding Intel's internal documents, the Commission asserts that Intel did not provide any contemporaneous document in support of its contentions, and relies, for that purpose, only on an *ad hoc* document written for the purpose of the administrative proceedings by an Intel executive.

– The conditional portion of the rebates

181 The Commission points out that the January 2004 spreadsheet on which Intel relies does not reflect a projected conditional rebate amount of [CONFIDENTIAL] %. The figure of [CONFIDENTIAL] % which the applicant attempts to present as Dell's projection of the conditional rebates amount is in fact the calculation of the effect of the change of the MCP rebate conditions at the end of 2003, which involved in particular the increase of the rate of the [CONFIDENTIAL] MCP from [CONFIDENTIAL] % to [CONFIDENTIAL] %.

182 Finally, insofar as Intel argues that it cannot be expected to comply with a legal rule which depends on information which was unknown to it, the Commission states that Intel was the best placed to know exactly what the conditions of its rebates to Dell were.

– The assessment of Intel's costs (AAC) and the Commission's 'alternative' calculation

183 The Commission contends that the arguments in the Foster report are misleading, that the Commission rightly concluded that the relevant categories of costs were avoidable and that there is no computational mistake in the calculations of the Decision.

184 Regarding the amount of US [CONFIDENTIAL], the application merely restates Intel's flawed argument from the administrative proceedings, which was rejected in recital 1278 of the Decision.

– The applicant's other arguments

185 As to the contention that the Commission's analysis cannot predict reality, the Commission submits that the nature of the AEC analysis is not to give predictions of actual market development but, on the contrary, to identify the economic incentives provided by rebate schemes in a theoretical situation, which is different from the actual market.

186 Moreover, the Commission asserts that the reinforcing factors mentioned in the Decision, namely (i) that Dell perceived that any loss of rebate from Intel would be complemented by increased rebates from Intel to Dell's competitors and (ii) the AEC analysis calculations do not take account of the potential loss of rebates for Dell on non-x86 CPU products, such as chipsets, are not fully factored in to the calculations in the Decision, but if included, would reinforce the assessed foreclosure capability of the MCP rebates.

2. HP

187 The Decision finds two types of infringement with respect to HP, namely naked restrictions (paragraph 325 et seq. below) and conditional rebates.

a) Errors in the assessment of the conditionality of the rebates

188 In respect of the conditional nature of the agreements between Intel and HP, the Decision sets out the following items: (i) between November 2002 and May 2005 HP and Intel entered into two agreements known respectively as HP Alliance Agreements 1 and 2 (referred to individually as '**HPA1**' and '**HPA2**', or jointly as '**HPA**'); (ii) those agreements were subject to unwritten conditions; (iii) one condition was that HP had to source at least 95% of the x86 CPUs for its commercial desktops from Intel; (iv) certain conditions were also imposed regarding the distribution and commercialisation of HP's AMD-based business desktops; (v) Intel could monitor HP's compliance with the quasi-exclusivity arrangement through monthly senior management meetings.

The applicant's arguments

189 The applicant asserts that the alleged unwritten conditions, including the 95% condition, were not, in fact, obligations binding HP, but that they reflected the parties' expectations. Further, Intel's rebates cannot be condemned as an abuse since the HPA1 and HPA2 agreements were the product of normal competition and resulted from a bidding process. Finally, the agreements did not restrict HP's freedom of choice and did not foreclose AMD from the market.

– The unwritten 95% condition

190 The applicant submits that, while there may have been an expectation that HP's purchases from Intel would approximate to 95% of its commercial desktop volume, HP was neither subject to a legally enforceable 95% condition nor bound by *de facto* conditionality on the theory that it feared disproportionate rebate reductions if it switched further business to AMD. The Commission's evidence of unwritten conditions in the final HPA1 agreement of December 2002 consists mostly of documents from July 2002 relating to the agreement rejected by Intel in August 2002.

191 The Commission also failed to provide evidentiary support for its claim of *de facto* conditionality, which is based upon the premise that HP feared that it would experience, and in fact would have experienced, disproportionate rebate reductions if it sourced more from AMD. The Decision's reliance on a December 2005 HP submission is particularly problematic, because that submission is inconsistent with significant other evidence. HP's unilateral decision to switch at least 5% of its corporate desktop business from Intel to AMD and its demand for a large rebate for the remaining Intel business shows that it did not fear 'retaliation', but believed it would gain negotiating leverage by shipping AMD systems.

– The fact that the rebates reflect normal competition

192 The applicant asserts that, in the judgment in *Hoffmann-La Roche* (paragraph 65 above), paragraph 91, the Court of Justice held that Article 82 EC is not infringed by rebates which constitute 'normal competition' in the particular market setting at issue. The Commission erroneously overlooks the fact that 'normal competition' among microprocessor suppliers is characterised by the fact that powerful OEMs create bidding contests in which they offer some portion of their business for a short duration in exchange for lower prices.

193 HP considered shifting an additional [CONFIDENTIAL] % of its commercial business to AMD, but its preferred choice was the more limited 5% deployment. HP [CONFIDENTIAL]. HP never asked Intel to bid on a lesser amount and never inquired about the rebate that Intel might provide if HP bought less than 95% from Intel. According to the applicant, where the agreements are not characterised by inequality of bargaining power of the partners, 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.

– HP's freedom of choice and AMD's market access

194 The applicant points out that, unlike the loyalty rebates deemed unlawful in previous cases, the rebates in question were not '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' (*British Airways* v *Commission* (paragraph 67 above), paragraph 68).

195 In that regard, the structure of the contract, including its one-year term and 30-day termination provision, is compelling evidence that the HPA agreements were incapable of foreclosing AMD. Agreements of short duration are less likely to produce anti-competitive foreclosure effects than are long-term agreements. AMD had the opportunity, during every month of the HPA agreements, to make HP an offer that would be more attractive than Intel's offer. The fact that HP preferred to buy from Intel is a consequence not of conditionality, but of HP's perception of the superiority of Intel's offering to whatever AMD chose to offer.

196 HP's decision not to accept an offer of one million free CPUs from AMD was the consequence of HP's recognition that there was insufficient demand for AMD-based business desktops.

The Commission's arguments

– The unwritten 95% condition

197 The Commission points out that the Decision finds that during the period from November 2002 to May 2005, the level of HPA rebates was conditional on HP obtaining at least 95% of its corporate desktop x86 CPU supplies from Intel. AMD offered HP one million CPUs for free for its business desktop PC segment. HP ended up taking only 160 000 of those in order not to breach the restrictive conditions of the HPA agreement. HP's compliance with the conditions of the HPA agreement was discussed in monthly senior management meetings between Intel and HP.

198 The Decision sets out both direct and circumstantial evidence showing that Intel communicated to HP that it would lose a disproportionate amount of HPA rebates if it decided no longer to stay quasi-exclusively with Intel. However, the applicant offers no more than generalised criticism that the Decision relies 'mostly' on documents from July 2002, and merely reiterates arguments which have already been answered, in particular in recitals 367 to 390 of the Decision. The Commission therefore submits Intel's assertions about the absence of an unwritten condition requiring 95% exclusivity must simply be dismissed.

199 For completeness, the Commission submits that the Decision does not rest only on evidence from July 2002, but also, in particular, on an official HP corporate statement of December 2005, in which HP gives a comprehensive account of the HPA agreements, and confirms that 'Intel granted the [HPA1 rebates] subject to the following unwritten requirements: a) that HP should purchase at least 95% of its business desktop system from Intel ...'. HP specified that despite the fact that the conditions mentioned above were unwritten, Intel had made it clear to HP, including at the highest level of the two companies, that they were integral parts of the HPA1 agreement. HP also mentioned that the HPA2 agreement 'was subject to the same unwritten conditions'. The existence of the unwritten quasi-exclusivity condition is also confirmed by a body of contemporaneous documentary evidence, comprising, in particular, emails of 14 July 2002, 15 July 2002 and 3 September 2004.

200 Regarding the applicant's assertion that HP was not subject to a legally enforceable 95% condition, the Commission contends that it is not necessary to demonstrate that that quasi-exclusivity condition was legally binding or enforceable (see paragraph 140 above and *British Airways* v *Commission* (paragraph 67 above), paragraph 62). HP explicitly confirmed that '[the] HPA1 [agreement] also contains mutual 30 day termination notice provisions. HP regards Intel's ability to terminate the agreement on 30 days notice as having incented [sic] HP to comply with the above-mentioned conditions [the unwritten conditions]'. HP also made the same statement with regard to the HPA2 agreement.

– The fact that the rebates reflect normal competition

201 The Commission submits that the conditional nature of the (quasi-) exclusivity of a rebate system excludes the finding that such a system constitutes normal competition. Restricting customers' freedom to source from the dominant company's competitors, even if the latter provides better or cheaper products, falls outside the scope of competition on the merits.

202 Contrary to the applicant's assertion, the unlawfulness of fidelity rebates does not imply that the customer cannot request a bid based on purchasing a specific volume or share and that it will hence lose a powerful tool for eliciting lower prices, since the customer remains entitled to request rebates by reference to its volume of purchases.

203 The Commission submits that the contention that HP had unilaterally decided to limit its CPU supplies in the desktop segment from AMD to 5% is belied by the evidence in the Commission's file. According to an Intel internal memo on the development of the negotiations of the HPA1 agreement dated 9 July 2002, Intel intended to provide its 'best offer' in cases where HP would accept a 100% exclusivity condition, to provide 'some assistance' if HP would only accept a 95% exclusivity condition, and to 'not pursue the agreement' in any other case. In any

event, the Commission maintains that even if HP took the initiative to request rebates conditioned on quasi-exclusivity, this would not change the legal assessment, since, according to settled case-law, a company in a dominant position must not even tie purchasers 'at their request' by an obligation 'or promise' on their part to obtain all or most of their requirements exclusively from the undertaking in consideration of a rebate (*Hoffmann-La Roche* v *Commission* (paragraph 65 above), paragraph 89).

– HP's freedom of choice and AMD's market access

204 The Commission reiterates that the case-law does not require the Commission to prove potential exclusionary effects of illegal fidelity rebates within the meaning of the *Hoffmann-La Roche* case-law (paragraph 72 above). In any event, the Commission submits that the Decision adduces ample evidence of the impact that the HPA agreements had or were capable of having on AMD's ability to compete with Intel for sales to HP, on HP's freedom to choose its supplier and on competition to the detriment of consumers. For example, AMD offered HP one million CPUs for free but HP accepted only 160 000 because it had to avoid at all cost the loss of the Intel quasi-exclusivity rebate.

205 The Commission submits, further, that, in view of HP's dependence on Intel's rebates and Intel's position as an unavoidable trading partner for most of HP's requirements, Intel's claim that the HPA agreements were in reality agreements of short duration is not relevant. In addition, according to the Commission, HP had to fear the loss of its Intel rebates for the entire remaining period of the agreement and not just 30 days.

b) Errors in the assessment of the effects of the rebates

The applicant's arguments

206 The applicant argues that a properly conducted AEC test shows that the HPA agreements were not capable of foreclosing an as-efficient competitor. Moreover, although the Decision fails to offer an AEC analysis for the first 11 months of the relevant period, the Commission nonetheless makes the unsubstantiated claim that Intel foreclosed AMD during that period.

– The contestable share

207 The applicant states that the Decision finds that the contestable share of HP's business desktop PCs within a one-year horizon was [CONFIDENTIAL] %. In recital 1345, the Commission relies on an April 2002 internal Compaq email and attached spreadsheet, which was prepared more than six months before the execution of the HPA1 agreement and which was never given to Intel. However, as a matter of law and economics, Intel's perception of how much business was contestable is the appropriate basis for estimating the contestable share. In any event, the Commission should have found that HP's contestable purchases

amounted to [CONFIDENTIAL] CPUs, or [CONFIDENTIAL] % of HP's requirements.

208 The main basis for the Commission's rejection of Intel's contemporaneous estimate is the Commission's assertion that an exchange of emails between HP's and Intel's outside antitrust counsel shows that the two companies colluded to inflate the contestable share. In that regard, the Commission asserts that that email message sent 'strong signals' to HP to 'increase its estimates of the contestable volumes thereby permitting Intel, in its appreciation, to provide the rebates HP was asking for'. However, that allegation is completely devoid of evidentiary support, as the report of Prof. Hazard shows. The Commission committed a manifest error of factual assessment by concluding that a polite expression of hope by Intel's counsel – namely that Intel would be able to reach a 'win-win' agreement with a very large and important customer – was an invitation to collude.

209 The applicant submits that the Commission's other reasons for rejecting Intel's assessment of the contestable share, namely the assessment of the number of CPUs at risk carried out by [CONFIDENTIAL] in August 2002 (senior pricing manager at Intel), and his assessment of the contestable share in an email of 31 October 2002 to [Intel executive], are not based on firm, precise and consistent evidence. [The senior pricing manager] sent that email in the ordinary course of business to the critical decision-makers within Intel, who were making real-time evaluations of the HPA deal, and the Commission has no evidence whatsoever that his estimate was not made in good faith.

210 The applicant concludes that, using the correct measure of the contestable share – Intel's contemporaneous expectations of the contestable volume based on HP's communications – Intel passes the AEC test in every period.

211 Regarding HP's assessment of contestable share, the applicant asserts that the Commission relies on an April 2002 Compaq spreadsheet prepared before Compaq merged with HP and long before the HPA1 agreement had been concluded. The Commission refused to use the much larger at-risk volume embodied in a 17 October 2002 presentation from HP's lead negotiator to HP's Chairman and CEO. HP's internal calculation of the contestable share within a one-year horizon was slightly above [CONFIDENTIAL] %. According to the applicant, if that [CONFIDENTIAL] % contestable share is used, the rebates granted by Intel in the HPA1 agreement pass the AEC test.

– The conditional portion of the rebates

212 The applicant states that the Decision offers three reasons for assuming that HP would have lost 100% of its rebates if it moved the contestable share to AMD. However, as the Salop-Hayes report shows, those three reasons incorrectly substitute the Commission's conjecture about what might have happened if HP

sourced from AMD for HP's own analysis of that issue. HP's expectations are reflected in a contemporaneous HP document which assumes that HP would lose only [CONFIDENTIAL] % of its rebates. According to the applicant, the Commission, faced with evidence that HP believed that only a small fraction of its rebate depended on Intel's share level, nonetheless asserts that it can treat 100% of the rebates as conditional on near-exclusivity.

213 The Salop-Hayes report shows that, if one uses HP's projected conditional rebate of [CONFIDENTIAL] % rather than the Commission's assumption of 100%, Intel passes the AEC test in every period, even if the Commission's calculation for the contestable share is used.

– Assessment of Intel's costs (AAC) and the Commission's other errors

214 The applicant refers back to the Decision's alleged errors regarding the appropriate cost measure (paragraph 84 above). The Commission made the same errors in applying the AEC test to HP.

215 The applicant points out, further, that the Commission failed to apply the AEC test for the first 11 months of the relevant period. Table 34 in recital 1334 offers the required share form of the AEC analysis for HP beginning from the fourth quarter of 2003, even though the relevant period for HP begins in November 2002. Rather than obtaining the actual data needed for the AEC test, the Commission simply asserts that Intel fails the test even during the period for which it lacks consistent data.

216 Finally, regarding the 'reinforcing factors', the Commission first fails to explain why an increase in rebates to HP's competitors would be deemed anti-competitive. Secondly, the applicant claims that if HP had received one million free CPUs from AMD, it would have avoided paying Intel USD [CONFIDENTIAL] for a million CPUs (the non-discounted ASP for a million CPUs). Intel's total rebates under the HPA1 agreement were only USD [CONFIDENTIAL], meaning that HP would have had to pay nearly USD [CONFIDENTIAL] to buy the equivalent number of CPUs from Intel. HP must have rejected AMD simply because there was insufficient demand for AMD-based systems.

The Commission's arguments

– The contestable share

217 The Commission submits that, contrary to what is stated in the application, the Decision's finding that the contestable share is [CONFIDENTIAL] % is not based only on one document dated April 2002, but on five contemporaneous documents, dated from April 2002 to July 2004. HP submitted to the Commission that the document reflected HP's view.

218 Regarding the internal HP presentation of 17 October 2002, the Commission maintains that, unlike the five documents on which the Decision is based, that presentation does not contain forecasts over the relevant one year horizon, but instead contemplates only market shares that would be reached after three years. What is more, Intel's calculation ignores the fact that the contestable share should be calculated net of the 5% units which HP could purchase from Intel competitors without breaching the condition of the HPA agreements.

219 Insofar as the applicant claims that, as a matter of law and economics, its perception of how much business was contestable is the appropriate basis for estimating the contestable share, the Commission first asserts that the AEC analysis and the information required for its implementation are not part of the legal requirements to establish the unlawfulness of the behaviour. In any event, the two estimates which Intel presents as its contemporaneous expectations are based on assumptions which are systematically and unduly favourable to Intel. Recital 1388 of the Decision concludes that, even under a hypothesis favourable to Intel, and even using Intel's own favourable estimate of its AAC, the HPA rebates are still found to be capable of foreclosing an as-efficient competitor.

220 Finally, regarding the emails exchanged between Intel and HP counsel, the Commission submits that the Decision makes no claim that the discussions between HP and Intel on exchange of information on the number of units at risk amounted to unlawful or improper activity.

– The conditional portion of the rebates

221 The Commission submits that the Decision explains in recitals 1306 to 1327 the numerous flaws in Intel's argument that the Decision should have based its analysis on an HP document which, according to Intel, assumes that only [CONFIDENTIAL] % of the HPA rebates would be lost if HP did not renew the HPA1 agreement. One of the main flaws in Intel's argument is that the level of rebates which appears in the HP presentation does not constitute a level of non-conditional rebates, but instead a level of rebates which are still subject to some conditions.

– The assessment of Intel's costs (AAC) and the applicant's other arguments

222 Concerning the application's arguments on costs, the Commission refers to the arguments set out at paragraph 183 above. In any case, the findings of the Decision concerning the capability of anti-competitive foreclosure of the HPA rebates remain valid whether one uses the value of Intel's AAC calculated by the Commission or that alleged by Intel. The issue of the assumption used by the Commission for Intel's AAC is therefore immaterial for the assessment of the HPA rebates.

223 The Commission refutes the argument that the Decision does not perform the AEC analysis for the period between November 2002 and the fourth quarter of

HP's fiscal year of 2003. The Decision includes an AEC analysis covering the entire period of the HPA1 agreement, which ran from November 2002 to May 2004.

224 Regarding the 'reinforcing factors', the Commission asserts, first, that the possibility of transfer of rebates to HP's competitors would add to the economic incentives leading HP not to break the conditions of the HPA agreement. Secondly, Annex B.31 to the Defence shows that all factual points raised by the application regarding AMD's offer to HP of one million free CPUs are incorrect.

3. NEC

a) Errors in the assessment of the conditional nature of the rebates

225 NEC is one of the top ten PC and server vendors worldwide. Until at least April 2005, NEC's activities were managed by two fully owned subsidiaries: NEC Japan and NEC Computer International ('**NECCI**'). NEC Japan managed NEC's operation in Japan and the Americas, while NEC operations in the rest of the world were handled by NECCI. NECCI was based in Europe, but it also managed NEC's operations in Asia (with the exception of Japan) via its Asia Pacific Countries ('**APAC**') branch. In April 2005, the corporate structure was modified and the APAC division was hived off from NECCI and transferred to NEC Corporation. In November 2005, NECCI's Europe, Middle East and Africa division was renamed 'Packard Bell B.V.'.

226 Regarding the assessment of the conditionality of the agreements with NEC, the Decision sets out the following matters: (i) between October 2002 and November 2005, Intel granted NEC rebates under an arrangement called the 'Santa Clara agreement' reached in May 2002; (ii) the rebates provided under this agreement were *de facto* conditional upon NEC's agreement to purchase from Intel 80% of its x86 CPU requirements worldwide. That global share was split into [CONFIDENTIAL] % for NECCI and [CONFIDENTIAL] % for NEC Japan; and (iii) in order to show that they had reached the required market share, NEC and NECCI were obliged to report their market shares to Intel on a quarterly basis.

The applicant's arguments

227 Intel submits that it has never disputed that market segment share targets were established in connection with an amount of USD [CONFIDENTIAL] to be paid to NEC in the fourth quarter of 2002 and the first quarter of 2003. However, Intel denies that any other rebates were linked to market share thresholds and that the term of the Santa Clara agreement extended beyond the first quarter of 2003. Furthermore, it was NEC that sought to increase its use of Intel CPUs and proposed an 80% share target in exchange for specific rebates.

– Evidence showing the absence of conditionality

228 The applicant points out that it never reduced its rebates even though NEC's purchases routinely fell below the alleged market share thresholds. Worldwide data of Gartner Research show that NEC's use of Intel CPUs reached or exceeded 80% in only four of the thirteen calendar quarters at issue. Similarly, an NECCI presentation shows that Intel's share of NECCI's CPU requirements reached or exceeded [CONFIDENTIAL] % in only four out of the first ten quarters at issue. Insofar as the Commission asserts that market share data published by Gartner underestimated Intel's market share at NEC, the applicant submits that a timing difference in a single quarter would not result in any long-term underestimation of Intel's share since the same effect would be expected to cause Gartner data to overstate Intel's share at NEC in a later quarter.

229 Regarding the statement in recital 495 of the Decision that Intel was unaware of NEC's breaches of the alleged conditions, the applicant points out that data on NEC's worldwide usage of CPUs is available through Gartner, to which Intel subscribed throughout the relevant period.

230 NECCI itself confirmed that Intel did not reduce its rebates after NECCI's breaches of the alleged conditions, stating that 'Intel has never taken any particular actions against NECCI as a result of NECCI's failure to meet the [CONFIDENTIAL] % threshold'. According to the applicant, a purported 'condition' which is never enforced – despite repeated breaches – is no condition at all.

– The ECAP rebates

231 The applicant submits that, under the Santa Clara agreement, Intel provided both 'exception to customer authorized pricing' rebates ('**ECAP** rebates') and market development funds ('**MDFs**'). Only the USD [CONFIDENTIAL] in MDFs provided in the fourth quarter of 2002 and the first quarter of 2003 had any link to market share thresholds. The SO of 2007 recognised this, concluding that 'a proportion of the total rebates' provided by Intel to NEC (those provided in the form of MDFs) were conditional on the attainment of market share targets. The NECCI Article 18 response formally specifies that the ECAP portion of Intel's rebates was not linked to market share targets.

232 The applicant submits that the evidence cited in the Decision fails to establish any conditionality pertaining to the ECAP rebates under the Santa Clara agreement. In particular, the Commission relies on an extract from NECCI's Article 18 response stating that [CONFIDENTIAL] prices depend on the agreement on [CONFIDENTIAL] % market share, not on volumes. However, given that NECCI referred to the MDFs as [CONFIDENTIAL] ECAPs, the only plausible reading of that reference of NECCI's is that it refers to the [CONFIDENTIAL] ECAP rebates, as distinct from the non-conditional regular ECAPs.

– The duration of the Santa Clara agreement, the alleged reporting obligation of NEC, and Intel's response to NEC's initial offer

233 According to the applicant, the Commission errs in finding (at paragraphs 491-493 of the Decision) that the Santa Clara agreement was in force from October 2002 to November 2005. NEC stated that [CONFIDENTIAL]. Further, an NECCI email of 25 April 2003 confirms the rebate was simply a volume rebate, not a share requirement. The file contains an NECCI presentation from the same time period which shows that NECCI used Intel CPUs for only [CONFIDENTIAL] % of its requirements in the second quarter of 2003, which is consistent with the absence of a [CONFIDENTIAL] % threshold.

234 Insofar as the Commission relies on general statements in NECCI's Article 18 response to the effect that the Santa Clara agreement continued in force until November 2005, the applicant submits that NECCI had no direct experience in negotiating ECAP rebates with Intel during the relevant period.

235 The Commission also errs, according to the applicant, in inferring that NEC and NECCI were obliged to report their market shares to Intel on a quarterly basis so that Intel could enforce its conditions. In fact, NECCI provided such information to both Intel and AMD, long before Intel offered the allegedly conditional rebates at issue; there is nothing uncommon or improper about that practice.

236 Finally, the applicant maintains that it was NEC who, at the May 2002 Santa Clara meetings, proposed a 'realignment plan' giving more than [CONFIDENTIAL] % of its CPU requirements to Intel. However, Intel rejected that proposal, and the Decision fails to explain how Intel's rejection of NEC's original proposal is consistent with the finding that Intel's goal was to foreclose AMD from competing for NEC's business.

The Commission's arguments

– Evidence showing the absence of conditionality

237 The Commission notes that the unlawfulness of fidelity rebates does not depend on the enforcement of conditionality but on the dominant company creating the incentive to encourage customers to stay loyal to it by refraining from purchasing from a competitor of the dominant supplier. Accordingly, even on its own factual premises, Intel's argument that the non-cancellation of NEC's rebates vitiates the Commission's finding of conditionality is unfounded.

238 Intel relies on data published by Gartner. However, although Gartner data are useful as a general tool, the evidence shows that Intel itself appreciated that they were neither reliable nor accurate. Insofar as the applicant refers to an NECCI presentation (paragraph 228 above) and asserts that it shows that Intel's share of NECCI's CPU requirements reached or exceeded [CONFIDENTIAL] % in only four of the first 10 quarters at issue, the Commission submits that it was already

explained in recital 496 of the Decision that the APAC branch of NEC, which used only Intel CPUs, was taken into account within NECCI's sales.

239 In any event, the Commission submits that there is consistent proof that NEC attempted to meet its commitments to Intel and that, where it occasionally failed to meet that objective, it tried to hide that fact from Intel. As to Intel's claim that NEC received substantial rebates from 2001 until the first half of 2002, the Commission contends that it is irrelevant since the Decision does not contain any findings on NEC for that period.

– The ECAP rebates

240 The Commission notes Intel's admission that a part of the payments made to NEC in the fourth quarter of 2002 and the first quarter of 2003, namely the regular MDF payment, was conditioned on NEC committing to a market share requirement that amounted to quasi-exclusivity. The fact that the amount of USD [CONFIDENTIAL] per quarter was conditional on quasi-exclusivity suffices for establishing unlawful fidelity rebates. The Decision refers to the level of these rebates only in the section in which the AEC analysis is set out.

– The duration of the Santa Clara agreement, the alleged reporting obligation of NEC, and Intel's response to NEC's initial offer

241 The Commission denies Intel's claim that the Decision relies 'principally' on a finding concerning an Intel lump sum MDF payment to NECCI of USD [CONFIDENTIAL] in the second quarter of 2003. The Decision also relies on two NECCI submissions which show that the Santa Clara agreement remained in force until November 2005 at least. Further, according to the Commission, NECCI was informed of the outcome of negotiations and must therefore have been fully aware of the duration of the Santa Clara agreement.

242 Intel's assertion that the rebates were simply a volume rebate, not a market share requirement, is contradicted by NEC's confirmation that the volume quoted in the documents relied on by Intel corresponds to the relevant [CONFIDENTIAL] % market segment share. It was customary for Intel to present its market share condition in terms of volume in its discussions with NEC. Finally, the Commission asserts the NECCI presentation showing that NECCI used Intel CPUs for only [CONFIDENTIAL] % uses a market share calculation methodology which is different from the one agreed under the Santa Clara agreement. Calculated using the agreed methodology, the Intel market share for that quarter reported by NECCI was [CONFIDENTIAL] %.

243 Regarding NEC's reporting obligation, the Commission submits that Intel's contrary claims are contradicted by NECCI's statement that Intel 'assesses whether or not NECCI has complied not only with the reporting obligations, but also with the [CONFIDENTIAL] % + market share agreed with Intel'.

244 Regarding Intel's response to NEC's initial offer, the Commission observes that the *Hoffmann-La Roche* case-law makes clear that fidelity rebates and payments for exclusivity granted by a company in a dominant position infringe Article 82 EC even if they are requested by the dominant company's client. In any event, according to the Commission, Intel's preference for paying less rebates for NEC's 80% quasi-exclusivity rather than paying more for NEC's 90% quasi-exclusivity is perfectly consistent with Intel deciding that this 'cheaper solution' was quite sufficient to prevent AMD from gaining a sufficient market foothold as NEC's supplier to constitute a real threat. In addition, Intel even indicated interest in complete exclusivity, and only reduced its ambitions because it considered that NEC's price for 90% exclusivity commitments was too high.

b) Errors in the assessment of the effects of the rebates

245 The Commission assessed Intel's rebates to NEC using the effective price form of the AEC test. Under that approach, the Commission calculated the ratio between the total value of the payments granted under the Santa Clara agreement and the value of the business at risk for Intel in the fourth quarter of 2002 to produce a measure of effective price. The Commission then compared that ratio to the ratio of Intel's AAC and ASP and concluded that Intel priced below cost because the former ratio is lower than the AAC/ASP ratio.

The applicant's arguments

246 The applicant submits that the Commission's calculations contain several flaws, which are independently sufficient to overturn its conclusions.

– Whether Intel passes the effective price test

247 The applicant maintains that the Commission's own data confirm that Intel passed the effective price test and was not pricing below cost. In that analysis, the Commission concluded at recital 1414 of the Decision that Intel's net revenues under the original plan were USD [CONFIDENTIAL] and that its net revenues under the Santa Clara agreement were USD [CONFIDENTIAL]. Simple arithmetic shows that the difference between the two amounts is USD [CONFIDENTIAL] (Tables 41 and 42 in the Decision). Next, at recital 1450, the Commission postulates that Intel's gross incremental revenues were USD [CONFIDENTIAL] (at most), meaning that the ratio between effective price and ASP can readily be calculated as [CONFIDENTIAL] %. That ratio is far higher than even the Commission's inflated cost ratio (AAC/ASP) of [CONFIDENTIAL] %.

248 Moreover, according to the Commission, incremental or conditional rebates were USD [CONFIDENTIAL], meaning Intel's net incremental revenues were USD [CONFIDENTIAL]. Net incremental revenues, submits the applicant, cannot be both USD [CONFIDENTIAL] and USD [CONFIDENTIAL].

– The calculation of the conditional portion of the rebates

249 The applicant submits that, according to the Decision (recitals 1408, 1443 and 1444), all Intel rebates to NEC in the fourth quarter of 2002 were conditional. That claim is contradicted by NECCI's unambiguous Article 18 statements, according to which the USD [CONFIDENTIAL] in MDFs provided for the fourth quarter of 2002 were the only benefit granted to NECCI under the Santa Clara agreement. Furthermore, NEC received sizeable rebates from Intel in the periods preceding the agreement, when Intel's market share of NEC's purchases was well below 80%. The Commission fails to explain why NEC would have lost 100% of its rebates if it failed to purchase 80% of its CPUs from Intel, when it had previously done so without suffering such loss. Finally, it is undisputed that Intel provided rebates to NEC even though NEC fell short of attaining the 80% level that the Decision finds was a prerequisite to obtaining any rebate at all.

– The calculation of Intel's business at risk

250 The applicant submits that the methodology used to calculate Intel's business at risk includes obvious flaws. First, the Decision explains that the amount shown in the 'ECAP discounts requested by NEC' column for the original plan (Table 41) is actually the Commission's estimate of rebates received by NEC under the Santa Clara agreement (Table 42). However, the rebates which NEC received under the Santa Clara agreement are not the same as the rebates it requested under the original plan. By understating the ECAP rebates requested by NEC, the Commission necessarily also undervalues Intel's gross revenue. Accordingly, the calculation of business at risk is in also invalidated because Tables 41 and 42 base business at risk under the Santa Clara agreement on the difference between Intel's gross revenue under the original plan and the Santa Clara agreement.

251 Secondly, the Commission's approach is wrong on a more basic level. Intel's business at risk is the number of incremental units that Intel stood to gain under the Santa Clara agreement versus the original plan, multiplied by Intel's non-discounted price (CAP) for those units. According to the applicant, it is apparent from the documents making up the Commission's file that NEC Japan intended to increase its Intel purchases by [CONFIDENTIAL] units and that NECCI intended to increase its purchases by [CONFIDENTIAL] units (or [CONFIDENTIAL] units in total). Minimum incremental revenue (business at risk) for Intel from NEC Japan was [CONFIDENTIAL] units multiplied by USD [CONFIDENTIAL] (on an estimate unfavourable to Intel), which amounts to USD [CONFIDENTIAL]. For NECCI, the figure is USD [CONFIDENTIAL], giving a total of USD [CONFIDENTIAL]. On the basis of that figure, which according to the applicant is conservative and thus unfavourable to it, Intel's rebates to NEC pass the effective price test shown in Table 43 of the Decision even if Intel's rebates are wrongly assumed to be completely conditional.

– Intel's costs, and the use of the fourth quarter of 2002 as a reference period

252 The applicant states that the Decision uses a cost ratio (AAC/ASP) of [CONFIDENTIAL] %. Because of the Commission's error in failing to calculate sales and marketing costs as a percentage of incremental revenues, however, the correct cost ratio should have been much lower. The applicant submits that, using the corrected cost ratios of between [CONFIDENTIAL] % and [CONFIDENTIAL] %, Intel passes the effective price test under three of the Commission's four scenarios, even using all of the Commission's other (allegedly erroneous) data.

253 Finally, the Commission errs in assuming that the fourth quarter of 2002 is representative of all the subsequent periods, and in conducting its effective price test for only that quarter. In particular, the USD [CONFIDENTIAL] in MDFs which were linked to the market share expectation did not remain in effect beyond the first quarter of 2003. More generally, the Commission bears the burden of proving that Intel's conduct was capable of foreclosing an equally efficient competitor throughout the relevant period, and it has no basis for assuming that all of the relevant numbers stayed the same from 2002 to 2005.

The Commission's arguments

254 The Commission asserts that proving that a fidelity rebate is capable of foreclosing competitors to the detriment of consumers was not a requirement for establishing its unlawfulness, but that the Decision nevertheless showed that Intel's rebates to NEC were capable of foreclosing AMD.

– Whether Intel passes the effective price test

255 The Commission refers to Annex B.31 and asserts that the applicant erroneously omits to take due account of the conditional rebates when calculating the effective price of the contestable units. As a result, the ratio between that effective price and the average selling price (ASP) calculated by Intel does not properly account for the effect of the conditional rebates. It cannot therefore serve to assess the potential effects of Intel's conditional rebates. Furthermore, the Commission contends that there is no inconsistency in its assumptions.

– The calculation of the conditional portion of the rebates

256 First, the Commission submits that the Decision does not claim that all the rebates granted to NEC were conditional. The Decision simply claims that the conditional portion of the Intel rebates included not only the lump sum MDF payments, but also certain – but not necessarily all – categories of ECAP rebates. That finding is based on a consistent, precise and firm body of evidence, set out in Annex B.31.

257 The Commission suggests that Intel's argument based on the grant of significant rebates in the periods preceding the Santa Clara agreement is unconvincing since,

in particular, the conditions applicable to the rebates granted before that agreement are unknown, and since data submitted by NECCI show a very significant increase (of about [CONFIDENTIAL] %) of Intel rebates to NECCI following the Santa Clara agreement.

258 Finally, insofar as the applicant asserts that it provided rebates to NEC despite NEC falling short of attaining the 80% market share condition, the Commission adds, in the context of the AEC analysis, that even if Intel's allegations about the market share of AMD at NEC being 'routinely' above the 20% threshold were correct, the AMD share at NEC never came close to the contestable share ([CONFIDENTIAL] %).

– The calculation of Intel's business at risk

259 According to the Commission, it is not the case that Table 41 refers to the original plan and Table 42 to the Santa Clara agreement. Both tables calculate the difference in Intel's net and gross revenues under the original plan (third line of both charts) as well as the Santa Clara agreement (second line of both charts). The argument that the calculation in Tables 41 and 42 of the Decision is incorrect is therefore groundless.

260 Regarding the alternative calculation of the value of the business at risk (paragraph 251 above), the Commission asserts that Annex B.31 shows that that calculation is incorrect because it relies on unproven assumptions on the relative quantity of low end and high end CPUs which NECCI switched from AMD to Intel under the Realignment Plan. Furthermore, contemporaneous documents demonstrate that Intel's assumptions are favourable to Intel and therefore lead to an overestimation of the value of business at risk for Intel with NECCI. Had Intel used for NECCI the same reasonable hypothesis as the one it used for NEC Japan, it would have come to a result which is in line which that reached by the Decision. Finally, Intel's calculation method is also fundamentally biased because it relies on the higher price of high range CPUs, yet takes no account of the higher conditional rebates associated with those high prices.

– Intel's costs, and the use of the fourth quarter of 2002 as a reference period

261 Regarding Intel's costs, the Commission refers to its previous submissions (paragraph 183 above), which show that Intel's arguments concerning the evaluation of Intel's costs in the Decision are misleading. The Decision therefore rightly relied on a cost ratio (AAC/ASP) of [CONFIDENTIAL] %.

262 Regarding the use of the fourth quarter of 2002 as a reference period, the Commission points out, first, that recital 1410 of the Decision lists the reasons why that quarter is representative and the documentary evidence on which the Decision relies. Secondly, the argument that MDF payments did not remain in effect beyond the first quarter of 2003 ignores the fact that documents in the file prove that the MDF payments did not disappear but were only subsumed into

other categories of rebates. Finally, the document to which Intel refers in support of its contention does not contain any calculation where the MDF lump sum payments are excluded.

4. Lenovo

263 The Decision finds that Intel infringed Article 82 EC with regard to Lenovo by two different types of conduct, namely (i) granting payments to Lenovo between June 2006 and December 2006 which were conditional on Lenovo delaying and finally cancelling its launch of AMD-based x86 notebooks ('naked restrictions'; see paragraph 348 et seq. below), and (ii) granting rebates to Lenovo between January 2007 and December 2007 at a level which was conditional on Lenovo obtaining all of its notebook x86 CPU supplies from Intel ('exclusivity rebates').

a) Errors in the assessment of the conditional nature of the rebates

264 The Decision states that contemporaneous evidence demonstrates that an unwritten condition of the Intel-Lenovo Memorandum of Understanding for 2007 ('the **MOU of 2007**')[1] was that Lenovo would grant exclusivity to Intel in the notebook segment, which led in particular to the *de facto* cancellation of its existing AMD notebook projects.

The applicant's arguments

265 According to the applicant, that finding is contrary to the evidence. The MOU of 2007, which the Commission says provided for USD [CONFIDENTIAL] in rebates for 2007, was not conditional on the cancellation of AMD-based notebooks. Lenovo's decision not to launch an AMD-based notebook in 2006/2007 was made for independent business reasons and not based on any payment from Intel.

– The Commission's treatment of the evidence

266 The applicant submits that the Commission did not take account of evidence which contradicts the Commission's findings, namely a 'formal submission of December 2007'[2] of Lenovo, and the testimony of Lenovo executives given in the proceedings instituted in Delaware regarding the case opposing AMD and Intel. In particular, the Commission summarily rejected the testimony of [a Lenovo executive], which was exculpatory of Intel, even though he was Lenovo's lead negotiator with Intel regarding the 2006 notebook deal. Instead, the Decision relies on statements of Lenovo employees who were not involved in the relevant negotiations. Finally, the Decision fails to recognise contemporaneous evidence

[1] – Signed by Lenovo on 30 December 2006 and by Intel on 15 January 2007. (See Defence footnote 458).

[2] – It appears that the date of that submission is actually 27 November 2007.

showing that Lenovo decided against releasing AMD-based notebooks because Intel's performance was better.

– The alleged unwritten condition of the MOU of 2007

267 The applicant submits that Lenovo never committed to launch AMD notebooks, and Intel could not have agreed with and paid Lenovo to cancel an AMD launch which Lenovo decided, on its own and independently, to cancel. Further, Lenovo confirmed to the Commission unequivocally that there was no such [CONFIDENTIAL] in the MOU of 2007 and that it [CONFIDENTIAL]. That statement was amplified by the sworn testimony of [a Lenovo executive], Lenovo's [designation of position] and lead negotiator for the MOU of 2007, who testified under oath that [CONFIDENTIAL].

268 According to the applicant, after striking a very lucrative deal with Dell, AMD favoured Dell at the expense of many long standing customers, and that supply strategy harmed Lenovo given AMD's capacity constraints. As Lenovo explained to the Commission, [CONFIDENTIAL]. Thus the email cited by the Commission, sent by a junior Lenovo procurement employee, [CONFIDENTIAL], to a supplier in December 2006 [CONFIDENTIAL], does not say that the deal was conditional, since a normal competitive response to a lower price is to prefer that supplier over the rival.

The Commission's arguments

269 The Commission asserts that the MOU of 2007 provided, amongst other terms, for USD [CONFIDENTIAL] funding from Intel to Lenovo in 2007, which funding was in particular linked to the unwritten condition that Lenovo would grant Intel exclusivity for its notebook segment during that period. According to the Commission, that implied that Lenovo had to cancel the already twice postponed, but still envisaged, AMD notebook launches.

– The Commission's treatment of the evidence

270 The Commission disputes Intel's assertion that Lenovo's submission of December 2007 was dismissed by the Commission without citing sufficient factual support. An analysis of Lenovo's submission revealed at least two specific points with regard to which it is contradicted by several pieces of contemporaneous evidence.

271 According to the Commission, the depositions of Lenovo executives from the Delaware proceedings do not comply with Article 43(5) of the Rules of Procedure and are therefore inadmissible. Except for the deposition of [a Lenovo executive], Intel has not provided any of these depositions in full. As regards [this executive's] deposition, the applicant submitted the entirety of the main text, but none of the related exhibits. Furthermore, most of those depositions had not even been made or transcribed before the Decision was adopted.

272 Finally, the Commission contends that its findings rely predominantly on contemporaneous communications between Lenovo's top management in the US and in China who were directly involved in the relevant negotiations, including in particular [a Lenovo executive].

– The alleged unwritten condition of the MOU of 2007

273 The Commission maintains that a broad range of evidence in the file demonstrates that the underlying condition of the MOU of 2007 for the notebook segment was exclusivity. There are certain references to a volume target of [CONFIDENTIAL] units, but the evidence shows that the notebook related part of that volume was from the outset understood as a volume translation of an exclusivity requirement. This is confirmed by, in particular, an e-mail of 5 January 2007 from [a Lenovo executive], [designation of position], to [another Lenovo executive], which included an executive summary which stated that [CONFIDENTIAL]. That sentence shows unambiguously that the anticipated [CONFIDENTIAL].

274 Regarding [another Lenovo executive's] email, the Commission asserts that the fact that [this executive] had not been involved in the negotiations with Intel does not exclude his being well informed about the real reasons for the cancellation of the AMD launch, since contemporaneous evidence suggests that all Lenovo staff concerned with the AMD/Intel issue had already been informed of the exclusivity deal agreed with Intel.

275 Finally, the wording of [a Lenovo executive's] deposition [CONFIDENTIAL] does not support Intel's interpretation. When asked to confirm his first answer, [this Lenovo executive] [CONFIDENTIAL].

b) Errors in the assessment of the effects of the rebates

The applicant's arguments

276 The applicant asserts that the MOU of 2007 was not capable of foreclosing an as-efficient competitor. The Commission's analysis overstates the allegedly conditional portion of the rebate, understates the contestable share, and overstates Intel's AAC. The last point is however not dealt with in detail in the application.

277 The applicant points out that, with respect to rebates offered under the MOU of 2007, the Decision concludes, in recitals 1474 to 1477 and recital 1461, that conditional rebates of USD [CONFIDENTIAL] were offered for a contestable share or volume of only [CONFIDENTIAL] to [CONFIDENTIAL] notebook units. It goes on to conduct two required share analyses and finds that the contestable volume was less than the required volume. However, the correct measure of the conditional rebate is USD [CONFIDENTIAL], and the contestable volume is [CONFIDENTIAL] units. Correcting either one of these errors reverses the Commission's findings.

– The conditional portion of the rebates

278 The MOU of 2007 mentioned two non-cash benefits afforded to Lenovo: improved access to an Intel [CONFIDENTIAL] and [CONFIDENTIAL]. The Commission attributed USD [CONFIDENTIAL] of the USD [CONFIDENTIAL] in conditional rebates to these non-cash items and based that USD [CONFIDENTIAL] on the value of the benefits to Lenovo. According to the applicant, that methodology is incorrect since, for the as-efficient competitor test, the conditional rebate ought to include the cost to Intel of providing those benefits, not their value to Lenovo. The Shapiro-Hayes Report calculated the cost of the two non-cash benefits at USD [CONFIDENTIAL].

279 According to the applicant, the Commission's assertion that an as-efficient competitor would lack a [CONFIDENTIAL] in China is without basis, especially given that AMD, the actual competitor in this situation, had a [CONFIDENTIAL] in China since at least 2006. The Commission makes the same error in valuing the [CONFIDENTIAL] at USD [CONFIDENTIAL], without even attempting to explain why the as efficient competitor would not incur the same USD [CONFIDENTIAL] cost as Intel.

280 Furthermore, the Commission fails its own test by relying on Intel's negotiating documents, and not on evidence of Lenovo's valuation of the non-cash benefits, which refutes the Commission's figure of USD [CONFIDENTIAL]. In the reply, the applicant points out that, based on a mere reference to Annex B.31, the defence insists on that figure; that assertion should be disregarded, because there is no adequate explanation in the Defence itself.

– The contestable volume

281 The applicant submits that there are two problems with the Commission's analysis of the contestable volume. First, the Commission's baseline scenario wrongly assumes that no CPUs for desktop computers were part of the contestable volume. Secondly, in its alternative scenarios it significantly underestimates the contestable volume of CPUs for desktop computers.

282 According to the applicant, the Decision's refusal to recognise the unequivocal fact that the rebates agreed to in the MOU of 2007 covered both desktop and notebook units is contrary to the evidence. In particular, the MOU of 2007 clearly states that Lenovo invited Intel to meet competition for 'at risk mobile and desktop platforms'; a substantial portion of the rebates provided for by the MOU were expressly linked to Lenovo's purchases of desktop CPUs; and recital 1488 of the Decision cites an internal Intel email reporting a discussion in which Lenovo indicated that [CONFIDENTIAL] desktop CPUs, in addition to [CONFIDENTIAL] notebook CPUs, were contestable.

283 In its second and third alternative methods, the Commission takes desktop CPUs into account but significantly underestimates the contestable volume. With a

conservative estimate of the contestable volume of [CONFIDENTIAL] CPUs (or [CONFIDENTIAL] desktop CPUs and [CONFIDENTIAL] notebook CPUs), the rebates to Lenovo during 2007 pass the AEC test.

The Commission's arguments

– The conditional portion of the rebates

284 The Commission submits that it was right to rely on the value of the non-cash advantages to Lenovo, as opposed to the cost of those for Intel. In essence, the as-efficient competitor analysis assesses the compensation which a hypothetical as-efficient competitor would have to offer Lenovo for the loss of Intel's rebates. According to the Commission, in order to have an incentive to choose the as-efficient competitor, Lenovo would expect to be compensated for its own losses, not for the losses of Intel.

285 Furthermore, Intel does not put forward any sound evidence that there was a divergence of views between Intel and Lenovo on the value of the non-cash advantages for Lenovo, still less that Lenovo had calculated another value for those non-cash advantages.

– The contestable share

286 The Commission submits that the Decision rightly included only notebook units in its main calculation of the contestable number of units, since the condition for the grant of the rebates was for Lenovo to remain Intel-exclusive on the notebook segment. Including in the contestable share units which belong to another segment would mean that the hypothetical as-efficient competitor would not suffer from anticompetitive foreclosure as long as it could compensate the effect of a restrictive condition by sacrificing profits on any product, even if those products are not targeted by the condition.

287 Contrary to Intel's claim, the Commission conducted a detailed step by step analysis of Intel's assessment of the number of contestable units in the combined desktop and notebook segments.

288 Finally, according to the Commission, Intel's allegation that a reasonable assumption of the contestable number of units in the combined notebook and desktop segments is [CONFIDENTIAL] units is flawed on many counts. First, it is not based on figures represented to Intel by Lenovo. Secondly, it uses an incorrect notion of contestable share. Thirdly, it uses data sets that are provisional. If Intel had used the final value of the data instead of the provisional one, it would have come to the same conclusion as the Commission.

5. MSH

a) Errors in the assessment of the conditional nature of the payments

289 Regarding the assessment of the conditional nature of the agreements with MSH, the Decision makes the following findings: (i) the funding agreements between Intel and MSH contained an unwritten exclusivity clause; (ii) MSH was free to start selling computers equipped with AMD CPUs at any time, but this would have led to a loss of a disproportionate fraction of the payments from Intel; (iii) it was 'clear to MSH' that a change in supplier strategy would entail a substantial and disproportionate reduction in total payment from Intel; (iv) Intel continuously and closely monitored MSH's compliance with the exclusivity requirement.

The applicant's arguments

290 The applicant claims that the evidence does not establish that MSH's expectation of a financial risk related to a disproportionate reduction in rebates from Intel if it were to purchase from AMD. In the reply, the applicant adds that the defence departs impermissibly from the Decision in claiming that the unwritten exclusivity clause alone suffices to prove an abuse. That assertion does not appear in the Decision, which relies entirely on the theory that Intel's rebates were conditional in that a switch to AMD would lead to a disproportionate reduction in rebates. Further, the defence wrongly asserts that the question whether Intel would actually have disproportionately reduced its payments and whether MSH believed in the threat is irrelevant. Finally, given the Decision's specific statements that the unwritten exclusivity clause meant only that MSH's rebates would drop disproportionately if it sold computers equipped with AMD CPUs, the application naturally emphasised the lack of evidence supporting that claim, albeit without admitting the existence of such a clause.

– The absence of documents from Intel to MSH containing threats

291 The Decision fails to identify any contemporaneous evidence from Intel to MSH in which any loss of rebates – still less a disproportionate reduction – is threatened. On the contrary, in 2001, Intel responded to a serious threat by MSH to shift business to AMD by increasing MSH's rebates on higher-performing Intel CPUs.

– The Commission's misreading of MSH's Article 18 response and the question whether MSH feared a disproportionate loss of rebates

292 The applicant observes that the Decision's conclusion that MSH feared a 'likely substantial and disproportionate loss' of rebates from Intel relies principally on MSH's Article 18 response, according to which 'it was clear to MSH ... that the sale of AMD-equipped computers would result at least in a reduction of the amount of Intel's contribution payments per Intel CPU ... even if the volume of Intel CPUs sold by MSH would have remained the same as in previous periods'.

However, the response says nothing about the magnitude of the expected reduction, and thus does not show that MSH expected a substantial reduction. The response is also ambiguous because different CPUs had different rebate levels, and thus, depending on the product mix shifted to AMD, the average per-unit rebate could decline without any reduction in the per-unit rebate for any Intel CPU.

293 Furthermore, MSH's response does not cite any document showing that MSH perceived that it would face a reduction of its rebates. Similarly, the statements submitted by the two MSH executives with direct responsibility for the negotiations with Intel [CONFIDENTIAL] contain no reference to the likelihood of a disproportionate reduction in Intel rebates as a consequence of introducing computers equipped with AMD CPUs.

294 The applicant submits that MSH's contemporaneous documents show that MSH assessed the impact of a switch to AMD and concluded that shifting approximately [CONFIDENTIAL] of its overall requirements to AMD would result in only a proportionate reduction in rebates from Intel. In spreadsheets from 2004, MSH assessed that switching [CONFIDENTIAL] of its PCs to AMD would not reduce its per-unit rebates from Intel. Those documents constitute powerful and direct evidence of MSH's actual contemporaneous beliefs concerning the effect of a switch to AMD. The Decision offers wholly implausible reasons for denying the obvious implications of those documents.

295 The Decision cites a number of other documents, in particular documents 7, FWB2 and 13, but, according to the applicant, none of those establishes that MSH feared a 'substantial and disproportionate' loss of rebates from Intel if it decided to sell computers equipped with AMD CPUs. Document 64 does not bear on whether the terms of the overall contribution agreement would change if MSH shifted a portion of its CPU demand to AMD. Finally, document GB7, an internal MSH [geographic area] email relating to the advertising of a particular AMD-based computer, is even less pertinent.

– Whether the Commission relied on information which was not disclosed to Intel

296 The applicant maintains that, in recitals 693, 695 and 696 and in footnotes 941, 945 and 946 of the Decision, the Commission relies on documents the full text of which it has refused to produce to Intel, which is a serious infringement of Intel's rights of defence.

297 In any case, those documents do not support the inferences that the Commission seeks to draw from them. For example, Document 5 is an internal MSH email from 2002, which refers to 'two different scenarios' under consideration based on the offers currently available from AMD, but the amounts of the risk have been redacted from the materials made available to Intel, and the file does not contain

the actual 'scenarios' referred to in Document 5. Similar flaws vitiate the Decision's reliance, in recital 695, on Document CHO10.

– The legitimate objectives of Intel's contribution agreements with MSH

298 The applicant disputes the assertion in recitals 588 to 616 of the Decision that Intel entered into a series of agreements with MSH to disguise exclusivity rebates as reimbursements for marketing expenditure, and that Intel has never shown any particular interest in MSH's compliance with these obligations.

299 First, Intel has entered into similar marketing cooperation agreements with many other retailers throughout Europe, notably with [retailer]. Secondly, the evidence shows that Intel exercised appropriate levels of oversight over contribution agreement funds. Thirdly, from 2002, MSH's entitlement to rebates rested solely on MSH's success in selling Intel-equipped computers, so that Intel had no reason to seek confirmation or otherwise monitor MSH's marketing activities.

The Commission's arguments

300 The Commission contends that Intel fails to address a substantial part of the factual findings and legal conclusions contained in the Decision. The Decision's findings that (i) the funding agreements between Intel and MSH contained an unwritten exclusivity clause, and that (ii) Intel gave MSH to understand that non-compliance with the exclusivity requirement would lead at least to a substantial and disproportionate reduction of its payments under the funding agreements, each alone suffice to prove the unlawfulness of Intel's payments to MSH. Yet, Intel mainly limits itself to addressing finding (iii), namely that MSH feared that it would incur a substantial and disproportionate financial loss if it breached the exclusivity requirement, and leaves the rest of the evidence largely uncontested. However, according to the Commission, the question whether Intel would actually have disproportionately reduced its payments or whether MSH believed in that threat is irrelevant.

– The absence of documents from Intel to MSH containing threats

301 As concerns the alleged absence of documents addressed to MSH from Intel containing threats, the Commission would firstly point out that Intel fails to address the considerable amount of evidence in the form of concrete examples set out in the Decision showing that Intel gave MSH to understand that it would reduce its payments disproportionately in the event of MSH breaching the exclusivity.

302 The fact that much of the evidence relied on by the Decision comprises MSH's account of its dealings with Intel is readily explained by the steps Intel took to hide the imposition of its exclusivity requirement on MSH. As noted at recital 680 of the Decision, Intel insisted that all discussion about its exclusivity agreement

with MSH 'would need to remain secret, should not be recorded in writing, and generally ... should not leave the room where they were held'.

– The Commission's misreading of MSH's Article 18 response and the question whether MSH feared a disproportionate loss of rebates

303 In that regard, the Commission points out that the applicant makes no attempt to answer the evidence adduced of three specific instances (namely the payment holdback in 1998/1999 described in recitals 700 to 705, the [flagship brand of a major OEM] incident described in recitals 706 to 711 and MSH [geographic area] accession to the exclusive funding agreements, described in recitals 712 to 725 of the Decision) demonstrating MSH's apprehension of disproportionate consequences if it breached its exclusivity obligation towards Intel; instead, the applicant interprets isolated pieces of evidence out of context. Nor does Intel address MSH's response (recital 994 of the Decision) wherein MSH stated that 'the amounts paid under the agreements were at least in part a reflection of the special and exclusive relationship it had with Intel'. This confirms MSH's understanding that it would lose at least a part of Intel's funding without any relation to the volume switched to AMD if it were to breach the exclusivity agreement.

304 The Commission submits that, contrary to what the applicant asserts, it is very clear that MSH feared a disproportionate loss of payments and there was no ambiguity in that regard in MSH's statements. The statements of the two MSH executives [CONFIDENTIAL] emphasise the exclusive nature of the arrangements and provide concrete examples – the veracity of which is uncontested by Intel – of the (disproportionate) consequences of breaching exclusivity.

305 Regarding the spreadsheets drawn up by MSH, the Commission submits that MSH could not be sure of the extent of Intel's reaction, but that it was clear, according to MSH, that by sourcing AMD-based computers as well, it would suffer at least a reduction of the level of contribution per processor from Intel, such that, even if it had maintained the same volume of sales of Intel-based computers, it expected a reduction in the value of payments received.

– Whether the Commission relied on information which was not disclosed to Intel

306 Regarding Document 5, the Commission submits that no infringement of the rights of the defence arises because the Decision does not rely on the redacted quantum of the risk referred to in the document. Had MSH simply projected no disproportionate loss of rebates consequent on sourcing from AMD, it would not have been a matter of 'risk', but a matter of straightforward quantification of the loss of rebates on the number of Intel-equipped computers whose sales were replaced by AMD-based computers. The same analysis applies to Document CHO10.

307 Documents 7 and 13 show that despite AMD making attractive offers to MSH, MSH was unable to countenance losing all or most of the Intel rebates as a consequence of breaking its exclusivity. According to the Commission, MSH could not, of course, expect to receive payments on purchases shifted to AMD, but the concern implicit in those documents is that the loss would go well beyond that. Such an interpretation is consistent with Document 64 and Document GB7.

– The legitimate objectives of Intel's contribution agreements with MSH

308 The Commission points out the fact that, under the written terms of the agreements, Intel was providing promotional support rather than payment for exclusivity is irrelevant, as the Commission's case on exclusivity rests on evidence outside the written terms of the agreements.

309 The Commission fails to see how the allegedly legitimate objective of Intel's funding agreements with MSH could disprove the Commission's findings that Intel's funding was conditional upon MSH exclusively selling Intel-based computers. Furthermore, Intel's own evidence shows that MSH was a special case. As to supervision of the contribution agreement funds, the applicant effectively admits that there was a considerable gulf between the terms of the agreements and the reality of practice.

b) Errors of assessment of the effects of the payment

The applicant's arguments

310 The applicant submits that the AEC analysis in the Decision for MSH, as well as overestimating Intel's AAC, contains two significant errors: (i) it used an illogical and invalid 'double conditional discount test'; and (ii) it incorrectly assumed that MSH would have lost 100% of its rebates if it sourced from AMD. Correcting for either one of these errors shows that MSH passes the AEC test.

– The application of a 'double conditional rebate' standard

311 According to the applicant, the Decision acknowledges in recital 1564, Table 58 that Intel's effective price to MSH was substantially above AAC for the entire period of alleged infringement (2002 to 2007). But the Commission then states that where Intel provides a conditional rebate to an OEM, an as-efficient competitor would have to supply additional rebates beyond those provided to MSH in order to ensure that it captures the contestable share of the OEM. The Decision calculates the amount of this 'double conditional discount' by assuming that every OEM that supplied MSH was subject to a conditional rebate equivalent to the total rebates offered to NEC in the fourth quarter of 2002, and would have lost every dollar of that rebate if MSH began selling computers with AMD CPUs. On the further assumption that 100% of the rebates provided to MSH were conditional, the Commission concludes that Intel's rebates would have foreclosed an as-efficient competitor in all years except 2004.

312 However, that analysis contains several significant problems which entirely invalidate its results. First, apart from NEC (which made up only [CONFIDENTIAL] % of MSH's purchases), the principal OEM suppliers of computers to MSH from 2002-2007 were [CONFIDENTIAL]. The applicant states that the Commission does not allege that conditional rebates for consumer computers were provided by Intel to any of those OEMs. Accordingly, the Commission's assumption that all of MSH's suppliers received substantial conditional rebates is unfounded.

313 Secondly, the Commission's analysis assumes that NEC and all other OEMs supplying MSH received, from 1997 to 2007, conditional rebates which were identical to NEC's rebate for a single calendar quarter. There is no basis for assuming that rebates provided to NEC were stable over a 10-year period, much less that the rebate offered to NEC has any bearing on the rebates provided to other OEMs.

314 Thirdly, the Decision performs a 'double conditional discount' analysis for the entire 1997-2007 time period, based solely on claims regarding NEC, even though the Commission does not allege that NEC received any conditional rebates before October 2002 or after November 2005. Fourthly, the Decision fails to acknowledge that NEC's European subsidiary, NECCI, routinely used AMD CPUs for one third of its requirements during the period when allegedly conditional rebates were granted. Finally, the Commission's double conditional rebate analysis wrongly assumes that rebates to NEC were entirely conditional.

– The conditional portion of the rebates

315 The applicant maintains that the Commission's conclusion that 100% of the rebates provided to MSH were conditional rests entirely upon an extrapolation from an episode in 2002 in which MSH considered introducing a line of [flagship brand of a major OEM] notebook computers equipped with AMD CPUs. But the evidence cited by the Commission concerning that episode does not provide any indication of a risk beyond the [CONFIDENTIAL] % of rebates associated with [this OEM's] notebooks. More directly, there is no evidence that MSH ever believed it risked losing all of its rebates from Intel under any circumstances.

316 According to the applicant, the Commission's reasoning is further undermined by evidence concerning rebates which Intel provided to other major European retailers in the same time frame. The Commission acknowledges the pertinence of that evidence, but then artificially eliminates those retailers whose share of AMD-based computers is below [CONFIDENTIAL] %, namely [retailer] and [retailer]. The applicant contends that the '[CONFIDENTIAL] % limitation' imposed by the Commission does not derive from any principle of the effective price test and appears to have been contrived to exclude unfavourable evidence.

317 In recital 1538, the Commission compares the Intel rebate percentage provided to MSH with a rebate percentage calculated for a group of much smaller retailers and concludes that the smaller retailers obtained [CONFIDENTIAL] % of the rebates awarded to MSH on average, thus resulting in a [CONFIDENTIAL] % conditional rebate percentage. However, the flaw in this analysis is the assumption that the volume of a retailer's purchases has no effect on the magnitude of rebates that it obtains from a supplier. In fact, the magnitude of Intel's rebates to retailers were closely tied to the retailer's sales volume of computers, and thus MSH and [retailer], the two largest retailers by far, consistently received higher percentage rebates.

The Commission's arguments

– The application of a 'double conditional rebate' standard

318 The Commission asserts that in order to be able to sell computers of a specific brand to MSH, an as-efficient competitor would have to ensure not only that MSH was ready to buy computers equipped with the competitor's CPUs, but also, and above all, that OEMs were ready to manufacture such computers. Thus, Intel's practices at different levels of the supply chain can have cumulative effect.

319 First, the Commission submits that in order to show that Intel's payments to MSH were capable of having an anti competitive foreclosure effect when cumulated with an Intel practice at the level of an OEM, it suffices to show that capability of effect by reference to a representative example of a conditional payment from Intel to one OEM.

320 Secondly, the Decision analyses the cumulation of Intel's payments to MSH and Intel's naked restrictions, in particular *vis-à-vis* AMD-based Lenovo notebooks from June 2006 to December 2006.

321 Annex B.31 analyses in detail the remaining Intel arguments. In essence, it shows that the Decision gives proper justification for the premise that the NEC rebates for the quarter concerned are representative of the entire relevant period, that the European branch of NEC could not have plausibly provided the entire contestable share of MSH and that the Decision does not rely on the assumption that 100% of Intel's rebates to NEC were conditional.

– The volume of the conditional rebate to MSH

322 The Commission maintains that the [flagship brand of major OEM] incident (paragraph 303 above) is a relevant reference because it is the only documented instance where MSH tested with Intel the possibility of even a limited derogation to the exclusivity agreement. Despite Intel's claim, the [flagship brand of major OEM] episode is evidence of the fact that MSH risked losing 100% of its payments if it decided to sell also AMD-based PCs for all brands and all segments.

323 The Commission denied that it considers that evidence about payments provided to other major European retailers is relevant, since such a comparison raises several issues of principle. Despite those issues of principle, the Decision made a comparison in order to test the robustness of its analysis.

324 Annex B.31 of the defence shows that the AEC principles justify the exclusion of retailers which sell significantly fewer AMD-equipped computers than the contestable share at MSH, that is, [CONFIDENTIAL] %. Finally, that annex shows that Intel has not given any convincing proof of its assertion that the magnitude of its payments to retailers was tied to sales volumes of computers.

E – *Errors in the assessment of naked restrictions*

1. HP

325 The Decision finds that the HPA1 and HPA2 agreements were not only conditional on HP purchasing at least 95% of its corporate desktop x86 CPU needs from Intel, but were also conditioned on three unwritten naked restrictions providing that: (i) HP was to direct its AMD-based x86 CPU business desktops to Small and Medium Businesses ('SMBs') and Government, and Educational and Medical ('GEM') customers rather than to enterprise business customers; (ii) HP was to preclude its channel partners from stocking HP's AMD-based x86 CPU business desktops such that such desktops would only be available to customers by ordering them from HP (either directly or via HP channel partners acting as sales agents); and (iii) HP was to delay the launch of its AMD-based x86 CPU business desktop in the Europe, Middle-East and Africa region by six months.

a) The applicant's arguments

326 The applicant asserts that the Commission's evidence in support of these findings relates principally to discussions between HP and Intel during July 2002, the terms of which were not carried over to the simpler one-year deal which the parties entered into later.

327 The Commission's conclusion in recital 413 of the Decision that the rebates provided under the HPA agreements were subject to the condition that HP's AMD-equipped business desktops could only be sold to SMBs and GEM customers and not to large enterprises is contrary to a written submission of HP of 23 December 2005: HP stated therein only that it would [CONFIDENTIAL]. HP was always free to sell the D315, the AMD-based computer, to enterprise customers.

328 Regarding the second finding, the applicant points out that, in his sworn testimony, [a HP executive] confirmed HP's intention to [CONFIDENTIAL]. The goal was to lower HP's costs to better compete with Dell's direct-fulfilment model and not to foreclose AMD.

329 Regarding the third finding, the Commission acknowledges in recital 409 of the Decision that HP's decision to delay its launch of an HP AMD-based commercial desktop product in the Europe, Middle-East and Africa region was the result of the go-to-market strategy HP had adopted. The Commission's finding that the launch delay must have resulted from Intel's interference has no evidentiary support. Furthermore, the HPA1 agreement was not executed until 21 December 2002, only two months before the scheduled date of launch in Europe. As such, the HPA1 agreement was not conditional on a six-month delay of the launch of the D315 in that region.

b) The Commission's arguments

330 The Commission first points out that, regarding the conditions relating to the SMB and GEM segments, the Decision does not find that there was an absolute ban on HP selling any AMD-based business desktops to large companies, but rather that HP was under the obligation not to direct sales of those products proactively to non-SMB or GEM customers. The Decision's findings are therefore fully in line with HP's submission of 23 December 2005 and HP's email of 14 July 2002 and the possibility that HP might, in exceptional cases, have sold AMD-based desktops to large companies is not inconsistent with HP's obligations.

331 Secondly, regarding sales channels, HP's submission of 23 December 2005 states clearly that the restriction of the distribution of AMD-based products to direct sales was not something which HP decided it would implement, but a restriction, which Intel told HP that it should implement. [A HP executive's] testimony before the FTC cited by the applicant is contradicted by another passage from the same testimony stating 'we wouldn't have voluntarily done [this]'.

332 Thirdly, regarding the delay constraint, the Commission points out that HP explained that 'Intel granted the credits subject to the following unwritten requirements: ... (c) that HP ... defer the launch of its AMD-based business desktop in the Europe, Middle East and Africa region by six months'. Insofar as Intel submits that HP had committed internally to launching the D315 in February 2003, whilst the HPA1 agreement was not executed until 21 December 2002, the Commission contends, first of all, that the presentation makes no mention whatsoever of the date of February 2003. Further, the presentation does not contain any indication that the decision to delay launch was an internal commitment of HP. On the contrary, that decision appears in the list of items which HP would provide to Intel in the context of the deal in negotiation.

2. Acer

333 The Decision concludes that Acer delayed the launch of its notebooks equipped with AMD x86 CPUs (called Athlon64 or K8) from September 2003, as initially planned, to January 2004 because of Intel's request to do so. Acer understood that if it did not, the previously agreed ECAP funding would be decreased.

a) The applicant's arguments

334 According to the applicant, the Decision fails to offer firm, precise and consistent evidence to support its findings (i) that Acer's 'understanding' was that Intel would decrease funding absent a delay, and (ii) that Intel 'indicated' to Acer that such reductions would occur. Instead, the evidence shows that Acer decided to delay its AMD Athlon 64-based notebook computer after running into a serious technical issue with the product design and in the face of a worldwide shortage of those CPUs. Further, Intel's rebates to Acer remained steady or increased even as AMD's market share at Acer climbed from [CONFIDENTIAL] % to [CONFIDENTIAL] %. In the defence, the Commission asserts that even a mere 'request' by Intel to delay the launch of an AMD-based product suffices, without more, to prove the unlawfulness of the naked restrictions, but it fails provide legal support for that erroneous assertion, which is inadmissible because it was not included in the Decision.

335 The Decision relies on an Acer response of 28 April 2006, which stated that Intel made certain 'more or less explicit requests' to Acer regarding the 'postponement of the launch of certain AMD-based Acer products'. According to the applicant, however, a request is not a threat to withhold rebates, and Acer did not suggest that it received any such threat from Intel. Insofar as the Commission based its finding of a naked restriction on Acer's alleged impression regarding a disproportionate loss of rebates, the Decision must be annulled with respect to Acer in light of the judgment in *Deutsche Telekom* v *Commission* (paragraph 69 above).

336 Further, the Decision relies on AMD documents purporting to describe discussions between Intel and Acer, of which AMD could absolutely not have had knowledge. Such 'hearsay' is inherently lacking in credibility.

337 On the other hand, the testimony of [an Acer executive], Acer's chief negotiator, of 12 June 2009, is inconsistent with the Commission's finding that Intel 'indicat[ed] to Acer' that its rebates would be reduced if it did not delay the launch. [This executive's] testimony regarding [CONFIDENTIAL] is supported by contemporaneous documents.

338 [Two executives of Acer] both denied that [an Intel executive] or anyone else from Intel requested explicitly that Acer cancel or postpone its launch of products equipped with AMD's Athlon 64.

339 The applicant submits certain internal Intel emails are the only evidence cited to support the finding that Intel indicated to Acer that rebates would be cut absent a delay. None of the emails provides any indication that any such communication ever took place, and the evidence of Acer's executives consistently confirms that no such threats or suggestions occurred. The Commission cannot prefer the

assertions of an interested party with no personal knowledge of the events over the evidence provided by disinterested third parties with direct knowledge of the facts.

340 Finally, the Commission's conclusions are inconsistent with Intel's entire course of dealing with Acer since 2002. As AMD's market share at Acer increased over time (from [CONFIDENTIAL] % in the third quarter of 2003 to [CONFIDENTIAL] % by the fourth quarter of 2005), Intel increased the ECAP rebates it provided to Acer (from [CONFIDENTIAL] % to [CONFIDENTIAL] % of revenue per quarter). Further, the Decision offers no plausible explanation of what Intel would have gained from such a trivial delay (of only four months).

b) The Commission's arguments

341 The Commission points out that Intel admits that it requested Acer to postpone launching AMD-based notebooks but denies having threatened to reduce Acer's rebates if Acer had refused to postpone. However, Acer's corporate submission is clear that Intel used its rebates to exert pressure on Acer not to launch AMD-based products. The absence of a response to repeated advances by Acer regarding the ECAP funding for the next quarter sufficed to make Acer offer the postponement of the AMD launch 'voluntarily'. Acer's corporate submission states: [CONFIDENTIAL]. Several documents from the file confirm this pattern of conduct on Intel's part.

342 Contemporaneous documents also confirm Acer's corporate submission and show that Acer was aware of the true nature of Intel's requests. In his statement made under Article 19 of Regulation No 1/2003, [an Acer executive] spelt out that [CONFIDENTIAL].

343 Regarding the deposition of [an Acer executive] of 12 June 2009 in the context of the Delaware litigation, the Commission submits, first of all, that that deposition should be excluded from the present proceedings on the basis of Article 43(5) of the Rules of Procedure of the Court. Furthermore, the deposition was taken about six years after the facts and well after the adoption of the Decision. In any event, there is no contradiction between [this executive's] statement that Intel [CONFIDENTIAL] and the findings of the Decision.

344 Regarding the written declarations of [two Acer executives], recital 438 of the Decision explains that both declarations are irrelevant since they cover only the content of a single meeting held between Acer and Intel on 25 August 2003, and that they do not rebut the evidence on which the Commission's findings rely.

345 The documents drawn up by [an AMD executive], report conversations he had with [two Acer executives] tasked with negotiations with Intel, and thus persons with first hand knowledge of high-level negotiations. The AMD emails are corroborated by other documents in the file and by the Acer corporate submission. In that regard, the Commission recalls that out of the 14 documents relied upon in the Decision to prove Intel's abuse vis-à-vis Acer, only three originate from

AMD. [One of the Acer executive's] deposition of 12 June 2009 does not contradict any of the relevant parts of [the AMD executive's] emails.

346 The Commission asserts that whether other factors also contributed to the postponement of the launch of Acer's AMD-based notebook is legally irrelevant to the validity of the Decision's findings. The evidence in the file shows that Acer's postponement decision was mainly the result of Intel's request not to launch the AMD K8-based notebook. The alleged CPU shortage issue raised by the applicant only arose at the end of September 2003 and thus around three weeks after Acer had decided to postpone the AMD launch. Next, the Commission denies the allegation that it erroneously assessed contemporaneous evidence from Acer and Intel.

347 Finally, the Commission submits that the evolution of Intel's market share at Acer is irrelevant for the assessment of the findings of the Decision since – unlike in the HP, Dell or NEC cases – the Commission does not find that Intel awarded Acer rebates which were conditioned on that market share.

3. Lenovo

348 According to the Decision, Intel granted 'payments to Lenovo between June 2006 and December 2006 conditional on Lenovo delaying and finally cancelling its AMD-based x86 CPU notebooks'.

a) The applicant's arguments

349 The applicant alleges that the Commission wrongly interpreted Lenovo's strategic objectives regarding AMD-based notebooks. Further, the Commission cannot establish an infringement with respect to the 2006 postponement.

The Commission's erroneous interpretation of Lenovo's strategic objectives regarding AMD-based notebooks

350 The applicant submits that the Decision contains three main mischaracterisations regarding Lenovo's sourcing strategy.

351 The first relates to problems in the Lenovo-Intel relationship in 2005 and early 2006, when Lenovo was concerned about Intel's supply and price competitiveness and the complexity of its discounting and marketing programs. The Decision suggests that Lenovo concluded that a dual-source strategy, whereby it would use both Intel and AMD CPUs in notebook computers, was the only solution to these concerns.

352 However, Lenovo deliberately used the threat of buying more AMD products to extract better terms from Intel. That strategy proved successful. In consequence, Lenovo re-evaluated the wisdom of a dual-source strategy.

353 Secondly, the Decision overstates the importance and extent of demand for AMD-based notebooks. According to the applicant, after Intel lowered its prices, AMD refused to cut prices to levels which Lenovo believed would be competitive against Intel-based systems, which substantially reduced the expected demand for AMD notebooks. The evidence shows that, given the choice of comparably priced Intel- and AMD-based notebooks, [CONFIDENTIAL]. Without a price advantage, Lenovo's forecasted demand for AMD-based notebooks plummeted.

354 Thirdly, AMD and Lenovo never reached agreement on price, and therefore Lenovo never committed to proceed with its AMD notebook project. The Commission mischaracterises the Statement of Work ('the SoW') in that regard. The SoW did not require Lenovo to launch an AMD-based notebook. It was simply a step on the way towards a product launch decision. [CONFIDENTIAL]. [A Lenovo executive] testified that [CONFIDENTIAL].

Establishment of an abuse with respect to the 2006 postponement

355 The applicant submits that the Commission errs in finding that the 'first postponement' (recital 519 of the Decision) was conditional on Intel payments. In that regard, the Decision does not identify any evidence of either 'conditionality' or 'payment'. The evidence shows instead that Lenovo chose not to launch the notebook because AMD was unwilling to meet its pricing demands. The Decision disregards this evidence and instead asserts that Intel 'reacted negatively' to closer cooperation between Lenovo and AMD. However, the email relied on in that regard was never sent to Lenovo. The other emails relied on by the Commission do not establish that Intel was responsible for the no-launch decision.

356 The Decision incorrectly finds, at recital 524, that in June 2006 Lenovo again decided to postpone the launch of AMD-based notebooks, as 'the result of a deal between Intel and Lenovo which was conditional on the postponement of the AMD-based notebooks'. Intel's and Lenovo's internal analyses show that Intel's improved pricing for the second half of 2006 was not predicated on exclusivity. The evidence does not establish any link between refraining from buying AMD with the payment of the rebate. The testimony of [a Lenovo executive] is no more than a statement of a normal, competitive rebate offer, under which Lenovo would receive greater rebates if it bought more products from Intel.

357 Finally, the applicant repeats its assertion that the Decision does not conduct an AEC test since it concludes, at recital 1676, that Lenovo's decision in the second half of 2006 to postpone the launch of AMD notebooks was the result of a 'naked restriction'. Prof. Shapiro and Dr Hayes performed such an analysis and showed that Intel passed the AEC test.

b) The Commission's arguments

The Commission's erroneous interpretation of Lenovo's strategic objectives regarding AMD-based notebooks

358 The Commission's primary submission in that regard is that the applicant's three claims are irrelevant, since none of them is incompatible with the findings establishing the unlawfulness of Intel's practices, namely the fact that the payments and rebates in question were conditional upon postponing and eventually cancelling the envisaged launches of AMD-based products.

359 Regarding the individual allegations, the Commission contends, first, that during 2005 and at the beginning of 2006, Lenovo experienced increased market demand for AMD products, which it considered increasingly competitive. In view of these circumstances, it is not credible that Lenovo's interest in AMD was limited to using the company as a mere threat in its negotiations with Intel. Further, Lenovo's notebook projects were far too advanced to be considered as a mere negotiation strategy *vis-à-vis* Intel. Finally, even after Intel had considerably improved its pricing, Lenovo believed that AMD retained certain advantages, and the Commission cites an email from [a Lenovo executive] of 26 May 2006 stating [CONFIDENTIAL].

360 Secondly, regarding the extent of demand, the Commission submits that the chain of events apparent from the contemporaneous evidence shows that Lenovo's postponement decision was not due to AMD's prices. According to the Commission, Lenovo [geographic area] had already struck the conditional deal with Intel when Lenovo's worldwide management was still negotiating improved pricing offers with AMD. According to the Commission, this shows that AMD never had a chance to reach a pricing agreement with Lenovo since Lenovo was no longer in a position to launch the AMD [geographic area] notebook in June if it wanted to respect Lenovo [geographic area] deal with Intel.

361 The evidence outlined in the Decision also shows that there was sufficient demand for AMD-based notebooks up to at least 2007, given that Lenovo's sales departments still projected sufficient demand in November/December 2006 to consider the AMD launch to be viable, and given that worldwide demand for AMD-based notebooks was actually increasing during the period in question.

362 Thirdly, regarding the SoW signed between Lenovo and AMD, the Commission contends that its legal status and its contents are not determinative of the findings from which the Decision concludes that Intel's exclusivity rebates and naked restrictions infringe Article 82 EC.

363 The Commission asserts, however, that the SoW was indeed a binding agreement between the two parties since it itself makes a clear distinction between non-binding statements of intent (such as Schedules E and F) and the other schedules. Further, the SoW went much further than simply describing certain projects that

Lenovo envisaged carrying out with AMD; rather, it laid down the basis for a long-term strategic alliance between both parties. Finally, there is contemporaneous evidence demonstrating that Lenovo intended to follow through on its agreement with AMD. In April 2006, Lenovo had already started executing the SoW, incurred development expenses and made some commitments with suppliers.

Establishment of an abuse with respect to the 2006 postponement

364 The Commission points out first of all that the Decision does not make a finding of a breach of Article 82 EC in respect of the first postponement. However, Intel fails to comment on the two most unambiguous pieces of evidence adduced in support of this finding, namely [a Lenovo executive's] email of 6 April 2006 and [another Lenovo executive's] e-mail of 7 April 2006.

365 As to the second postponement, the Commission points out that Intel does not comment on any of the unequivocal statements contained in a wide array of contemporaneous evidence from Lenovo. The Commission then analyses the allegedly contradictory documents relied on by the applicant, namely Intel's internal minutes of 27 April 2006, [a Lenovo executive's] e-mail of 26 May 2006, [this executive's] deposition taken on 12 March 2009 and Lenovo's submission of 27 November 2007. None of these documents disproves the Commission's findings. In particular, the Commission submits that the unambiguous contemporaneous evidence has greater probative value than Lenovo's contradictory corporate statement which was drafted *ex post*.

366 Regarding the absence of an AEC analysis, the Commission asserts that such an analysis is superfluous in establishing the unlawfulness of a practice which undermines effective competition by preventing market access for competing products and/or which, being outside the scope of competition on the merits, aims at foreclosing competitors.

F – *The applicant's other complaints*

367 In parts M, N and O of the application, the applicant puts forward several complaints based upon the absence of harm to consumers or to the competition, AMD's performance and regarding the alleged 'single strategy' to foreclose AMD. The Commission did not allocate specific parts of its defence to responding to these arguments but examined them jointly with the applicant's other pleas and/or contends that they are without relevance. In its rejoinder, the Commission adds arguments concerning the alleged foreclosure of AMD, harm to consumers and the AEC analysis.

1. The alleged absence of harmful effects for consumers and the competition

368 The applicant submits that section VII.4.2.5. of the Decision, entitled 'Harm to competition and consumers', merely asserts anti-competitive foreclosure effects,

without actually analysing whether such effects existed. However, the Commission cannot simply presume that Intel's rebates caused harm to consumers; it must have regard to their legal and economic context.

369 The applicant alleges, first, that there were no harmful effects for consumers. In that regard, CPU prices have declined during the relevant period at a faster rate than the prices of any other product. Consumers have benefited from rapid innovation and that the pace of investment in future innovation has increased. The Commission's assertion that Intel's conduct limited consumer choice is factually flawed for several reasons, inter alia because European OEMs sold systems with AMD CPUs in every segment and at every price point.

370 Secondly, the applicant asserts that there was no harm to competition. Recital 1612 of the Decision indicates that the Commission's findings of detriment to consumers and competition are dependent on an assumption of foreclosure. However, there is no foreclosure because all of Intel's challenged rebates pass the AEC test. The Commission is unable to identify even a claim of harm to AMD. Furthermore, the total level of sales affected by the conduct challenged by the Commission ranged from 0.3% to 2.0% of the relevant market per year.

371 The Commission contends that the impression given by the reply is wholly misleading since the share of the market covered by Intel's abuses was over 25% for much of the period of infringement; that share was thus both significant and strategically important.

2. AMD's performance

372 The applicant submits that the Commission's assertion – that analysis of AMD's performance is not relevant for the application of Article 82 EC – is not supported by the case-law or the Commission Guidance. The Commission fails to consider the real reasons why the OEMs purchased certain AMD products in significant volumes but declined to purchase others.

373 The reality is that 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.

374 According to the applicant, AMD's sales in the commercial PC segment were hampered by its inability to offer reliable platforms to meet the needs of commercial customers. Mr Richard, AMD's top sales executive, explained why commercial customers did not chose AMD as follows: [CONFIDENTIAL].

375 Further, AMD acknowledged that it neglected the mobile (laptop/notebook) segment. However, AMD performed much better in the consumer segment, its traditional area of strength, and particularly in the consumer desktop segment. AMD also experienced successful growth in the server segment based upon the

success of its Opteron CPU. During most of the relevant period, AMD enjoyed strong growth and registered record profits.

376 AMD's fortunes took a turn for the worse in 2007, but, according to the applicant, the reversal of the trend is attributable to four factors: (i) supply problems; (ii) AMD's failure to deliver on its promises regarding a new version of its Opteron CPU; (iii) Intel's introduction of a new, market-leading product line in 2006; and (iv) AMD's overpayment in its acquisition of graphics chipset maker ATI Technologies.

377 The Commission points out, above all, that the claim that AMD's market shares increased five fold during the period covered by the Decision is belied by market share figures from independent reporting companies.

3. The alleged single strategy to foreclose AMD

378 The applicant states that the Decision concludes that it would not be appropriate to view each of the practices of Intel in isolation, that Intel engaged in a long-term comprehensive strategy to foreclose AMD from the strategically most important sales channels in the market, that the measures adopted complemented each other, and that, taken together, the practices were capable of having or likely to have had an even greater negative impact overall on the market. Based on those assertions, in recital 1748 of the Decision the Commission finds that Intel committed a single infringement of Article 82 EC from October 2002 until December 2007.

379 The applicant submits that, even if the Court upholds the Commission's findings of abuse, 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. In particular, no allegations are made in respect of Dell, the largest computer manufacturer, for any period after December 2005. Intel's alleged conduct consisted of a haphazard mix of activities and time periods with respect to the various OEMs and covers an insignificant proportion of the CPU market.

380 The only evidence in support of Intel's alleged strategy consists of two emails cited in footnote 2065 of the Decision. However, the applicant points out that those emails, which were sent in 1998, are not probative of any comprehensive plan of action to foreclose AMD and are not direct evidence of an exclusionary strategy.

381 In the rejoinder, the Commission submits that both Intel's rebates and naked restrictions complemented each other and formed part of a single strategy to foreclose AMD from the x86 CPU market. It follows from the nature of this case, in which Intel made systematic efforts to conceal its anticompetitive practices, that there is no overt statement of a strategy to foreclose AMD, but there is ample evidence of the existence of such a plan or strategy.

IV – *The heads of claim seeking annulment or reduction of the fine*

A – *The applicant's arguments*

382 The applicant, supported by ACT, submits that, in light of the Court's unlimited jurisdiction to review the level of any penalty pursuant to Article 229 EC and Article 31 of Regulation No 1/2003, the fine should be annulled or reduced substantially on the following grounds: (i) the level of the fine is manifestly disproportionate; (ii) Intel did not infringe Article 82 intentionally or through negligence; (iii) the Commission misapplied the 2006 Guidelines and took irrelevant considerations into account.

1. The allegedly disproportionate nature of the fine

383 The applicant points out that its fine of EUR 1.06 billion is the highest fine ever imposed on a single company for an infringement of the competition rules. It submits that such fines must be proportionate to the scale of their anticompetitive effects and the interests of the consumers or competitors injured thereby; in that regard it cites Case T-83/91 *Tetra Pak* v *Commission* [1994] ECR II-755, paragraph 240. 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 to consumers or competitors, regardless of whether actual effects are relevant to the finding of an abuse.

384 In the present case, the evidence demonstrates that the market for CPUs was characterised by constantly falling prices, improving product quality and a nearly five fold increase in AMD's market share during the period considered by the Decision (from 5.5% in the second quarter of 1997 to 25.3% in the fourth quarter of 2006).

385 In addition, to the extent that AMD registered losses in certain periods, the Commission has not demonstrated that these were attributable to Intel's conduct. Similarly, the Commission has failed to establish any harm to consumers. However, 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.

386 The fine imposed upon Intel is also disproportionate compared to other recent cases including the case giving rise to the judgment in *Microsoft* (paragraph 61 above).

387 Moreover, consistent with paragraph 328 of the judgment in Case T-450/05 *Peugeot Nederland* v *Commission* [2009] ECR II-2533, the fine should be reduced since any decision on the part of the OEMs to purchase Intel CPUs may well have been due to other business reasons and not to the loyalty inducing effects of any conditional rebates.

388 Finally, the applicant claims that the fine was imposed unlawfully and in breach of Article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950 ('the ECHR') under which any criminal charge must be decided by an independent tribunal. According to the applicant, that requires particular judicial scrutiny in accordance with the unlimited jurisdiction of the Court, which is not limited by the 2006 Guidelines.

2. The alleged absence of an intentional or negligent infringement of Article 82 EC

389 The applicant points out that, under Article 23(2)(a) of Regulation No 1/2003, the Commission may only impose fines upon undertakings where they have infringed the provisions of Article 82 EC either intentionally or negligently.

390 However, the existing case-law does not show that conditional rebates are always unlawful. Further, the Commission's attempt to predicate findings of abuse on OEMs' supposed fear of disproportionate rebate reductions is a novel approach, as is its attempt to fashion a new category of abuse that it refers to as a 'naked restriction'.

391 The applicant asserts that the Commission's allegations that Intel took steps to conceal its conduct are ill-founded and wrong. In particular, the 'Sales and Marketing Creation Reference Card' is a document produced by Intel to educate its business-people to avoid potential wrongdoing.

392 Finally, the applicant maintains that, at the time of the allegedly abusive conduct at issue, it could not have foreseen the results that were ultimately reached by the Commission in the application of its AEC test, which was based upon internal data from the various OEMs which was neither ever known nor accessible to Intel. For example, the Commission calculates Dell's contestable share based exclusively upon internal Dell spreadsheets which were never communicated to Intel. The Commission's finding of an infringement is therefore contrary to the general principle of legal certainty (*Deutsche Telekom* v *Commission*, paragraph 192).

3. The alleged misapplication of the 2006 Guidelines

393 The applicant states, first, that the Commission has failed to define a relevant product and geographic market in respect of the MSH allegations, despite paragraph 13 of the 2006 Guidelines providing that the basic amount of the fine should be set taking the value of the undertaking's sales of goods or services to which the infringement directly or indirectly relates in the relevant geographic area.

394 Secondly, insofar as the Commission states in recital 1785 of the Decision that it took account, in assessing gravity, of the fact that Intel took measures to conceal the conducts established in the Decision, it should be noted that the Commission

has only set out specific allegations of concealment as regards MSH, HP, and Lenovo.

395 Thirdly, the Commission found a 'single infringement' in assessing the gravity of the infringement. However, for the majority of the financial year 2006, when the only conduct relating to the EEA involved MSH, there can be no basis for attributing greater gravity to Intel's alleged conduct resulting from a single alleged infringement in relation to a single retailer with a *de minimis* market share within the EEA. The Decision also inflated the fine by using the value of Intel's sales in all EEA Member States in December 2007, even though 12 Member States joined the EEA during the infringement period.

396 Fourthly, the Commission unlawfully applied the 2006 Guidelines with retroactive effect. Admittedly, according to the case-law, Article 7 of the ECHR 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; but those principles do not apply when one set of fining guidelines is replaced by another, with retroactive effect.

B – *The Commission's arguments*

397 The Commission contends, first of all, the applicant's suggestion that no fine should be imposed on it is predicated on the claim of absence of any infringement, and must accordingly be rejected.

1. The allegedly disproportionate nature of the fine

398 The Commission submits that it is not necessary to show actual effects to justify the level of the fine. The applicant's reasoning wrongly assumes that the effects of the infringement are a decisive factor in setting the level of the fine, or that the Commission based its decision to impose a fine of EUR 1.06 billion on such effects. However, the case-law has established that the decisive factor for determining the amount of the fine is the nature of the infringement, not its effects. In particular, in the *British Airways* case (paragraph 67 above), the General Court assumed that by their very nature the rebates in question had damaged the structure of competition; the Commission decision contested in that case had made no finding of effects on that structure. Similarly, the effects of the infringement are no longer mentioned as a relevant factor in the 2006 Guidelines. Accordingly, it is unnecessary, for the purpose of discussing the level of the fine, to examine the applicant's arguments in that regard.

399 The reference to other cases is fundamentally wrong since decisions in other cases can give only an indication for the purpose of determining whether there is discrimination. Furthermore, such comparisons are meaningless if one does not take into account the size of the undertaking being fined and the market concerned by the infringement.

400 In any event, the size of the fine imposed on Intel is modest given that the Commission decided that the proportion of the value of sales to be used to establish the basic amount of the fine to be imposed on Intel should be 5%, while this proportion can reach 30%, in accordance with paragraph 21 of the 2006 Guidelines. The Commission submits that, if one takes into account Intel's size and financial capacity, the fine amounts to 4.15% of Intel's annual turnover, far below the 10% ceiling laid down in Article 23(2) of Regulation No 1/2003.

401 The Commission adds that the applicant's assertions concerning the evolution of AMD's CPU sales, even if they were correct (*quod non*), cannot prove that the infringement had no effects, since, in the absence of abusive practices, the market shares of its competitors would have been able to grow more significantly.

402 Finally, the Commission submits that nothing in the mechanism for the enforcement of the competition rules of the Treaty established by Regulation No 1/2003 runs contrary to Article 6 ECHR or Article 47 of the Charter of Fundamental Rights of the European Union.

2. The alleged absence of an intentional or negligent infringement of Article 82 EC

403 The Commission submits that Intel's contentions are unsustainable. It is settled case-law that the condition that the infringement was committed intentionally or negligently is satisfied where the undertaking concerned cannot be unaware of the anti-competitive nature of its conduct, whether or not it was aware that it was infringing the competition rules of the Treaty (*Tetra Pak* v *Commission*, paragraph 283, and *Deutsche Telekom* v *Commission*, paragraph 295).

404 First, as stated in recital 1782 of the Decision, conditional rebates by undertakings in a dominant position have already been condemned on several occasions by the Commission and the Court of Justice. Secondly, whether Intel tried to conceal its conduct or not is immaterial to the issue of intent or negligence. However, the Commission points out that Intel's attempts to camouflage its unlawful practices also show that Intel was aware of the abusiveness of its conduct. Thirdly, the AEC analysis is not part of the legal test for determining whether fidelity rebates are abusive.

3. The alleged misapplication of the 2006 Guidelines

405 Regarding the application of the 2006 Guidelines, the Commission first asserts that, given that Intel committed a single infringement aimed at foreclosing its sole competitor, all individual aspects of its conduct affect the whole volume of Intel's sales within the EEA. Intel is therefore wrong in alleging that the Commission should have taken into account only sales in those countries where MSH is present. In any event, the Commission duly took into account the low intensity of the infringement in certain periods when setting the proportion of sales to be used

in the calculation at only 5%, which lowered the overall level of the fine, exactly as if it had decided to consider a reduced value of sales for certain years.

406 Secondly, the Commission did indeed take account of the fact that Intel had tried to conceal its abusive practices, which made it more difficult to detect and sanction them. The Commission was entitled to take this element into account, among many others, when assessing the gravity of the infringement. According to the Commission, Intel's contentions are rendered implausible by MSH's unambiguous statement that Intel made clear to MSH that the exclusivity agreement was to be kept secret, and should never be referred to in writing. The Decision does not exclude that [CONFIDENTIAL].

407 Thirdly, the Commission contends that Intel's assertion that the finding of a single infringement increases the gravity of the infringement and the level of the fine is misconceived. On the contrary, had the Commission found a number of separate infringements, it would have imposed a fine for each infringement. By finding a single infringement, the Commission has thus applied a lower fine. Should the Court nevertheless consider that certain factors relied on by the applicant should be reflected in the value of sales or in the multiplier on account of duration, the Commission requests the Court to re-examine the proportion of the value of sales to be taken into account for determining the basic amount of the fine, which was set at the very low level of 5% precisely on account of these factors, and should be increased to avoid double-counting.

408 Fourthly, the Commission asserts that it may, at any time, raise the level of the fines by reference to that applied in the past. On the assumption that a new method of calculating fines contained in a new set of guidelines has the effect of increasing the level of the fines imposed, the application of those guidelines is reasonably foreseeable for the undertakings at the time the infringements concerned are committed. Those principles apply not only when the Commission adopts a first set of guidelines, but also when a new set of guidelines replaces the previous one.

Alfred Dittrich
Judge-Rapporteur

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