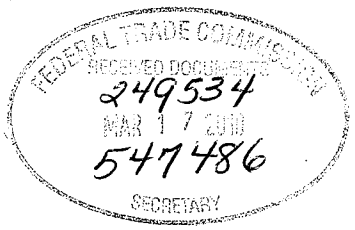
ORIGINAL



UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION

In the Matter of	)	PUBLIC
INTEL CORPORATION,	)	**DOCKET NO. 9341**
Respondent.	)	

MOTION TO ADMIT EUROPEAN COMMISSION DECISION[1]

Complaint Counsel moves to admit into evidence the European Commission's ("EC") decision that condemned Intel's conduct in the CPU markets as a violation of Article 82 of the EC Treaty, the European Union's anti-monopoly law.[2] The EC made detailed findings of fact regarding market definition, Intel's market power, and the existence of Intel's exclusionary arrangements with certain OEMs that are both relevant and material to this case.

By this motion we do not suggest the decision is somehow binding here; this Court will make its own decision based on all the evidence the parties submit. Nor does this motion ask the Court to assess (and the parties need not brief the issue of) the evidentiary weight the Court should give the EC decision. The sole issue presented by this motion is whether the EC decision is admissible

---

1 We raise this motion now to ensure that Respondent has a full opportunity to respond to this evidence. In a March 15, 2010, telephone conversation between Darren Bernhard, counsel for Intel, Complaint Counsel was advised that Respondent opposes this motion, and the parties reached an impasse. This motion complies with FTC Rule of Practice, 16 C.F.R. §3.22 (c).

2 We request *in camera* treatment of the confidential version of the decision (CX0243). See Affidavit of Thomas H. Brock Esq. (Attachment A). The confidential version includes some limited redactions that were requested by Intel or a third party as a condition to the EC's release of the decision to the FTC. We must emphasize that many paragraphs in CX0243 are subject to the confidentiality laws of the EC, which should be observed in this litigation. We also submit the public version of the decision as evidence in this matter (CX0244).

evidence.

We believe that, under the law, the EC decision should be considered as part of the evidentiary record in this case. The decision is "[r]elevant, material, and reliable." Rule 3.43(b). It also falls squarely within Rule 803(8)(C) of the Federal Rules of Evidence. The federal courts have consistently admitted the EC's Statement of Objection ("SO") into evidence under Rule 803(8)(C). If a SO, which is the preliminary finding before the Final Decision of the EC, is admissible under the Federal Rules of Evidence, surely the ***final*** EC Decision should be admissible in a hearing governed by the Part 3 Rule and Administrative Procedures Act.

Federal Rule of Evidence 803(8)(C) allows the admission of "reports . . . of public offices or agencies, setting forth . . . factual findings resulting from an investigation made pursuant to authority granted by law" such as the EC decision. The U.S. Supreme Court, in *Beech Aircraft Corp. v. Rainey*, held that decisions of administrative law judges and other executive fact-finders are "admissible along with other portions of the report[s]." 488 U.S. 153, 170 (1988). The Court explained that Rule 803(8)(C) allows the admissibility of "factual findings" as well as "conclusions" and "opinions that flow from the factual investigation." *Id.* at 164. The admissibility of evidence covered under Rule 803(8)(C) "is generally favored." *Gentile v. County of Suffolk*, 926 F.2d 142, 148 (2d Cir. 1991).

The federal courts have admitted the EC's Statement of Objections ("SO") pursuant to 803(8)(C). In *Information Resources, Inc. v. The Dun & Bradstreet Corp.*, 1998 WL 851607 (S.D.N.Y. 1998), the Court admitted the EC's SO under Rule 803(8)(C), because "[t]he circumstances do not indicate any lack of trustworthiness, and to the extent that the [SO] represents conclusions, it is 'subject to the ultimate safeguard-the opponent's right to present evidence tending to contradict or diminish the weight of those conclusions.'" *Id.* at *1. And, in a decision published in December 2009, Judge Underhill admitted a SO into evidence despite the fact that the EC had

subsequently *closed* the matter without issuing a final decision. *Ethylene Propylene Diene Monomer (EPDM) Antitrust Litigation*, 2009 WL 5218057, 2009-2 Trade Cases P 76,855, at *9-11(D. Conn. 2009). Courts also have admitted the decisions of other foreign tribunals. For example, the Third Circuit admitted the "recommended decision" of the Japanese FTC as evidence under Rule 803(8)(c). *In re Japanese Elec. Products*, 723 F.2d 238 (3d Cir. 1983), *rev'd sub nom. on other grounds, Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986). The court found that the decision was "unquestionably . . . sufficiently trustworthy for admission under Rule 803(8)(C)." *Id.* 272-74. The Third Circuit held that "such reports of investigations are presumed to be reliable." *Id.* at 265, 273.

I. The EC's Decision Is Trustworthy

Once a party shows that the "evidence" contains "factual findings . . . based upon an investigation made pursuant to legal authority," the "admissibility of such factual findings is presumed." *Bridgeway Corp. v. Citibank*, 201 F.3d 134, 143 (2d Cir. 2000). "The burden to show 'a lack of trustworthiness then shifts to the party opposing admission." *Id.* Among the factors to be considered are (1) the finality of the decision; (2) the timeliness of the investigation; (3) special skills or experience of the official; (4) whether a hearing was held and level at which it was conducted, and (5) possible motivation problems. *Id*

The EC's 447 page decision relied on the report of a hearing officer and a 4000 document record that included submissions from Intel, original equipment manufacturers ("OEMs"), and other third parties. Decision ¶37.[3] The EC's factual findings are trustworthy because (1) the decision

---

[3] The Supreme Court described the European process and analogized it to the Federal Trade Commission:

> If the DG-Competition decides to pursue the complaint, it typically serves the target of the investigation with a formal "statement of objections" and advises the target of its intention to recommend a decision finding that the target has violated European

here is in its final form; (2) the decision is the product of an independent administrative proceeding; (3) there is no indication that the decision was not completed in a timely manner; (4) the decision was based on a record of ascertainable and verifiable facts; and (5) the report was issued by the EC Commissioner for Competition, Neelie Kroes, the highest Commission official directly responsible for antitrust matters.[4] *See EPDM Antitrust Litigation,* 2009 WL 5218057, 2009-2 Trade Cases P 76,855, at *45.

Intel has publicly attacked the EC decision. First, it claims the EC was "predisposed" to rule against Intel. The EC decision was reached after years of investigation and relied on submissions and testimony from OEMs, Intel and other market participants. Intel was given multiple opportunities to submit responses to the EC and present evidence and economic testimony to support its claims. Intel's attack seems to be driven by its unhappiness with the outcome rather than evidence of bias on the part of the EC. Second, Intel accused the EC of "suppressing" *potentially* exculpatory evidence. An independent review of Intel's claims by the EC Ombudsman did not find that the EC suppressed exculpatory evidence.[5] The Ombudsman's report did chastise the EC for "maladministration" for its failure to include the notes of a meeting with Dell in 2006 in its official

---

> competition law. EC. *Amicus Curiae* 7. The target is entitled to a hearing before an independent officer, who provides a report to the DG-Competition. *Ibid.;* App. 18-27. Once the DG-Competition has made its recommendation, the EC may "dismis[s] the complaint, or issu[e] a decision finding infringement and imposing penalties." EC *Amicus Curiae* 7.

Intel Corp. v. Advanced Micro Devices, Inc., 542 U.S. 241, 254-55 (2004).

[4] The European Commission Advisory Committee, with representatives from over twenty European countries, also concurred in the decision. Opinion of the Advisory Committee (Sept. 22, 2009) *available at* http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:52009XX0922%2802%29:EN:NOT.

[5] Decision of the European Ombudsman Closing his Inquiry 1935/2008/FOR (July 14 2009) *available at* http://www.ombudsman.europa.eu/cases/decision.faces/en/4164/html.bookmark.

case file. However, it did not find that Intel's rights were infringed and allowed the decision to stand.

Intel also publicly suggested that the decision is inconsistent with "evidence" that "microprocessor" prices have fallen dramatically over the last decade. Intel has emphasized the same data from the United States Bureau of Labor Statistics ("BLS") in its Answer to the Complaint in this case. That data is irrelevant to this case. The BLS "microprocessor" pricing data aggregates the prices of *any* product classified as a "microprocessor" by a manufacturer participating in the survey – and includes, for example, the billions of embedded microprocessors used in cell phones, cars, and televisions. The inclusion of these non-relevant products renders the BLS data meaningless here. That flaw is compounded by the fact that Intel has *never* submitted its pricing data to the BLS. Respondent's PUBLIC Answers to Complaint Counsel's Requests for Admission 8 (Mar. 1, 2010). The data is both over-inclusive in that it includes the prices of billions of products that are not in the relevant market and under-inclusive in that it does not include Intel's prices.

Nevertheless, for the purposes of this motion, it does not matter whether Intel believes it can refute the evidence contained in the EC decision. That is the purpose of the trial. *See Korean Air Lines Disaster of September 1, 1983*, 932 F.2d 1475, 1481-83 (D.C. Cir.1991) ("The district court [properly] decided that KAL's trustworthiness objections were more properly addressed to the jury for purposes of evaluating the weight to be accorded" the report.). The only question before the Court at this time is whether the evidence is admissible.

II. The EC Decision Is Material and Relevant

The EC's factual determinations are material and relevant to many of the alleged facts in the Complaint. The EC made findings of fact regarding market definition, Intel's market power, and the existence of Intel's exclusionary arrangements with certain OEM's not to do business, or to do less business, with Intel's competitors.

EC Finding: Intel is a Dominant Firm. The EC's assessment of Intel's market power is relevant to this case. The approach under European law largely mirrors the American approach. *Compare* Decision ¶¶792-912 *with United States v. Microsoft*, 253 F.3d 34, 52 (D.C. Cir. 2001); *In the Matter of Polypore Int'l, Inc.*, Docket No. 9327, Initial Decision at 303 (Mar. 1, 2010) ("Polypore Initial Decision").

The EC found that the demand substitution evidence supported separate markets for (1) x86 CPUs for desktop computers; (2) x86 CPUs for laptop computers; and (3) x86 CPUs for server computers. Decision ¶799 ("customers do not, in general, regard CPUs for desktop computers, CPUs for laptop computers and CPUs for servers as substitutes on the demand side, and indeed, the prices of CPUs for those three different segments vary significantly."); *see also* ¶¶795-798, 815, 833-835. However, the EC found that its analysis would remain unchanged even if the market was x86 CPUs for all computers. The EC found that the evidence did not support Intel's argument that the market should include non-x86 CPUs or embedded CPUs used in non-computer devices. *Id.* ¶¶803-808, 821-824 (non-x86 CPUs); 809-813, 825-830 (embedded CPUs). There was no dispute that the relevant geographic market was worldwide. *Id.* ¶836.

The European market power analysis, like that in the United States, relies on an assessment of market shares and entry barriers. *Compare* Decision ¶840, *with* Polypore Initial Decision at 303-305 (explaining that "monopoly power may be inferred from a firm's possession of a dominant share of a relevant market"). The EC found Intel was dominant in all four relevant markets given its overwhelming market shares and the significant barriers to entry in those markets. Intel's share of revenues in the relevant markets ranged from REDACTED for the overall x86 market, REDACTED for the desktop x86 market, REDACTED for the laptop x86 market, and

for the x86 server market between 1997 and 2008.[6] Decision ¶44-45 (overall); ¶847 (desktop); ¶849 (laptop); ¶851, (server); Charts 1a-4b (excerpted below). Market shares in excess of 70% not only support a finding of "dominance" under European law but they also support a finding of monopoly power under American law. *Compare* Decision ¶ 852, *Image Technical Servs. v. Eastman Kodak Co.*, 125 F.3d 1195, 1206 (9th Cir. 1997) ("Courts generally require a 65% market share to establish a *prima facie* case of market power"); Polypore Initial Decision at 310.

REDACTED

6 Intel has admitted that its share of the overall market (desktop, notebook, and server) has consistently exceeded 65 percent; that its share of the desktop market has consistently exceeded 70 percent; and that its share of the notebook market has consistently exceeded 80 percent during the relevant time period. Respondent's PUBLIC Answers to Complaint Counsel's Requests for Admission (1-4) (Mar. 1, 2010).

REDACTED

}

The EC found that there were significant barriers to entry in the relevant markets. Decision ¶¶853-882. Those entry barriers included the substantial research and development costs, the intellectual property rights, the costs associated with a manufacturing facility, scale economies, and reputation. *Compare* Decision ¶¶854-867 *with Microsoft*, 253 F.3d at 51; Polypore Initial Decision at 272-277 (significant barriers to entry included significant capital investment, technical expertise, and reputation). Intel did not contest the EC's findings on barriers to entry. Decision at ¶881.

Intel argued that regardless of its overwhelming market shares and the significant barriers to entry in these markets, it did not have market power. For example, Intel suggested that the OEMs enjoyed sufficient negotiating leverage to discipline Intel. The EC disagreed and found that Intel is an unavoidable business partner. *Id.* ¶886. OEMs have no choice – they have to trade with Intel. *Compare* Decision ¶¶894, 905 *with* Polypore Initial Decision at 289 ("At a basic level, customers

must have alternative suppliers in order to have any real bargaining power.").

EC Finding: Intel Entered into Exclusionary Arrangements with OEMs. The EC's assessment of Intel's arrangements with Tier One OEMs is also relevant to this case.

The EC found that Intel entered into *de facto* exclusive arrangements with Tier One OEMs in an effort to limit or foreclose the adoption of AMD.[7] The decision relied on a number of Intel and OEM documents to support its findings that Intel had *de facto* exclusive arrangements with Dell, HP, NEC, and Lenovo. Decision ¶926. For example, the EC found that Intel conditioned billions of dollars of rebates to Dell in return for Dell's commitment to purchase CPUs exclusively from Intel. *See* Decision ¶¶187-242; Table 5 (p. 68); Table 6 (p. 69); ¶¶927-950. The *de facto* exclusive arrangement with Dell alone foreclosed AMD from REDACTED of the overall x86 CPU market. Decision ¶182. The EC also detailed Intel's conditioning millions of dollars for exclusivity or near exclusivity at HP, NEC, and Lenovo. Decision ¶¶325-413 and 951-972 (HP); 455-503 and 973-981 (NEC); 508-546 and 962-972 (Lenovo).

The EC addressed Intel's payments to OEMs in exchange for their commitment to delay, cancel or in some other way restrict the release of specific AMD-based products. Decision ¶¶1641-1681. For example, Acer planned to launch both a desktop and notebook based on AMD's 64-bit Athlon in fall 2003. *Id.* ¶415. The EC found that Acer postponed, and later canceled, the launches of these AMD-based products after Intel threatened to reduce its payments to Acer. *Id.* ¶¶418-435; 1659-1662. The EC also discussed Intel's arrangements with Lenovo and HP to limit the adoption of AMD. *Id.* ¶¶1645-1658 (HP); 1663-1666 (Lenovo). The EC's factual findings would support a violation of either Section 5 or Section 2. *Microsoft*, 253 F.3d at 62 ("the anticompetitive effect of

---

[7] This claim mirrors U.S. law on this point. *See FTC v. Brown Shoe Co.*, 384 U.S. 316, 320-21 (1962) (discussing the legality of exclusive dealing under Section 5 of the FTC Act); *Microsoft*, 253 F.3d at 70 (exclusive and partial exclusive deals entered into by a monopolist can violate Section 2); *LePage's v. 3M,* 324 F.3d 141, 155 (3d Cir. 2003).

the license restrictions is, as Microsoft itself recognizes, that OEMs are not able to promote rival browsers . . ."); *Conwood Co., L.P. v. U.S. Tobacco Co.*, 290 F.3d 768, 784 (6th Cir. 2002).

The EC decision contains other relevant factual findings regarding the CPU industry and Intel. For example, there is a helpful description of CPU products and the manufacturing process. Decision ¶¶105-148, Table 4. The EC found that AMD's CPUs enjoyed a performance and price advantage over Intel between 2002 and 2006. Decision ¶¶150-159 (AMD had "CPU of [the] year [for] 3 consecutive years"; "In Dell's perception [AMD's Opteron CPU] generally performed approximately 25% better than the comparable Intel Xeon CPU at the time"). The decision highlights the fact that very few of Intel's sales are documented in a single written contract. Deals worth hundreds of millions and even billions of dollars were agreed to orally and can only be documented by piecing together a number of separate emails and powerpoints. Decision ¶¶167-169.

CONCLUSION

The EC's factual findings are relevant, material and reliable, and hence are clearly admissible as evidence within Rule 3.43(b) of the FTC's Rules of Practice. Accordingly, we respectfully ask that the EC decision be admitted into evidence as CX0243 (in camera) and CX0244 (public).

March 17, 2010

Respectfully submitted,

J. Robert Robertson
Bureau of Competition
Federal Trade Commission
600 Pennsylvania Ave N.W.
Washington, D.C. 20580
(202) 326-2008
rrobertson@ftc.gov
Complaint Counsel

Attachment A

AFFIDAVIT

I, Thomas H. Brock, state as follows:

1. I am a Senior Litigator, Office of Director, Bureau of Competition, Federal Trade Commission, and I have entered an appearance in In Re: Intel Corp., Docket No. 9341.

2. The European Commission (EC) issued a decision in a case filed against Intel Corporation, COMP/C-37.990 on May 13, 2009.

3. The public version of the EC decision is available at **http://ec.europa.eu/competition/sectors/ICT/intel_provisional_decision.pdf** We have designated a copy of this public document as CX 0244. This public version includes redactions of numerous facts relevant and material to the EC decision that Intel, the third parties, or the EC considered confidential.

4. The FTC asked the EC to provide it a complete version of its decision. However, the confidentiality rules of the EC are generally more stringent than those applicable in Part 3 proceedings. The EC had to obtain waivers from Intel and the third parties that had provided the confidential information cited or quoted in the EC decision before the EC released the decision to the FTC.

5. I understand that the EC asked Intel and third parties to identify any objections they had to the release of a complete version of the EC decision to the FTC. This request was made with the understanding that, if the EC released a complete version to the FTC that contained redacted information, the FTC would maintain the confidentiality of all information that had been redacted in the EC's public version of its decision.

6. I understand that, with certain exceptions, Intel and the third parties agreed to the EC's release of a complete version of its decision to the FTC, but only on the condition that the FTC treat as confidential the portions of the decision that the EC had redacted in its public version. In addition, Intel and a third party, NEC, specifically objected to the release of the decision to the FTC unless the EC redacted a few discrete portions of its decision.

7. The EC provided the FTC a copy of its decision, which we have designated as CX 0243. This is a complete version of the EC decision, but with the redaction of the portions of the decision requested by Intel and NEC.

8. The EC released the complete version of its decision to the FTC on the condition that, and based on an express agreement that, this version would be given confidential treatment and would not be publicly released if the FTC submitted this in any proceedings filed against Intel.

9. The FTC and EC regularly exchange information regarding their investigative efforts and enforcement actions. This exchange of information is vital to the efforts of both the EC and the

FTC to enforce the antitrust laws. If the FTC does not maintain the confidentiality of the portions of CX 0243 that the EC redacted in its public version of the decision, it would impede the ongoing cooperative efforts of the FTC and the EC.

Pursuant to 28 U.S.C. § 1746, I declare, under penalty of perjury, that the foregoing is true and correct.

Executed on: March 16, 2010

Thomas H. Brock

UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION

In the Matter of	)	
	)	
INTEL CORPORATION,	)	**DOCKET NO. 9341**
	)	
Respondent.	)	

[PROPOSED] ORDER ADMITTING EUROPEAN COMMISSION DECISION

Upon motion of Complaint Counsel and consideration of the arguments in support and in opposition to the motion, it is hereby

ORDERED, that CX0243 meets the standards for *in camera* treatment and is admitted into evidence, and shall be afforded *in camera* treatment indefinitely, and it is further

ORDERED, that CX0244 is admitted into evidence.

D. Michael Chappell
Chief Administrative Law Judge

Dated: _____

CERTIFICATE OF SERVICE

I certify that I filed via hand and electronic mail delivery an original and two copies of the foregoing Motion to Admit European Commission Decision with:

Donald S. Clark
Secretary
Federal Trade Commission
600 Pennsylvania Ave., NW, Rm. H-159
Washington, DC 20580

I also certify that I delivered via electronic and hand delivery a copy of the foregoing Motion to Admit European Commission Decision to:

The Honorable D. Michael Chappell
Administrative Law Judge
Federal Trade Commission
600 Pennsylvania Ave., NW, Rm. H-113
Washington, DC 20580

I also certify that I delivered via electronic mail a copy of the foregoing Motion to Admit European Commission Decision to:

James C. Burling
Eric Mahr
Wendy A. Terry
Wilmer Cutler Pickering Hale & Dorr
1875 Pennsylvania Ave., N.W.
Washington, DC 20006
james.burling@wilmerhale.com
eric.mahr@wilmerhale.com
wendy.terry@wilmerhale.com

Robert E. Cooper
Joseph Kattan
Daniel Floyd
Gibson Dunn & Crutcher
1050 Connecticut Ave., N.W.
Washington, DC 20036
rcooper@gibsondunn.com
jkattan@gibsondunn.com
dfloyd@gibsondunn.com

Darren B. Bernhard
Thomas J. Dillickrath
Howrey LLP
1299 Pennsylvania Ave., NW
Washington, DC 20004
BernhardD@howrey.com
DillickrathT@howrey.com

Counsel for Defendant Intel Corporation

March 17, 2010

By: Terri Martin
Terri Martin
Federal Trade Commission
Bureau of Competition

PROVISIONAL NON-CONFIDENTIAL VERSION

OF THE COMMISSION DECISION OF 13 MAY 2009

COMP/37.990 Intel

This is a provisional non-confidential version. The definitive non-confidential version will bc published as soon as it is available.

EUROPEAN COMMISSION

Brussels,13.5.2009
D(2009) 3726final

COMMISSION DECISION

of

relating to a proceeding under Article 82 of the EC Treaty and Article 54 of the EEA Agreement

(COMP/C-3 /37.990 - Intel)

(Only the English text is/are authentic)

(Text with EEA relevance)

COMMISSION DECISION

of

relating to a proceeding under Article 82 of the EC Treaty and Article 54 of the EEA Agreement

(COMP/C-3 /37.990 - Intel)

(Only the English text is/are authentic)

(Text with EEA relevance)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Community,

Having regard to the Agreement on the European Economic Area,

Having regard to Council Regulation (EC) No 1/2003, of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty[1], and in particular Article 7 and Article 23(2) thereof,

Having regard to the complaint lodged by Advanced Micro Devices on 18 October 2000 and on 26 November 2003, alleging infringements of Article 82 of the Treaty and Article 54 of the EEA Agreement by Intel and requesting the Commission to put an end to those infringements,

Having regard to the Commission decision of 26 July 2007 to initiate proceedings in this case,

Having given the undertaking concerned the opportunity to make known its views on the objections raised by the Commission pursuant to Article 27(1) of Regulation (EC) No 1/2003 and 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 of the EC Treaty[2],

---

1 OJ L 1, 4.1.2003, p. 1.

2 OJ L 123, 27.4.2004, p. 18.

After consulting the Advisory Committee on Restrictive Practices and Dominant Positions,

Having regard to the final report of the hearing officer in this case[3],

WHEREAS:

I. PARTIES TO THE PROCEEDINGS

1. Intel Corporation

(1) Intel Corporation ("Intel") was incorporated in the state of California, USA in 1968, and was reincorporated in the state of Delaware, USA in 1989. It has operations in different parts of the world including in locations within the EEA. It describes itself as the "*world's largest semiconductor chip maker, based on revenue*". It states that its "*products include chips, boards and other semiconductor components that are the building blocks integral to computers, servers and networking and communications products.*" It develops "*advanced integrated digital technology products, primarily integrated circuits, for industries such as computing and communications*". Intel offers "*products at various levels of integration, allowing our customers flexibility to create advanced computing and communications systems and products.*"[4]

(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.[5]

2. The complainant: Advanced Micro Devices, Inc.

(3) Advanced Micro Devices, Inc. ("AMD") describes itself as "*global semiconductor company with facilities around the world*". It provides "*processing solutions for the computing, graphics and consumer electronics markets.*" AMD was incorporated under the laws of Delaware, USA, on May 1, 1969 and became a publicly held

---

3 OJ [TO BE ADDED WHEN PUBLISHED].

4 Intel's form 10-K report for the fiscal year ended 29 December 2007, http://www.sec.gov/Archives/edgar/data/50863/000089161808000106/f36442e10vk.htm, downloaded and printed on 14 January 2009.

5 Intel's form 10-K report for the fiscal year ended 27 December 2008, http://idea.sec.gov/Archives/edgar/data/50863/000089161809000047/f50771e10vk.htm, downloaded and printed on 6 April 2009.

company in 1972. Since 1979, its common stock has been listed on the New York Stock Exchange under the symbol "AMD".[6]

(4) At the end of 2007, AMD had approximately 16 420 employees. In 2007, AMD had net revenues of USD 6 013 million and made a net loss of USD 3 379 million. In 2006, AMD had net revenues of USD 5 649 million and made a net loss of USD 166 million.[7]

II. PROCEDURE

1. Commission procedure

(5) On 18 October 2000, AMD submitted a formal complaint to the Commission under Article 3 of Council Regulation (EC) No 17/62, First Regulation implementing Articles 81 and 82 of the Treaty.[8]

(6) On 26 November 2003, AMD submitted a supplementary complaint under Article 3 of Regulation (EC) No 1/2003[9] providing new facts and making new allegations.

(7) In May 2004, the Commission launched a round of investigations focusing on allegations contained in the supplementary complaint. Within the framework of that investigation, in July 2005, the Commission, assisted by several National Competition Authorities, carried out on-the-spot inspections under Article 20(4) of Regulation (EC) No 1/2003 at four Intel locations in [...] ([...][10] [...]), [...], as well as the locations of several Intel customers [...].

(8) On 26 July 2007, the Commission notified a Statement of Objections to Intel in Case No. COMP/C-3/37.990 ("the 26 July 2007 SO"). The Commission took the preliminary view that Intel held a dominant position and had abused its dominant position by engaging in exclusionary marketing arrangements and other practices with certain customers.

---

6 AMD's form 10-K report for the fiscal year ended 29 December 2007, http://www.sec.gov/Archives/edgar/data/2488/000119312508038588/d10k.htm, downloaded and printed on 14 January 2009.

7 idem.

8 OJ 13, 21.2.1962, p. 204. p.

9 OJ L 1, 4.1.2003, p.. 1.

10 [...].

(9) The Commission originally set Intel a deadline of 8 weeks to submit its reply to the 26 July 2007 SO.[11] That deadline was extended twice by the Hearing Officer, first to 4 January 2008,[12] and then to 7 January 2008.

(10) Intel submitted its reply to the 26 July 2007 SO on 7 January 2008 ("Intel Reply to the 26 July 2007 SO"). Intel asked for an oral hearing to be held ("the Oral Hearing"). The Oral Hearing was held on 11 and 12 March 2008.

(11) In application of Article 6(1) of Regulation (EC) No 773/2004,[13] the Commission provided AMD with a copy of the non-confidential version of the 26 July 2007 SO. AMD made its views on the 26 July 2007 SO known in writing on 29 February 2008. AMD also participated at the Oral Hearing.

(12) After the 26 July 2007 SO was issued, the Commission obtained additional information about Intel's conduct vis-à-vis other customers and distributors of its products. This included information contained in Intel's Reply to the 26 July 2007 SO.

(13) On 17 July 2006, AMD filed a complaint to the German National Competition Authority, the Bundeskartellamt. In the complaint, AMD alleged that Intel had engaged in exclusionary marketing arrangements and other practices with Media-Saturn-Holding GmbH ("MSH"), a European retailer of microelectronic devices, including Personal Computers ("PCs").

(14) On 6 September 2006, the German National Competition Authority exchanged information with the Commission on that subject, in application of Article 12 of Regulation (EC) No 1/2003.

(15) Following that exchange of information, the Commission opened an investigation on the subject, under Case No. COMP/C-3/39.493. Within the framework of that investigation, in February 2008, the Commission, assisted by several National Competition Authorities, carried out inspections under Article 20(4) of Regulation (EC) No 1/2003 at Intel's premises [...], as well as at the premises of several European PC retailers in [...].

(16) On 17 July 2008, the Commission notified a supplementary Statement of Objections to Intel ("the 17 July 2008 SSO"), and at the same time joined the relevant findings of Case No. COMP/C-3/39.493 to the procedure followed under

---

11 Letter from the Commission to Intel of 27 July 2007.

12 Letter from the Hearing Officer to Intel of 12 October 2007.

13 OJ L 123, 27.4.2004, p. 18.

Case No. COMP/C-3/37.990. The Commission continued the procedure under Case No. COMP/C-3/37.990.

(17) The Commission originally set Intel a deadline of 8 weeks to submit its reply to the 17 July 2008 SSO.[14] On 15 September 2008, that deadline was extended to 17 October 2008 by the Hearing Officer.[15]

(18) On 10 October 2008, Intel lodged an application with the Court of First Instance ("CFI") seeking *inter alia* the annulment of the decision of the Hearing Officer of 15 September 2008 granting an extension of the time limit, and of an alleged decision by Ms. Neelie Kroes, Member of the Commission, taken on or about 6 October 2008. Intel also applied for interim measures, asking the President of the CFI to suspend the Commission's procedure pending a ruling by the CFI on its main application and/or to suspend the timetable for service of a reply to the 17 July 2008 SSO and/or, in the event that the Court were to reject the application for interim measures or reject Intel's application in the main action, to grant Intel 30 days from the date of the said judgment to reply to the 17 July 2008 SSO.[16]

(19) Intel failed to provide a reply to the 17 July 2008 SSO by the extended deadline of 17 October 2008. Intel's arguments relating to its decision not to provide a reply to the 17 July 2008 SSO are dealt with in section IV.1.

(20) On 19 December 2008, the Commission sent Intel a letter drawing Intel's attention to a number of specific items of evidence relating to the Commission's existing objections which the Commission indicated it might use in a potential final Decision. The Commission set Intel a deadline of 19 January 2009 to provide comments on these items. That deadline was extended to 23 January 2009.[17]

(21) Intel failed to reply to the Commission's letter of 19 December 2008 by the extended deadline of 23 January 2009. This was confirmed by Intel's counsel on 27 January 2009,[18] after the Commission had asked Intel about the matter.[19] Intel did not provide reasons for its failure to reply by the extended deadline.

(22) On 27 January 2009, the President of the Court of First Instance issued an Order rejecting Intel's application for interim measures on the ground that Intel's main

---

14 Letter from the Commission to Intel of 17 July 2008.

15 Letter from the Hearing Officer to Intel of 15 September 2008.

16 Letter from Intel to the Commission of 13 October 2008.

17 Letter from the Commission to Intel of 16 January 2009.

18 Email from Intel to the Commission of 27 January 2009, entitled *'CONFIDENTIAL Case 37.990'*.

19 Email from the Commission to Intel of 26 January 2009, entitled *'Case 37.990'*.

application was *prima facie* manifestly inadmissible and that the condition of urgency was not fulfilled. This rejection included the rejection of Intel's request for an extension of the 17 October 2008 deadline to reply to the 17 July 2008 SSO. In this respect, the Order sets out that "*in order to have access to all the information it needs to properly conduct the administrative procedure, it is a possibility available to the Commission to grant such an extension in order to allow Intel to serve a reply to the SSO, even though Intel has not complied with the time-limit initially laid down, or to take into account written submissions in response to the SSO received after that time-limit.*"[20] [21]

(23) On 29 January 2009, Intel 'proposed' to file its reply to the 17 July 2008 SSO and to the Commission letter of 19 December 2008 within 30 days of the day of the Order of the President of the Court of First Instance. Intel also asked the Commission to confirm that it would grant Intel's request for an oral hearing.[22]

(24) 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 17 July 2008 SSO or to the Commission letter of 19 December 2008, as such an extension would not be justified given that Intel had had ample opportunity to submit such replies within the deadlines and had chosen not to do so. The letter also indicated 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 indicated that the Commission services considered that the proper conduct of the administrative procedure did not necessitate an oral hearing.[23]

(25) On 5 February 2009, Intel served a written submission including observations related to the 17 July 2008 SSO and the Commission letter of 19 December 2008 (respectively "Intel submission of 5 February 2009 related to the SSO" and "Intel submission of 5 February 2009 related to the Commission letter of 19 December 2008"). Intel characterises its submission of 5 February 2009 related to the SSO as its "reply to the SSO". Similarly, Intel characterises its submission of 5 February 2009 related to the letter of 19 December 2008 as its "reply to the letter of 19 December 2008". However, the Commission cannot accept these characterisations

---

20 Order of the President of the Court of First Instance of 27 January 2009 in Case T-457/08 R *Intel v Commission*, paragraph 89.

21 On 3 February 2009, Intel withdrew its application in Case T-457/08. The case was removed from the register of the Court by Order of 24 March 2009.

22 Letter from Intel to the Commission of 29 January 2009.

23 Letter from the Commission to Intel of 2 February 2009.

due to the fact that in each case, Intel chose not to reply by the specified deadline. This is described in greater detail in section IV.

(26) In its submission of 5 February 2009, Intel indicated that it would request that the Hearing Officer grant an oral hearing. On 10 February 2009, Intel wrote to the Hearing Officer and asked to be granted an oral hearing in relation to the 17 July 2008 SSO.[24] The Hearing Officer replied by letter of 17 February 2009 rejecting Intel's request.[25]

(27) The following companies and associations have been granted the status of Interested Third Party by the Hearing Officer: Silicon Graphics, Inc. ("SGI"); International Business Machines Corporation ("IBM"); Bureau Européen des Unions de Consommateurs ("BEUC"); Union Fédérale des Consommateurs – Que Choisir ("UFC – Que Choisir"); and Hewlett-Packard Company ("HP"). The Commission informed the Interested Third Parties of the nature and subject matter of the proceedings by sending them a summary of the 26 July 2007 SO on 21 December 2007 (SGI and IBM), 3 March 2008 (BEUC), 7 March 2008 (UFC – Que Choisir) and 10 March 2008 (HP), and of the 17 July 2008 SSO on 17 December 2008 (all interested third parties). None of the Interested Third Parties made their views on the 26 July 2007 SO known in writing. BEUC, UFC – Que Choisir and HP participated at the Oral Hearing.

(28) Access to file was granted three times to Intel (31 July 2007, 23 July 2008 and 19 December 2008).

(29) In agreement with Intel, the access to file exercises of 31 July 2007 and 23 July 2008 were in part conducted under specific conditions. Instead of receiving access to only the non confidential part of the file provided by certain information providers, Intel was granted access to their entire information and agreed bilaterally with each of these information providers to receive the entirety or a distinct part of their information located on the Commission's file in unredacted format (that is, including confidential information) in exchange for limiting the access to this information to a restricted circle of persons (its outside counsels and economic advisers and in some cases certain in-house counsels).[26] The information providers waived their confidentiality rights with regard to the Commission to the extent that such a waiver was necessary for the proper conduct of that information exchange. To the extent that this type of access would amount to a restriction of Intel's rights of access to file, Intel has by letters of [...] waived its right to access

---

24 Letter from Intel to the Hearing Officer of 10 February 2009.

25 Letter from the Hearing Officer to Intel of 17 February 2009.

26 The information providers that concluded such agreements with Intel are [...].

the file with regard to the Commission, and has agreed to only receive access to the respective parts of the file via the bilateral arrangements with the specific information providers.

2. Procedure in other public jurisdictions

(30) Intel's conduct has also been the object of procedures conducted by other public regulatory authorities.

(31) On 8 March 2005, the Japan Fair Trade Commission (JFTC) found that Intel's conduct violated Section 3 of the Japanese Antimonopoly Act. The JFTC concluded that Intel had "*since May 2002 ... 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 funds referred as 'MDF' (Market Development Fund) in order to maximize their MSS* [market segment share], *respectively, on condition that:*

> *(a) the Japanese OEMs make MSS at 100% and refrain from adopting competitors' CPUs.*
>
> *(b) the Japanese OEMs make MSS at 90%, and put the ratio of competitors' CPUs in the volume of CPUs to be incorporated into the PCs manufactured and sold by them down to 10%;*
>
> *(c) the Japanese OEMs refrain from adopting competitors' CPUs to be incorporated into PCs in more than one series with comparatively large amount of production volume to others.*"[27]

(32) The JFTC specified that [...].

(33) 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 Computer (TriGem), contingent upon them not purchasing Central Processing Units (CPUs) from AMD. The KFTC imposed a corrective order and a punitive surcharge of KRW 26 000 million (approximately EUR 16,5 million) on Intel. On 9 December 2008, Intel announced that it had filed a formal complaint with the Seoul High Court seeking to overturn the KFTC's final written decision.[28]

---

27 See JFTC press release at http://www.jftc.go.jp/e-p./pressreleases/2005/march/050308intel.pdf, downloaded and printed on 1 June 2007.

28 See http://www.intel.com/pressroom/chipshots/chipshots.htm#120908b, downloaded and printed on 14 January 2009.

(34) The Federal Trade Commission of the United States of America ("US FTC") is also currently engaged in an investigation of Intel's commercial practices. In the context of this enquiry, it served a subpoena to Intel on 4 June 2008.[29]

(35) The Attorney General of the State of New York is also currently engaged in an investigation of Intel's commercial practices.[30]

III. INTEL'S ALLEGATION OF BIAS IN THE COMMISSION'S ENQUIRY

(36) Intel has alleged that the Commission's enquiry has been "*discriminatory and partial*".[31] According to Intel, the Commission "*has blindly adopted wholesale AMD's theories and allegations blaming Intel's pricing and other conduct for each AMD failure to win the business of the OEMs*".[32] Intel also alleges that the Commission "*has distorted the evidence and the record*",[33] that it is guilty of "*suppression of exculpatory evidence*",[34] and that it has shown "*bias and lack of objectivity* ".[35] Intel speaks of "*systematic, willful administrative malfeasance that infects the entire administrative procedure.*"[36] Intel also expressed "*serious doubts on the fairness and the independence of the Case Team* [the Commission staff handling the investigation]".[37]

(37) The Commission considers that there are no grounds for the serious allegations made by Intel. As the Commission has already specified to Intel during the proceedings, "*the Commission has carried out a thorough and balanced enquiry in the present case. It has conducted several surprise inspections* [in 2005 and 2008 *at the premises of various actors in the market* [21 premises], *and has gathered a broad range of information from many sources.*"[38] As regards the body of evidence that the Commission has gathered, the Commission sent requests for information pursuant to Articles 11 and 18 of Regulation (EC) No 1/2003 to 141 companies in this case, including all major OEMs, the main European PC retailers, Intel and AMD. As a result, there are more than 3900 document

---

29 See http://www.intel.com/pressroom/archive/releases/2008/20080606corp.htm, downloaded and printed on 14 January 2009.

30 See http://www.oag.state.ny.us/media_center/2008/jan/jan10a_08.html, downloaded and printed on 14 January 2009.

31 Intel's Application in Case T-457/08. Summary of the Application, p. 2, paragraph 2.

32 Intel's letter to Commissioner Kroes of 25 September 2008, p. 1, paragraph 3.

33 Intel's Application in Case T-457/08. Summary of the Application, p. 2, paragraph 98.

34 Intel submission of 5 February 2009 related to the 17 July 2008 SSO, paragraph 810.

35 Intel's Application in Case T-457/08. Summary of the Application, p. 2, paragraph 98.

36 Intel submission of 5 February 2009 related to the 17 July 2008 SSO, paragraph 810.

37 Intel's letter to Commissioner Kroes of 25 September 2008, p. 3, paragraph 2.

38 Letter from the Commission to Intel of 6 October 2008.

entries in the file, many of which contain several documents with multiple pages. In total, the file numbers several hundred thousand pages. As is apparent from this Decision, the Commission's conclusions are based on extensive sets of evidence originating in their significant majority from third parties or from Intel itself. It is therefore not the case, as Intel claims, that the Commission "*has blindly adopted wholesale AMD's theories and allegations blaming Intel's pricing and other conduct for each AMD failure to win the business of the OEMs*".[39]

(38) Even though the Commission considers that Intel's allegations are without merit and in any event without relevance to the substance of the Commission's case, in view of the seriousness of Intel's allegations, the Commission will briefly address the three specific *'procedural defects'* which, in its submission of 5 February 2009, Intel claims characterise the case.[40] Subsection 1 will address the meeting between the Commission and Dell of 23 August 2006. Subsection 2 will address [...]. Finally, Intel also addresses the issue of certain documents from the private litigation between AMD and Intel in the US State of Delaware, which it claims the Commission should have sought to obtain and provide to Intel. This specific Intel claim will be examined in section IV as it is the main element invoked by Intel to explain its failure to reply to the 17 July 2008 SSO and to submit comments on the Commission's letter of 19 December 2008 by the deadlines set by the Commission.

1. The meeting between the Commission and Dell of 23 August 2006

(39) Intel makes reference to a meeting held on 23 August 2006 between members of the Commission's case team handling the investigation in case COMP/C-3/37.990 and [...], [Dell Executive] and [Dell Executive], as well as [...]. According to Intel, the Commission "*failed to take a detailed file note*" of this meeting.[41] Intel notes that in March 2003, [Dell Executive] had provided testimony to the US FTC, which it views as "*highly favourable to Intel*".[42] Furthermore, Intel relies on a document which it obtained from Dell in the course of discovery during the US private litigation between AMD and Intel entitled "*Indicative list of topics to be discussed with Dell Meeting of 23 August 2006*".[43] Intel claims that that document constitutes an agenda of the meeting which the Commission would have failed to provide to Intel in the course of access to file.[44] On the basis of these two documents, Intel concludes that it is "*inconceivable that a great*

---

39 Intel's letter to Commissioner Kroes of 25 September 2008, p. 1, paragraph 3.

40 Intel submission of 5 February 2009 related to the 17 July 2008 SSO, section V.

41 Intel submission of 5 February 2009 related to the 17 July 2008 SSO, paragraph 737.

42 Idem.

43 Intel submission of 5 February 2009 related to the 17 July 2008 SSO, Annex 615.

44 Intel submission of 5 February 2009 related to the 17 July 2008 SSO, paragraph 615.

volume of relevant evidence was not given by [Dell Executive] *during that interview* [the meeting with Dell]" and that it is *"virtually certain, given the topics addressed, that the evidence given by* [Dell Executive] *was exculpatory.*"[45] Finally, Intel alleges that the Commission refused Intel access to a note to the file which had been written subsequent to the meeting.[46]

(40) Intel's arguments are misconceived. In the first instance, there is no general obligation for the Commission to take minutes of meetings.

(41) The Commission Notice on the rules for access to the Commission file in cases pursuant to Articles 81 and 82 of the EC Treaty, Articles 53, 54 and 57 of the EEA Agreement and Council Regulation (EC) No 139/2004[47] (hereafter "the Notice on Access to File") states that: "*There is no obligation on the Commission departments to draft any minutes of meetings with any person or undertaking. If the Commission chooses to make notes of such meetings, such documents constitute the Commission's own interpretation of what was said at the meetings, for which reason they are classified as internal documents.*"[48]

(42) The case law underlying that above paragraph of the Notice on Access to File to which it makes explicit reference is stated in paragraphs 349-359 of the TACA Judgement.[49] In paragraph 351 of the TACA Judgement, the Court states that "*there is ... no general duty on the part of the Commission to draw up minutes of discussions in meetings or telephone conversations with the complainants which take place in the course of the application of the Treaty's competition rules*". The Court has further confirmed this finding in the Groupe Danone Judgement.[50]

(43) In the TACA and the Groupe Danone Judgments, the Court goes on to say that "*if the Commission intends to use in its decision inculpatory evidence provided orally by another party it must make it available to the undertaking concerned so as to enable the latter to comment effectively on the conclusions reached by the Commission on the basis of that evidence. Where necessary, it must create a written document to be placed in the file*".[51]

---

45 Intel submission of 5 February 2009 related to the 17 July 2008 SSO, paragraph 752.

46 Intel submission of 5 February 2009 related to the 17 July 2008 SSO, paragraph 737.

47 OJ C 325, 22.12.2005, p. 7.

48 Notice on Access to File, paragraph 13.

49 Joined Cases T-191/98 and T-212/98 to T-214/98 *Atlantic Container Line and others v Commission (TACA)* [2003] ECR II-3275, paragraphs 349-359.

50 Case T-38/02 *Groupe Danone v Commission* [2005] ECR II-4407, paragraph 66.

51 *TACA op. cit.*, paragraph 352; *Groupe Danone* op.cit., paragraph 67.

(44) Those circumstances do not apply to this case. The Commission did not make use of any information provided orally in the 23 August 2006 meeting with Dell to inculpate Intel. As to Intel's claim that it is '*virtually certain*' that exculpatory evidence relating to Intel was provided by [Dell Executive] during this meeting, that claim is entirely based on Intel's speculation that [Dell Executive] would have provided views during the 23 August 2006 meeting between Dell and the Commission which support Intel's own interpretation of the content of [Dell Executive]'s [...]2003 testimony to the US FTC. In fact, the purpose of the meeting with Dell was to explore further investigative measures related to Dell. The purpose was not to gather information in the format of countersigned minutes or statements pursuant to Article 19(1) of Regulation (EC) No 1/2003.

(45) This reasoning on the part of Intel is incorrect on three counts. Firstly, it must be emphasised that the Commission was under no obligation to take minutes of the meeting of 23 August 2006 under the Notice on Access to File and the case law of the Court in *TACA* and *Groupe Danone*. The relevant case law that exceptionally establishes an obligation to create a written document for the file with respect to inculpatory evidence is not applicable in this case because the meeting did not pertain to information that the Commission "*intends to use in* [any possible] *decision.*" The present Decision does not rely on the content of the meeting of 23 August 2006.

(46) Secondly, Intel's allegation that exculpatory information was communicated to the Commission at the meeting remains unfounded. In order to substantiate its claim, Intel refers to [Dell Executive]'s US FTC deposition made more than 3 years prior to the meeting and to a document that allegedly shows the indicative topics to be discussed at the meeting[52] (as explained in recital (39)). The Commission notes that neither of these documents contain evidence of what was actually discussed at the meeting. Without prejudice to whether any statements which a participant of the meeting made three years previously are exculpatory, the fact that such statements were made does not demonstrate that [Dell Executive] provided any information to the Commission which might be exculpatory. In fact, [Dell Executive]'s statement made before the US FTC largely relates to the period preceding the conduct relating to Dell concerned by this Decision.[53] This is further confirmed by the questions raised during the meeting to which Dell answered in

---

52 The Commission notes that that document provided by Intel as Annex 615 to its submission of 5 February 2009 related to the 17 July 2008 SSO [...] was previously not part of the Commission's file. From the document itself, it is not possible to determine from whom it originates. It is most likely a personal note of a case handler that was either sent to Dell by email prior to the meeting or handed over to Dell during the meeting. Such notes normally serve as preparation for both the Commission case team and the other parties attending a meeting to acquaint themselves with possible topics that could be discussed at a meeting. However, in the course of a meeting, discussions often depart from the topics outlined in such notes based on the limited time available for such meetings and topics that arise in the meeting.

53 The conduct related to Dell relates to the period starting from December 2002 while [Dell Executive]'s testimony before the US FTC of [...] 2003 mostly relates to the period before December 2002.

writing in a submission dated 22 September 2006 and which largely related to the performance of AMD's product 'Hammer' in the course of 2002. Equally, the indicative list of topics submitted by Dell does not imply that these topics were in fact addressed (partially or in full) at the meeting and, if they were addressed, with what level of detail. Therefore, the Commission concludes that on the basis of the evidence submitted by Intel, it cannot be demonstrated that the meeting covered exculpatory information.

(47) Finally, the claim that the testimony given by [Dell Executive] to the US FTC in [...]2003 would be "*highly favourable to Intel*" is based on a selective reading of [Dell executive]'s testimony. As will be demonstrated in section VI.2.3, when assessed in its entirety, the content of [Dell Executive]'s testimony to the US FTC is fully compatible with the Commission's conclusions on the nature of Intel's conduct with regard to Dell. Moreover, Intel has provided the Commission with a second testimony of [Dell Executive] made in 2009 in the course of the AMD/Intel Delaware litigation. As is described in section VI.2.3.4.3.f), that testimony did not alter the Commission's conclusions in this case. It is therefore highly unlikely that [Dell Executive] would have communicated to the Commission something different and more favourable to Intel at the meeting on 23 August 2006.

(48) Concerning the note to the file written subsequent to the meeting with Dell and to which Intel alleges it was refused access, the Commission notes that this is in fact an internal document which summarises the personal impression of one of the Commission's case-handlers at the meeting. This note was drafted six days after the meeting, and also incorporates in at least one instance information from other sources, personal views and provides the case-handler's views on further investigative strategy. The note was therefore evidently not drafted for the purpose of being countersigned or agreed by any other attendees of the meeting (and indeed it never was) and was not meant to become at any point in time part of the facts (inculpatory or exculpatory) resulting from this investigation. Rather, the function of this note was, as is also evident from the way the case-handler treated it, to be an *aide mémoire* for himself and for other members of the case-team in preparing further investigative measures. As Intel was informed by the Hearing Officer, there is no legal right to access to such internal documents.[54] Despite the absence of any legal duty on the part of the Commission to provide access to this internal document, a non-confidential version thereof was provided to Intel as a matter of courtesy and in order to dispel any doubts about the nature of that document and of the meeting mentioned in it. The Commission gave Intel an opportunity to provide its comments on the document.[55]

---

54 Letter from the Hearing Officer to Intel of 7 May 2008.

55 Letter from the Commission to Intel of 19 December 2008, paragraph 9 and annex 3.

(49) It is also not correct that the Commission would have covered up the fact that a meeting with Dell had taken place on 23 August 2006.[56] While Intel was aware of the meeting as a result of its access to the file,[57] the Commission had initially not informed Intel of the existence of that note, as the case team considered that given its internal nature (described above in recital (48)), it was not part of the file. In the course of the access to file procedure, the Hearing Officer overruled that initial position by decision of 7 May 2008[58] and asked that the note be placed in the file, but at the same time denied Intel access to the note on the basis that the document was internal and therefore not accessible.

2. [...].

IV. INTEL'S FAILURE TO REPLY TO THE SUPPLEMENTARY STATEMENT OF OBJECTIONS OF 17 JULY 2008 AND TO SUBMIT COMMENTS ON THE COMMISSION LETTER OF 19 DECEMBER 2008 WITHIN THE DEADLINES SET BY THE COMMISSION

(53) As described in section II.1, the Commission originally set Intel a deadline of 8 weeks to submit its reply to the 17 July 2008 SSO.[59] This deadline was extended to 17 October 2008 by the Hearing Officer.[60]

(54) On 10 October 2008, Intel lodged an application with the Court of First Instance (CFI) seeking *inter alia* the annulment of the deadline extension to 17 October 2008. Intel further applied for interim measures to suspend the Commission's procedure pending a ruling of the CFI on its substantive application and to extend the deadline to reply to the 17 July 2008 SSO.[61]

(55) Intel did not supply a reply to the 17 July 2008 SSO by the extended deadline of 17 October 2008.

(56) On 27 January 2009, the President of the CFI issued an Order rejecting Intel's application for interim measures on the ground that Intel's application was *prima facie* manifestly inadmissible. This rejection included the rejection of Intel's request for an extension of the 17 October 2008 deadline to reply to the 17 July 2008 SSO. The Order sets out that "*in order to have access to all the information it needs to properly conduct*

---

56 As inferred by Intel in paragraph 750 of its submission of 5 February 2009 related to the 17 July 2008 SSO.

57 As admitted by Intel in paragraph 745 of its submission of 5 February 2009 related to the 17 July 2008 SSO.

58 Letter from the Hearing Officer to Intel of 7 May 2008.

59 Letter from the Commission to Intel of 17 July 2008.

60 Letter from the Hearing Officer to Intel of 15 September 2008.

61 Letter from Intel to the Commission of 13 October 2008.

the administrative procedure, it is a possibility available to the Commission to grant such an extension in order to allow Intel to serve a reply to the SSO, even though Intel has not complied with the time-limit initially laid down, or to take into account written submissions in response to the SSO received after that time-limit."[62] On 3 February 2009, Intel withdrew its application in Case T-457/08. The case was removed from the register of the Court by Order of 24 March 2009.

(57) On 29 January 2009, Intel 'proposed' to file its reply to the 17 July 2008 SSO and to the Commission's letter of 19 December 2008 within 30 days of the day of the Order of the President of the CFI.[63]

(58) 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 or to the Commission's letter of 19 December 2008, as such an extension would not be justified given that Intel had had ample opportunity to submit such replies within the deadlines and had chosen not to do so. The letter also indicated 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.[64]

(59) On 5 February 2009, Intel served a written submission including observations related to the 17 July 2008 SSO.

(60) The remainder of this section will first explain the reasons why the Commission considers that Intel's contentions relating to the reasons why it did not reply to the 17 July 2008 SSO by the deadline set by the Commission are incorrect and unjustified (subsection 1). The Commission will then outline the consequences that it drew from this failure to reply in due time as regards the nature and relevance of the Intel submission of 5 February 2009 related to the SSO (subsection 2). Finally, the Commission will address Intel's failure to submit comments on the Commission letter of 19 December 2008 by the set deadline (subsection 3).

1. Intel's arguments about its failure to reply to the 17 July 2008 SSO within the deadline set by the Commission

(61) Intel essentially argues that the Commission's procedure should have been suspended because Intel has been prevented from exercising its rights of defence. According to Intel, this is because the Commission has refused to obtain and provide

---

62 Order of the President of the Court of First Instance of 27 January 2009 in Case T-457/08 R *Intel v Commission*, Article 89.

63 Letter from Intel to the Commission of 29 January 2009.

64 Letter from the Commission to Intel of 2 February 2009.

Intel with documents from, *inter alia,* private litigation between Intel and AMD in the state of Delaware in the USA.[65] Intel alleges that these documents are likely to be exculpatory of Intel.[66] In essence, Intel argues that these documents are likely to contain information which shows that AMD had technical or commercial issues which made its products unattractive to customers as compared to Intel, at least in certain key segments. According to Intel, these AMD issues explain the reasons for AMD's bad performance in certain key areas. Intel argues that its own conduct cannot be blamed.

(62) Annex 1 to the Intel letter to the Commission of 4 September 2008 provides a list of such issues claimed by Intel. Among these are the following: "*AMD's failure to execute properly and to introduce competitive products limited its ability to compete successfully with Intel*"; "*AMD's failure to provide products that satisfied the needs of enterprise customers explains its lack of success in the corporate segment*"; "*AMD was at a serious competitive disadvantage in the enterprise segment because of its inability to offer the platform solutions required by enterprise customers*"; "*AMD lacked a competitive mobile product and thus did not perform well in this rapidly expanding segment*"; "*AMD did not have technological leadership over Intel but rather lagged behind in the key parameters that were of important to, inter alia, enterprise customers*"; or "*AMD's capacity constraints mean that it was not foreclosed by Intel*".[67]

(63) Intel argues that because of the Commission's failure to obtain the documents it requested and provide them to Intel, "*Intel's ability to exercise its rights of defence effectively in this case will be irreparably prejudiced.*"[68]

1.1 General observations

(64) The Commission cannot accept Intel's arguments. As a general point, it should first be noted that the Commission's file already contains a significant amount of material which allows the Commission to form an impartial judgement on the subject matter of the case. Secondly, even if it were the case that the Commission were required to seek additional information, *quod non*, Intel's request for the Commission to obtain additional documents was not specific enough to allow the Commission to identify documents which might be relevant for its investigation in a proportionate manner. Moreover, the Commission accepted to obtain from AMD and provide to Intel all documents which it was able to specifically identify from the list that Intel outlined. To the extent that they

---

65 However, Intel's belief that the Commission should obtain more documents is not limited to documents from the Delaware litigation.

66 Intel's Application in Case T-457/08, paragraph 6.

67 Intel's letter of 4 September 2008, annex 1. This is only an excerpt of all categories mentioned by Intel, which is not intended to be exhaustive.

68 Intel's letter of 4 September 2008, p. 1, last paragraph.

were new, these documents had no relevance to the case. In particular, the Commission considers that no document included any exculpatory information. All these elements will be further developed in sections 1 to 3.

(65) In addition, the description of the categories of documents that, according to Intel, the Commission should obtain, shows that, by their very nature, these documents cannot be considered exculpatory for Intel. These categories relate to questions of AMD performance (such as capacity issues, design issues). Abuse of a dominant position pursuant to Article 82 of the Treaty is an objective concept.[69] As regards Intel's conducts concerned by the Decision, the performance of competitors is not relevant for the application of Article 82 of the Treaty according to the relevant case-law (see section VII.4.2). Similarly, as described in section VII.4.2.2.6, the as efficient competitor analysis conducted in this case considers the capability or likelihood of foreclosure of a hypothetical as efficient competitor (again, without reference to actual performance in the market). Nevertheless, the Commission addresses Intel's arguments related to the quality of AMD products, capacity and AMD market performance in this Decision (recitals (1682) to (1736)).

(66) For the reasons specified in recitals (68) to (83), the Commission considers that it had no obligation to obtain the documents in question.

(67) The Commission further notes that Intel has not substantiated that it exhausted all steps available to it to provide the Commission with more documents from the Delaware litigation. Indeed, as is specified in section VI.2.3.4.3.f), Intel was able to submit depositions and exhibits from the Delaware litigation relating to Dell to the Commission very quickly, thus contradicting its allegation that "*the Protective Order in the Delaware litigation prevents Intel from making use of documents produced in that matter outside the Delaware proceedings*".[70]

1.2 The content of the Commission file

(68) As previously noted (see recital (37)), Intel's contention that the Commission conducted an unfair investigation is unjustified.

(69) Moreover, the gathering of information has been impartial and even-handed throughout the procedure. Contrary to Intel's claims, this also holds true for information that the Commission obtained which stemmed from the Delaware case. In this respect, following the publication online of pre-trial briefs by both Intel and AMD, on 21 May 2008, the Commission asked both Intel and AMD, by means of a request for information pursuant to Article 18 of Regulation (EC) No 1/2003, to submit all the documents

---

69 Case T-219/99 *British Airways v Commission* [2003] ECR II-5917, para. 241.

70 Letter from Intel to the Commission of 6 August 2008, p. 12.

authored by or received by Intel and AMD and which were cited in their respective pre-trial briefs.

(70) Although the request for the submission of certain documents in the US trial does not in itself change any consideration of whether all documents from that trial are relevant or not, the requested documents were most likely to contain relevant evidence. This follows from the Order of the Delaware Court, which 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 defenses*".[71] It should also be noted that in a letter dated 6 June 2008 Intel itself expressed the view that the documents in question were likely to provide "*a full picture of all the relevant facts*".[72]

1.3 Intel's unspecific request

(71) The list of documents which Intel asked the Commission to obtain from AMD and provide to Intel is contained in an annex to a letter from Intel to the Commission dated 4 September 2008.[73] The annex contains a list of 81 items which are generally not documents, but categories of documents relating to broad subject matters, such as *"all documents relating to AMD's capacity constraints"; "all documents relating to AMD's sales projections and actual sales figures"; "all AMD documents relating to its performance and customer (OEM) perception in the enterprise segment"; "all documents relating to its delivery or design failures";* or *"all AMD documents relating to AMD's ability to coexist competitively with Intel at OEMs without retaliation".* Subsequently, on 25 September 2008, Intel requested that *"the Commission should, at a minimum, request that AMD provide all internal documents relevant to the allegations in both the SO* [the 26 July 2007 SO] *and the SSO* [the 17 July 2008 SSO]".

(72) The categories are very broad and general. Moreover, Intel has not substantiated that there could be exculpatory documents included. In this regard, Intel has stated, without any specific justification, that: "*there is good reason to believe, on the basis of the documents that AMD did submit, that there are many more relevant documents, including documents specifically relevant to the allegations in the SSO that may well be exculpatory of Intel* [underlines added]".[74] In light of the above, seeking to obtain such wide categories of documents would have in practice sent the Commission on a vague fishing expedition for a virtually limitless set of documents, without any precise

---

71 Order of the United States District Court of Delaware of 28 March 2008, point 7(b) http://download.intel.com/pressroom/legal/600_Order%20to%20submit%20preliminary%20pretrial%20statements_Court.pdf, downloaded and printed on 24 March 2009.

72 Intel's letter of 6 June 2008, p. 5, footnote 4.

73 Intel's letter of 4 September 2008, annex 1.

74 Intel's letter of 6 October 2008, pp. 2 and 3.

indication of the reasons why they would be exculpatory. Such an exercise is unjustified and disproportionate, particularly in light of the nature of the investigation that has been carried out. If the principle were accepted that, at any point in time during an investigation, a company could *de facto* oblige the Commission to at any point seek information from broad, general categories which the company claims, without substantiation, might be exculpatory, then meaningful and timely competition enforcement in the EEA would be severely compromised.

(73) The disproportionate character of such an exercise was recognised by Intel itself in connection with a motion to intervene in the Delaware litigation filed by the French consumer organisation, UFC - Que Choisir. In a 6 June 2008 letter to the Commission, Intel asked the Commission to oppose that motion by filing an amicus brief and argued *inter alia* that: "*Intel has produced the electronic equivalent of over 145 million pages in the Delaware litigation, and AMD has produced some 45 million pages. Seventy-three third parties, encompassing virtually every major player in the worldwide computer industry, were subpoenaed and produced millions of pages with more being produced over the coming months. Pursuant to 28 USC § 1782, QC* [UFC - Que Choisir] *is now seeking to take this US discovery as it relates to Intel and third parties documents and inject it, inter alia, into the Commission's pending proceedings in Case 37990. The likely result, should QC succeed, is that the entire US discovery file (including AMD's documents) could find its way into the EU proceedings.*"[75] and that: "*Should the Commission acquiesce in QC's § 1782 motion, it would encourage similar eleventh hour attempts to submit large amounts of new material, which - whether intended or not - would upset and derail Commission proceedings. For this reason alone, as a matter of precedent, the Commission should assert its objection to the § 1782 application.*"[76] Intel's claim in the present proceedings is therefore in stark contradiction to the position it adopted just several months earlier.

1.4 The relevance of the documents obtained by the Commission

(74) Intel's annex to its letter to the Commission of 4 September 2008 did include references to a limited number of specific documents which the Commission was able to identify. Without prejudice to their relevance to the case, as a courtesy to Intel, the Commission obtained these documents from AMD by means of a request for information pursuant to Article 18 of Regulation (EC) No 1/2003 dated2 October 2008 and provided them to Intel by letter of 8 October 2008. There were 7 such documents.

(75) The Commission's analysis of the 7 documents in question shows that they either contain information which was already provided to Intel in the access to file exercises or

---

75 Intel's letter to the Commission of 6 June 2008, p. 2.

76 Idem, p. 7.

bear no relevance to its enquiry. Furthermore, none of the documents which Intel did not already have contain the type of information which Intel claimed they would contain, and which Intel claimed might be exculpatory, as will be shown in recitals (76) to (83).

(76) The first document is an AMD-Lenovo statement of work agreement.[77] The only part of that document which contains substantive information relating to the allegations in either of the two Statements of Objections in this case is its schedule C which concerns concrete information on the planned launch of AMD-based notebooks by Lenovo in 2006. Schedule C was already provided to Intel during the access to file exercise for the 17 July 2008 SSO. All other parts of the document concern other aspects of the AMD/Lenovo business relationship, such as agreements on desktop PCs, which are not covered by the Commission's enquiry.

(77) The second document is a study about the brand image of AMD in 2003.[78] It does not refer to any conduct analysed by this Decision. Furthermore, according to Intel, this document was supposed to be relevant in pointing to "*AMD's failure to execute properly limited its ability to compete successfully with Intel*".[79] In reality, this document is a study which analyses good and bad aspects of the AMD brand image. It does not in any way address AMD "*failure to execute*".

(78) The third document is a survey on the satisfaction of AMD's customers in 2002.[80] It does not refer to any conduct analysed by this Decision. Furthermore, according to Intel, this document was supposed to be relevant in pointing to the fact that "*AMD was at a reputational disadvantage vis-à-vis enterprise customers*".[81] In reality, this document is a complex study that outlines the advantages and disadvantages of AMD from the view of its customers. It comes to the conclusion that the overall mark obtained by AMD ([...]) is higher than that obtained by Intel ([...]).[82]

(79) The fourth document is an HP presentation on its business desktop line.[83] It does not refer to any conduct analysed by this present Decision. Furthermore, according to Intel, this document was supposed to be relevant in pointing to: "*AMD's failure to*

---

77 "*Development and marketing funding – Statement of work #4906L10121 to Goods agreement #4905L10507* " AMD submission of 2 October 2008, annex 1.

78 "*Custom Research. Brand Image tracking- Y03. Fall 2003*". AMD submission of 2 October 2008, annex 2.

79 Intel's letter of 4 September 2008, annex 1, line 13, last column.

80 "*Advanced Micro Devices – Customer Satisfaction Survey*". AMD submission of 2 October 2008, annex 3.

81 Intel's letter of 4 September 2008, annex 1, line 36, last column.

82 AMD submission of 2 October 2008, annex 3, p. 6.

83 "*HP*" (no further readable title) . AMD submission of 2 October 2008, annex 4.

provide products that satisfied the needs of enterprise customers explains its lack of success in the corporate segment".[84] In reality, this document is an HP presentation on the advantages of HP's business desktops, including AMD and Intel-based products. It does not contain any statement qualifying AMD's products.

(80) The fifth document is an IBM report on AMD's supplier performance for 2004.[85] It does not refer to any conduct analysed by this Decision. Furthermore, according to Intel, this document was supposed to be relevant in showing that: "*AMD's failure to execute and satisfy customer needs limited its ability to compete successfully with Int*el".[86] However, in reality, this document gives AMD a total mark of "[...] *out of 100 points"* and indicates that a *"score of* [...] *point or more is passing*".[87]

(81) The sixth document is an AMD letter to [OEM].[88] According to Intel, this document was supposed to be relevant to show that "*AMD was not successful with* [OEM] *because it lacked a competitive mobile product. AMD also had a conscious policy of misusing antitrust claims as part of its strategic plan to compete with Intel*".[89] Neither the 26 July 2007 SO nor the 17 July 2008 SO raise any objection about Intel's dealings with [...]. Whether AMD has a general policy in respect of antitrust claims is not relevant for the assessment of a specific complaint.

The seventh document is an AMD letter of agreement to Lenovo of 28 February 2006 about the launch of AMD-based Lenovo notebooks in 2006.[90] The exact contents of this letter were carried over in the negotiations and were finally incorporated into Schedule C of the statement of work which was signed subsequently and to which Intel obtained access in the access to file exercise.

(83) In view of these facts, the Commission concludes that it is all the more unlikely that pursuing Intel's broader, general request would lead to any appreciable result that could justify such a step, all the more so when the scale of the investigative effort that would be required at a late stage of the procedure are considered.

---

84 Intel's letter of 4 September 2008, annex 1, line 36, last column.

85 "*2004 AMD x-Series Supplier Performance Evaluation*". AMD submission of 2 October 2008, annex 5.

86 Intel's letter of 4 September 2008, annex 1, line 25, last column.

87 AMD submission of 2 October 2008, annex 5, p. 2.

88 Letter from [AMD Senior Executive] to [OEM Senior Executive] of 29 November 2005. AMD submission of 2 October 2008, annex 6.

89 Intel's letter of 4 September 2008, annex 1, line 51, last column.

90 Letter from [AMD Senior Executive] to [Lenovo Senior Executive] of 28 February 2006. AMD submission of 2 October 2008, annex 7.

1.5 Conclusion

(84) The Commission therefore concludes that its file contains sufficient information, that Intel was able to properly exercise its rights of defence and that the Commission is able to make a sound decision on the conducts by Intel under scrutiny.

2. The nature and relevance of the Intel submission of 5 February 2009 related to the 17 July 2008 SSO

(85) On 5 February 2009, Intel served a written submission including observations related to the 17 July 2008 SSO and the Commission's letter of 19 December 2008.

(86) The title of the part of the Intel submission of 5 February 2009 which relates to the 17 July 2008 SSO is '*Reply to the Supplementary Statement of Objections submitted by Intel*'. However, due to the fact that Intel chose not to reply to the 17 July 2008 SSO by the extended deadline of 17 October 2008, the Commission cannot accept that this document be considered and treated as a reply to a Statement of Objections within the meaning of Article 10 of Regulation (EC) No 773/2004.

(87) In this regard, Article 10(2) of Regulation (EC) No 773/2004 provides that "*The Commission shall, when notifying the statement of objections to the parties concerned, set a time-limit within which these parties may inform it in writing of their views. The Commission shall not be obliged to take into account written submissions received after the expiry of that time-limit.*"

(88) As described in recitals (53) to (60), Intel did not reply to the 17 July 2008 SSO by the extended deadline of 17 October 2008 set by the Commission. This deadline was not further extended.

(89) In its application for interim measures, Intel had asked the President of the CFI to extend the deadline for the reply to the 17 July 2008 SSO, but the President of the CFI rejected this request. In his Order, the President of the CFI noted that "*in order to have access to all the information it needs to properly conduct the administrative procedure, it is a possibility available to the Commission to grant such an extension in order to allow Intel to serve a reply to the SSO, even though Intel has not complied with the time-limit initially laid down, or to take into account written submissions in response to the SSO received after that time-limit.*"[91] In a letter of 2 February 2009 to Intel, the Commission informed Intel that

---

91 Order of the President of the Court of First Instance of 27 January 2009 in Case T-457/08 R *Intel v Commission*, paragraph 89. Underline added.

the Commission services had decided not to grant an extension of the deadlines to reply to the 17 July 2008 SSO.

(90) The Commission explained that such an extension would not be justified given that Intel had had ample opportunity to submit such replies within the deadlines and chose not to do so. The letter also indicated 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. The Commission underlined that, in order to avoid undue delays, these submissions should focus on information that was genuinely relevant for the proper conduct of the administrative procedure and should not be unnecessarily lengthy.

(91) Intel's 5 February 2009 written submission related to the 17 July 2008 SSO was therefore filed some three and a half months after the deadline set by the Commission under Article 10(2) of Regulation (EC) No 773/2004 (and more than 6 months after the 17 July 2008 SSO was issued). According to Article 10(2) of (EC) No Regulation 773/2004, the Commission is therefore not obliged to taken into account this written submission.

(92) This is further supported by the fact that, as underlined by the President of the CFI in his order, Intel "*was in no way prevented – either by the contested decisions in the main action or by bringing its action for annulment and this application for interim measures – from preparing and submitting, in good time, its reply to the* [17 July 2008] *SSO on the basis of the information available to it, at least as a precaution, and that all the more so since the Hearing Officer had granted an extension of the deadline by four weeks.*"[92]

(93) In this respect, the Commission notes that the information available to Intel at the time it prepared its written submission of 5 February 2009 was therefore the same as that which was available to Intel following the issue of the 17 July 2008 SSO. The 5 February 2009 submission could therefore have been submitted in good time (that is, by 17 October 2008) to the Commission as a reply to the 17 July 2008 SSO. Instead, Intel chose not to submit this document by the deadline set by the Commission. As stated in the Order of the President of the CFI, by doing so, "*Intel would merely be exercising its right to choose, of which it would have to bear the foreseeable consequences.*"[93]

(94) It is noteworthy that despite the Commission's indication that any belated written submission should focus on information that was genuinely relevant for the proper

---

92 Order of the President of the Court of First Instance of 27 January 2009 in Case T-457/08 R *Intel v Commission*, paragraph 87.

93 Idem, paragraph 66.

conduct of the administrative procedure and should not be unnecessarily lengthy,[94] the Intel submission of 5 February 2009 related to the SSO contains 370 pages for the main submission only,[95] including more than 100 pages in which Intel primarily restates its arguments already developed in writing and orally in reply to the 26 July 2007 SO.[96]

(95) Finally, in the section entitled *'Intel's rebuttal of the SO's allegations'*, Intel makes a claim of "*Abandoned Allegations*".[97] According to Intel, the fact that the 17 July 2008 SSO did not seek to address Intel's evidence which Intel claimed "*refutes the SO's allegations*" demonstrates that "*the Commission has failed to discharge its evidentiary burden and thus, its burden of proof.*" Intel therefore claims that the Commission cannot conclude by way of a negative Decision with regard to what it terms the "*Abandoned Allegations*" by addressing Intel's arguments only in a final decision.[98] Intel's reasoning is incorrect. A supplementary Statement of Objections is not a document where arguments in a response to a Statement of Objections are generally addressed (nor indeed is a letter such as the Commission's letter of 19 December 2008 in which the Commission invited Intel to comment on specific items of evidence that the Commission might use in a potential final Decision). Throughout this procedure, Intel has been afforded every opportunity to make known its views on the Commission's preliminary conclusions in its two Statements of Objections. Its arguments are addressed extensively in this Decision.

(96) Despite not being obliged to take into consideration the Intel submission of 5 February 2009 related to the SSO, the Commission has nevertheless decided, for the sake of good administration, to assess whether the said submission contains material which calls into question the preliminary conclusions set out in the 26 July 2007 SO and the 17 July 2008 SSO.

---

94 See recital (90).

95 Plus two expert reports of respectively 150 and 34 pages, excluding annexes, and 320 annexes.

96 Intel submission of 5 February 2009 related to the 17 July 2008 SSO, section III entitled *'Intel's rebuttal of the SO's allegations'*.

97 Intel submission of 5 February 2009 related to the 17 July 2008 SSO, section III entitled *'Intel's rebuttal of the SO's allegations'*, paragraphs 439-441. Intel makes a similar argument in its submission of 5 February 2009 related to the Commission letter of 19 December 2008, see footnote 55.

98 "*Thus, if the Commission were to render a final decision in respect of the Abandoned Allegations based on the SO and the SSO (i) without addressing Intel's rebuttal arguments, or (ii) by addressing Intel's rebuttal arguments only in the final decision, without giving Intel the opportunity first to rebut them in the administrative procedure, i.e., by the issuance of a new or supplementary SO, the Commission would violate Intel's right of defence*". Paragraph 440 of Intel submission of 5 February 2009 related to the 17 July 2008 SSO.

(97) The Commission has reached the conclusion that this is not the case. Because of the nature of the document as outlined above, the Commission is not obliged in this Decision to include a detailed description and assessment of each of the relevant arguments in Intel's submission of 5 February 2009 related to the 17 July 2008 SSO. Nevertheless, the Commission has in this Decision undertaken such an analysis focusing in particular on the most prominent of the arguments in Intel's submission of 5 February 2009 related to the 17 July 2008 SSO, in particular in certain situations where Intel adduces new documents or elaborates new reasoning which it claims invalidate the Commission's preliminary conclusions. This Decision also addresses instances where Intel presents its own interpretation of documentary evidence described in the 17 July 2008 SSO in order to show that such Intel interpretations are not reasonable, in particular when taken in the context of all the evidence in the file.

(98) Intel's failure to reply to the 17 July 2008 SSO by the extended deadline of 17 October 2008 and Intel's decision not to request an oral hearing on the 17 July 2008 SSO before February 2009 impacted the Hearing Officer's decision to reject Intel's request for an oral hearing on the 17 July 2008 SSO.[99] On 17 February 2009, the Hearing Officer recalled that "[a] *subjective right to have an oral hearing exists until the end of the deadline to reply to the statement of objections*".[100] A belated request for an oral hearing thus obliges the Hearing Officer to exercise his or her discretion. After having taken note of the position of the Commission services expressed in the letter of 2 February 2009 (see recital (24)), and having evaluated all of Intel's arguments, the Hearing Officer took into account more general issues of fairness and the need for a proper and timely conduct of the procedure when concluding that: "*granting Intel an oral hearing under these circumstances and at this stage of the procedure would risk causing serious difficulties in the proper and timely conduct of this procedure.*"[101] The Commission confirms this evaluation and the Hearing Officer's decision to reject a second oral Hearing.

(99) The reasons described for the Commission's decision not to grant an extension of the deadline to reply to the 17 July 2008 SSO and not to grant an oral hearing are based on the specific circumstances of the case. In addition to these specific circumstances, it is important to highlight the implications that accepting Intel's request for a deadline extension would have had on the Commission's ability to discharge the mission of enforcing EC competition policy, of which it is entrusted by the Treaty. Accepting Intel's claim would have implied that a company could *de*

---

99 Letter from the Hearing Officer to Intel of 17 February 2009.

100 Idem.

101 Idem.

facto delay *sine die* any Commission competition case with no practical downside by merely claiming that more documents have to be obtained by the Commission, without any precise references to them.

(100) Indeed, this case is not unique in that respect. Any incriminated party under a procedure run by the Commission may at any moment in time, including after the expiry of a deadline to reply to a Commission Statement of Objections, ask the Commission to obtain "*all internal* [complainant] *documents relevant to the allegations in (...) the SO*", as Intel did in the case at hand, and to grant it further time to reply to a Commission Statement of Objections after such documents have been provided.[102] The same applies, as was the case in the present instance, if, (at a very late point in a procedure), a company maintains that it has the right to an oral hearing even though it has chosen not to request such a hearing (in its reply to a Statement of Objections) within the time-period set in accordance with Regulation (EC) No 773/2004 and confirmed by the Hearing Officer. If such requests were to be accepted, this would in effect give parties control over the timeline of Commission procedures, thereby frustrating the possibility for the Commission to ensure an effective enforcement of competition rules, and eventually increasing the risk of irreversible damage to the competitive process on the markets affected.

3. Intel's failure to reply to the Commission letter of 19 December 2008 by the deadline set by the Commission and its consequences

(101) On 19 December 2008, the Commission sent Intel a letter drawing Intel's attention to certain specific items of evidence relating to the Commission's existing objections which the Commission indicated it might use in a potential final Decision. The Commission set Intel a deadline of 19 January 2009 to provide comments on these items. This deadline was extended to 23 January 2009.[103]

(102) Intel failed to provide comments on the Commission's letter of 19 December 2008 by the extended deadline of 23 January 2009. This was confirmed by Intel's counsel on 27 January 2009,[104] after the Commission had asked Intel about the matter.[105]

---

102 See recital (71).

103 Letter from the Commission to Intel of 16 January 2009.

104 Email from Intel to the Commission of 27 January 2009, entitled *'CONFIDENTIAL Case 37.990'*.

105 Email from the Commission to Intel of 26 January 2009, entitled *'Case 37.990'*.

(103) Intel did not provide any reasons why it considered it was entitled not to reply to the 19 December 2008 letter by the set deadline.[106]

(104) The Commission considers that the reasoning set out in recitals (86) to (97) concerning the Intel submission of 5 February 2009 related to the 17 July 2008 SSO applies, by analogy, to the Intel submission of 5 February 2009 related to the Commission letter of 19 December 2008. The Commission has therefore assessed both submissions in accordance with the same principles, and refers to them in the same way in this Decision.

V. THE PRODUCTS CONCERNED BY THE DECISION

(105) This section describes the products concerned by this Decision. Most of this section was originally described in the 26 July 2007 SO (Section II thereof). Intel has not substantively commented on the description.

1. CPUs as a part of the computer

(106) The products concerned by this present Decision are microprocessors, which are also known as Central Processing Units (CPUs).

(107) The CPU is the device that interprets and executes instructions.[107] CPUs generally comprise millions of transistors that process data and control other devices in a computer system, and are therefore the core of a computer.[108] The CPU has the ability to fetch, decode and execute instructions and to transfer information to and from other resources over the computer's main data-transfer path, the bus. The CPU is the computer's "brain".[109] Sometimes, the term "CPU" encompasses both the processor and the computer's memory.

---

106 By letter of 27 January 2009 to the Hearing Officer, Intel informed the Hearing Officer that it disagreed with the Hearing Officer's decision not to grant an extension to submit comments on the Commission letter of 19 December 2008 beyond 23 January 2009, and informed the Hearing Officer of its intent to appeal this decision (as well as other decisions by the Hearing Officer) to the CFI and "*to take such steps as it considers appropriate to preserve its position in the interim, including, pending resolution of Intel's appeal, a request for interim measures suspending the Commission's proceedings in Case 37.990 insofar as they relate to the SO.*" To the Commission's knowledge, Intel has, however, not followed up in this regard.

107 Microsoft Computer Dictionary, 5th edition, Redmond, USA, p. 132.

108 See for example Intel's SEC Form 10-K Annual Report of 27 February 2006 for the fiscal year ended on 31 December 2005, downloaded and printed on 14 January 2009 from http://www.sec.gov/Archives/edgar/data/50863/000089161806000089/f12963e10vk.htm, p. 2; and AMD's SEC Form 10-K Annual Report of 27 February 2006 for the fiscal year ended 25 December 2005, downloaded and printed on 14 January 2009 from http://www.sec.gov/Archives/edgar/data/2488/000119312506040130/d10k.htm p. 3.

109 Idem.

(108) The set of hardware lines used for data transfer among the components - the CPU and other parts of the computer for example - of the computer system is called a "bus". It consists of specialised groups of lines that carry different types of information (memory, data, signals, etc.). Buses are characterised by the number of bites they can transfer at a single time.[110]

(109) CPU performance is a key component in the overall performance of a computer.[111] In terms of the cost, a CPU is the component which represents the most significant proportion of a computer's cost. According to one study, it ranges between [...]% and [...]% of the final cost of a computer (generally speaking, the higher the specification of the computer, that is, the more sophisticated the computer is, the higher the share of the cost accounted for by the CPU).[112]

2. CPU production

2.1 Manufacturing process

(110) CPUs are manufactured in production facilities called "fabs". These are big semiconductor foundries that produce millions of CPUs per month. CPUs are manufactured in a "cleanroom", which is an ultra-clean environment that minimises the presence of specks of dust which could otherwise ruin thousands of CPUs.[113] Three different types of facilities (a wafer fabrication facility ("Fab"), an assembly facility and a test facility) are required for the production of CPUs. A fab is required to manufacture semiconductor wafers containing numerous integrated circuits, an assembly facility is required to separate the semiconductor wafers into functioning individual CPU chips and put them into packages so that they can be electrically connected to a circuit board in the end-product, and finally, a test facility is required to ensure that the assembled package meets the product specifications.[114]

---

110 Idem.

111 See AMD's SEC Form 10-K Annual Report of 27 February 2006, *op. cit.*

112 See RBB Economics, "Abuse of Dominance in the Market for x86 Processors", 15 September 2006, (the "RBB paper"), pp. 51-52. Reference to Mercury Research, Inc. Dean McCarron report on Desktop PC Build Costs, Updated edition 2Q2006.

113 See http://www.intel.com/education/cleanroom/index.htm, and http://www.intel.com/education/cleanroom/index.htm, downloaded and printed on 14 January 2009. The manufacturing process itself is complex: a silicon cylinder is sliced in "wafers", which are ultra-thin pizza sized disks. They are progressively engraved with various layers of coatings (for example silicon dioxide, ultraviolet light, chemicals) circuitry and transistors. In this way, hundreds of identical "dies" (that is to say CPUs) are created on a single wafer.

114 IBM submission of 3 July 2006, p. 2.

(111) The equipment installed in a cleanroom constitutes the largest share of the capital expenditure and is only purchased and installed as required by demand. This is done in order to optimise return on investments, and to only commit to the capital expenditures that are necessary to meet customer demand. Consequently, the cleanroom space of a fab may originally be built to accommodate more equipment than that which has been installed.[115]

(112) CPUs are punched out of a circular thin slice of semi-conducting material (wafer). The wafer diameters currently used in CPU production are 200 and 300 mm. The piece of material that is punched out is called a "die".[116]

(113) During the manufacturing process, each CPU is equipped with circuitry. The smaller the circuitry, the better performing the CPU is. In 2006, circuitry sizes ranged between 65 and 90 nanometres.[117]

(114) Certain technological steps such as the increase of wafer size or the production of smaller circuitry require entirely new equipment and, thus, significant investment.[118]

2.2 Production capacity

(115) Building and running a fab is a risky and expensive investment. It takes several years to construct and ramp up a fab,[119] and the cost of a complete state of the art fab is circa USD 2 000 – 3 000 million. Moreover, the fixed costs of running a fab are very high.[120] According to IBM, the "[...]"[121]

(116) The potential capacity of a fab varies depending on whether more output is needed in the short, medium or long term. Capacity utilisation of cleanroom space under normal circumstances ranges between 75% and 100%. The lower of these two values is due to the efficient scale within the fab that requires the use of around

---

115 See AMD submission of 27 June 2006.

116 See http://computer.howstuffworks.com/motherboard.htm/printable, downloaded and printed on 14 January 2009 See also McGregor, J., "Intel Manufacturing Capacity and Die Cost", In-Stat Report, August 2005, p. 12.

117 See AMD submission of 27 June 2006.

118 See AMD submission of 27 June 2006.

119 In-StatMDR "Intel CPUs Service – Manufacturing Capacity and Die Costs", July 2004, p. 12.

120 See complaint of AMD against Intel in the United States District Court for the District of Delaware, filed on 27 June 2005, at paragraph 27. Complaint at: http://www.amd.com/us-en/assets/content_type/DownloadableAssets/AMD-Intel_Full_Complaint.pdf, downloaded and printed on 14 January 2009.

121 IBM submission of 3 July 2006, p. 2.

75% of the cleanroom space.[122] Within that range, the manufacturer can increase production in **the short run** (maximum six months) by fine-tuning production processes and bringing back online previously retired facilities. Through this process, the manufacturer might also be able to exceed the "maximum" 100% cleanroom capacity by up to 5%.[123] Within an **even shorter** time-span (practically at any point in time), production can be switched from one type of CPU to another type of CPU.[124]

(117) In the **middle term** (six months to one year), significant[125] capacity increases are possible by outsourcing production to independent foundries or by adding equipment to existing facilities.

(118) In the **long term** (approximately three years), capacity increases are possible by building an entirely new fab.[126] It may also be possible to add cleanroom space to an existing facility within a period shorter than 3 years.

(119) Intel's arguments related to AMD capacity are dealt with in section VII.4.4.3.

3. CPUs in the market

(120) Both Intel and AMD manufacture CPUs which are primarily destined for different segments of the computer industry. The main segments are desktop computers, laptop computers and server computers.[127] Desktop and laptop computers are sometimes collectively referred to as "client" PCs. CPUs used in computers can be sub-divided into two categories: the x86 and non-x86 architecture.

3.1 x86 architecture CPUs

(121) The x86 instruction set for CPUs derives from a decision made in the 1980s by IBM, which at the time was *de facto* defining PC standards. At the time, IBM chose Intel's CPUs for its PCs. The Intel CPU instruction set was known as the x86 instruction set on the basis of Intel's naming convention for its CPUs. At the same time, IBM chose Microsoft's Windows, which was compatible with the x86 instruction set, as its chosen PC operating system (the software which controls a

---

122 See AMD submission of 27 June 2006, p. 5.

123 See AMD submission of 26 January 2006.

124 In-Stat "Intel Manufacturing Capacity and Die Costs", August 2005, p. 8.

125 For AMD up to 25 %, see AMD submission of 26 January 2006, p. 4.

126 In-StatMDR "Intel CPUs Service – Manufacturing Capacity and Die Costs", July 2004, p. 12.

127 Higher-powered computers which serve desktop and laptop computers (for example by allowing them to share files on a certain network).

computer). Successive generations of PCs used CPUs known as 8086, 286, 386, 486 etc., leading to the commonly used denomination of "x86" architecture CPUs. The Intel x86 CPU is built on the basis of the so-called Complex Instruction Set Computers ("CISC") architecture.[128]

(122) Both the Windows and the Linux operating systems are compatible with the x86 instruction set; however, Windows is primarily linked to x86 instruction sets, while versions of Linux are also compatible with non x86 designs.

(123) Intel and AMD are the main manufacturers of x86 architecture CPUs. Apart from Intel and AMD, the only other x86 CPU vendors in recent times have been VIA Technologies, Inc. ("VIA")[129], with the C7 processor family,[130] and Transmeta Corporation ("Transmeta"), with the Crusoe processor family.[131]

(124) VIA is a "fabless" supplier, meaning that VIA does not have any production or manufacturing facilities, but instead subcontracts the manufacture of its products to third party fabs.[132]

(125) Transmeta, amongst other activities, develops CPU and semiconductor technologies. However, Transmeta ceased x86 CPU production in the first quarter of 2005, and is no longer active in the market.[133]

3.1.1. Market exits

(126) Prior to 2000, a number of other companies manufactured x86 CPUs. These companies included IDT, Rise Technology, SGS-Thomson, IBM and Texas Instruments. None of these companies manufacture x86 CPUs any longer.[134]

(127) On 7 October 2008, AMD announced a significant restructuring of its organisation. AMD's two fabs as well as related assets and intellectual property rights will be transferred to a new company, provisionally named "The Foundry Company".

---

128 See http://searchsmb.techtarget.com/sDefinition/0,290660,sid44_gci213854,00.html, downloaded and printed on 14 January 2009.

129 In 2003, VIA settled its long-time patent and monopolisation disputes against Intel in the UK in exchange for an extensive cross-licence agreement with Intel for 10 years.

130 Although VIA, on p. 1 of its submission of 7 July 2006, makes clear that it does not manufacture x86 CPUs, but outsources production to third parties.

131 http://www.transmeta.com/corporate/index.html, downloaded and printed on 14 January 2009.

132 [...]. (See Mercury Report "PC Processors and Chip Sets – Updated Edition 3Q2006", pp. 3-107).

133 See Transmeta's SEC Form 10-K Annual Report for the fiscal year ended 31 December 2005, pp. 3-4, at http://www.sec.gov/Archives/edgar/data/1001193/000095013406005322/f18553e10vk.htm, downloaded and printed on 14 January 2009.

134 Mercury Report "PC Processors and Chip Sets – Updated Edition 3Q2006", p. 3-3.

AMD will own 44,4 % of the Foundry Company. The remaining 55,6 % will be owned by the Advanced Technology Investment Company, an investment company formed by the government of Abu Dhabi. After the transfer of its manufacturing assets to the Foundry Company, AMD will focus on design and development.[135]

(128) After the market exits mentioned in recital (126) and the transfer of AMD's manufacturing assets mentioned in recital (127), Intel will remain the only company in the world which will both design and manufacture x86 CPUs a significant scale.

3.1.2. Intellectual property requirements

(129) For a company to be able to produce x86 CPUs, it is necessary to develop a basic x86 CPU design in order to access the x86 market. AMD notes that "*it will require a significant expenditure to develop the required know how to design competitive x86 CPUs. Both AMD and Intel have a long history of developing x86 CPUs and have built a significant knowledge base which it will be very costly for a new entrant to replicate.*"[136] Furthermore, AMD highlights that "*the x86 instruction set is subject to substantial intellectual property right protection. A potential entrant will thus require either a license from Intel, or an enormous combination of ingenuity, time and capital committed to the seemingly impossible task of creating a non-infringing x86 instruction set.*"[137]

(130) AMD and Intel have a cross license agreement with regard to the x86 instruction set. The latest version entered into force on 1 January 2001 (Patent Cross License Agreement), with both parties guaranteeing mutual non-exclusive, non-transferable licences to the applicable intellectual property rights required to produce [...], without the right to sublicense.[138]

---

135 http://www.amd.com/gb-uk/Corporate/VirtualPressRoom/0,,51_104_543~128482,00.html, downloaded and printed on 14 January 2009.

136 AMD submission of 27 June 2006, p. 1.

137 AMD submission of 27 June 2006, pp. 1-2. AMD also notes that "*a further very important element is that critical technology and intellectual property necessary to design, manufacture and sell a CPU that executes the x86 instruction set is owned and vigorously enforced by Intel. It will therefore be very costly, time consuming and difficult to develop a product which is compatible with the x86 instruction set and may ultimately be impossible.*"

138 For the Licensing Agreements, see AMD submission of 16 November 2006.

3.2 *Non-x86 architecture CPUs and products*

(131) Unlike x86 CPUs, non-x86 CPUs are mostly built on the basis of the so-called Reduced Instruction Set Computers ("RISC")[139] architecture.[140]

(132) Non-x86 CPUs can be used for desktops, laptops and servers.[141] A number of operating systems ("OS") can run on such non-x86 CPUs. For instance, until 2005, Apple computers were powered by IBM non-x86 PowerPC CPUs (with the MAC-OS). One of the main vendors of non-x86 architecture CPUs is HP. HP offers its HP 9000 server family based on the PA-RISC architecture CPUs. HP's proprietary HP-UX operating system runs on these servers.[142]

3.3 *Distribution of CPUs*

(133) CPUs for computer systems are not sold directly to the final customer, but are generally incorporated into computers by Original Equipment Manufacturers (OEMs). OEMs assemble computers which incorporate a variety of other hardware and software components, and these computers are then sold either to retailers or directly to end customers. The top ten worldwide OEMs (PC, notebook, server) in terms of overall sales of computers are Dell, HP, IBM, Lenovo, Acer, Fujitsu-Siemens, Toshiba, NEC, Gateway and Sony.[143]

(134) CPU manufacturers generally sell products through direct sales, mostly to larger OEMs. Most of the smaller OEMs are supplied through third-party industrial and retail distributors and through independent sales representatives.[144]

---

139 RISC stands for Reduced Instruction Set Computers. RISC processors only use simple instructions that can be executed within one clock cycle in contrast to CISC (Complex Instruction Set Computers) which is used for x86 and which includes multi-clock complex instructions. However, RISC also brings certain advantages. The RISC "reduced instructions" require fewer transistors of hardware space than the complex instructions, leaving more room for general purpose registers. Because all of the instructions execute in a uniform amount of time (that is to say one clock), pipelining is possible. Despite the advantages of RISC based processing, RISC chips took over a decade to gain a foothold in the commercial world. This was largely due to a lack of software support. See http://cse.stanford.edu/class/sophomore-college/projects-00/risc/risccisc/ downloaded and printed on 14 January 2009.

140 See also Microsoft Computer Dictionary, 5th edition, Redmond, p. 455.

141 See for example IBM submission of 3 July 2006, p. 4.

142 See http://www.hp.com/products1/servers/HP9000_family_overview.html, downloaded and printed on 14 January 2009.

143 See Gartner data.

144 Intel Form 10-K of 27 February 2006, p. 11, *op. cit*; AMD Form 10-K of 27 February 2006, p. 8, *op. cit.*

(135) End customers may purchase their computers either directly from the OEMs, or via PC retailers. The retailers purchase complete desktop or laptop PCs from OEMs and sell them on to end customers. While the majority of PCs are sold through consumer electronics retailers and PC specialists, there are also some supermarket chains which at times sell non-food products such as PCs in great quantities.[145] In terms of overall sales value and market coverage, non-specialist Media-Saturn Holding GmbH ("MSH") and PC specialist DSG International plc ("DSGI") count among the leading PC retailers in Europe.[146]

4. Price Comparison

(136) Intel's Average Selling Price ("ASPs") for CPUs has historically been higher than that of AMD.[147] The ASP is calculated by looking at the overall sales in a particular market segment and by dividing this figure by the units sold in that segment.

(137) The following ASP price comparison tables are based on Mercury data,[148] and cover the period from the first quarter of 2002 until the third quarter of 2006. The tables in question show the development of ASPs over time for the different CPU segments (namely, desktop, mobile, server). The comparison considers all of Intel's and AMD's products in the various segments. It is a weighted average, which means that it reflects the actual amounts sold on the market.[149]

Table 1

[...]

Table 2

[...]

---

145 This applies to, for example, the German-based discount supermarket chains Aldi and Lidl, or to the French supermarket chain Carrefour.

146 Mintel International Group Ltd, *"PC Retailing – Europe, Retail Intelligence, July 2007"* ("Mintel Report"), pp. 15-16.

147 The ASP stands for the price of a certain good that the good is sold for. The ASP reflects both the type of product and the life cycle of the product. Generally, more complex products tend to have higher ASPs, and also, towards the end of the life cycle of a product, the ASPs tend to decrease.

148 PC Processors and Chipsets, Updated edition 3Q2006, Dean McCarron.

149 For Intel, any rebates have been deducted from the overall sales per product, which means that Intel ASPs are net of rebates. It would appear that the Intel ASPs might be slightly underestimated since Mercury's estimate of total Intel revenue is USD [...] million below the total reported in Intel's Form 10-K for 2005, while the Mercury estimate of AMD's total revenue is less than USD [...] million below AMD's actual revenue as reported in its Form 10-K. (Note 2, RBB paper, p. 61).

Table 3

[...]

(138) The tables show that over the relevant period, Intel's weighted ASPs are higher than AMD's in [...], and that they were lower in [...].[150] The price differential reflects both the companies' relative brand recognition (see section VII.3.3.2 for a description of the strength of the Intel brand) and the fact that Intel's mix of CPUs sold is weighted more towards higher-priced, higher-performing CPUs than that of AMD.

5. Innovation in x86 CPUs

(139) Innovation is, together with price, one of the main factors that triggers demand in the x86 industry. The very high research and development (R&D)[151] and production costs can usually only be recovered if new inventions can be sold before the competitor responds with a more innovative product.

(140) The pace of innovation is rapid.[152] Rapid innovation means quick increases in CPU transistor density and quick improvements in the CPU architecture.

(141) CPU transistor density generally doubles about every two years.[153] For CPU producers, this is mainly relevant when it comes to investment in new and more innovative production facilities which manufacture dies with increasingly smaller circuitry. Transistor density also has an impact on the performance of the CPU.

(142) Each new product in the CPU industry improves to some extent the performance in relation to the needs of certain groups of customers. The main improvements in

---

150 It is worth noting that it may be possible to run the same server hardware with fewer AMD CPUs than Intel CPUs. In this regard, according to an IBM study, the Opteron-based "e325" product was able to produce the same output with fewer CPUs compared to the Intel-based "BladeCenter" or "x335", thereby leading to hardware, software and infrastructure cost savings. See IBM, "*To Blade or Not to Blade?*", September 2003.

151 Between 2003-2007, Intel spent over USD 26 billion on R&D. See http://files.shareholder.com/downloads/INTC/597024279x0x191072/A1DA1340-1482-4851-87F9-FD94F16AFD9A/intel_2007ar.pdf , downloaded and printed on 31 March 2009; AMD, in the same period spent USD 5,982 million on R&D. See http://www.amd.com/us-en/assets/content_type/DownloadableAssets/AMD_10-K_2007.PDF downloaded and printed on 31 March 2009.

152 See for instance Intel's SEC Form 10-K Annual Report of 27 February 2006, *op. cit.*, p. 12.

153 This development is also named "Moore's Law" named after Gordon Moore, the founder of Intel, who predicted on the basis of the density increases in the 1960s that transistor density would continue to increase at the same pace in the future; See "*Moore's Law: Raising the Bar*", downloaded and printed on 14 January 2009 from: ftp://download.intel.com/museum/Moores_Law/Printed_Materials/Moores_Law_Backgrounder.pdf

,

recent years have been in three different fields: (i) the speed of the internal CPU calculations (clock rate); (ii) the width of the connections between the CPU and other devices of the motherboard; and (iii) the number of processor cores and the ability of several CPUs to work together on one single motherboard. These are explained in more detail in recitals (143) to (148).

5.1 Higher clock rate

(143) Clock rate is measured in hertz and describes the number of calculation cycles a CPU carries out per second. However, as some CPUs can do more calculations per cycle than others, the clock rate can only be used as a comparator between CPUs to a certain extent.[154]

(144) In 2000, AMD was first to bring to market a CPU with a clock rate of 1 GHz.[155] In 2001, AMD launched the Athlon XP CPU which was based on the Quantispeed microarchitecture. This represented a break from the traditional focus on increasing CPU clock rates - AMD instead focused on an increase of the "instructions achieved per clock" (IPC), while also increasing the clock rate.[156] Intel continued improving clock rates of its Netburst-based CPUs and eventually launched a CPU with a 3,8 GHz clock rate in 2004.[157]

5.2 The 64-bit architecture

(145) In computer architecture, 32-bit or 64-bit are adjectives used to describe the width of buses, memory addresses or other data units. The higher this bit rate is, the more data can be processed by the CPU.

(146) AMD launched the first x86 CPUs with a 64-bit architecture in April 2003 with the Opteron CPU, and in September 2003 with the Athlon 64 CPU. Intel announced its first 64-bit processor with an x86 architecture called Xeon-64 (EM64-T) in the first quarter of 2004. This was launched in September 2004.

---

154 AMD procurement guidelines, see http://www.amd.com/us-en/assets/content_type/DownloadableAssets/Benchmark_Procurement_Guidelines_for_Government_PC_Buyers.pdf, downloaded and printed on 14 January 2009.

155 http://www.amd.com/gb-uk/Weblets/0,,7832_10554_10536,00.html, downloaded and printed on 14 January 2009.

156 http://www.amd.com/us-en/Processors/SellAMDProducts/0,,30_177_3532_3839%5E4576,00.html, downloaded and printed on 14 January 2009.

157 http://www.infoworld.com/article/04/11/01/HNinteltops_1.html, downloaded and printed on 14 January 2009.

5.3 *Dual core CPUs*

(147) Intel's traditional path for improving CPU performance by means of increasing its internal clock frequency (measured in hertz) reached its limits in 2004. The barrier of 4GHz was mainly due to technical and material limitations. As a result, the overall strategy for improving performance has changed with the design of "dual" or "multiple core" processors. A dual core processor consists of two processor cores residing on a single die that translates to almost double the performance of a single-core chip. Dual and multi-core chips were launched almost simultaneously in 2005 by AMD and Intel.[158]

5.4 *Products in the market*

(148) The evolution of product families by AMD and Intel which adopted new technologies in the course of the last eight years is shown in the table below:[159]

Table 4 - AMD and Intel product family development

Quarters	Server		Desktop		Mobile[160]	
	AMD	Intel	AMD	Intel	AMD	Intel
Q1 2001	Athlon	Pentium III Xeon	Athlon (1.3 GHz) Duron (850 MHz)	Pentium IV Willamette (1.3 GHz) Celeron	Duron	Mobile Pentium III (1 GHz) Celeron
Q2 2001		Xeon Itanium (Non-x86, 64-bit processor)			Athlon 4	
Q3 2001						
Q4 2001	Athlon MP		Athlon XP			

158 http://www.techweb.com/encyclopedia/printArticleP..jhtml?term=dual+core, downloaded and printed on 25 July 2007.

159 For a more concise overview, the low end (mostly consumer) products are not included in this table. These products are technologically not much different from the respective corporate segment products but more targeted at the needs of consumers for whom price counts more than performance. In addition, the table only shows major developments and does not list every new product released on the market. Furthermore, since this table is not meant to give an accurate overview of all factors relevant to performance but merely is meant to illustrate the very tight race amongst the CPU manufacturers based on their product brand names, it does not depict the technological advancements made in transistor density on the basis of the so-called Moore's Law, see also recital (141).

160 In the mobile segments, the same CPUs can be used as in the desktop segment. Due to more constraints with regard to heat, power consumption and space, the industry slowly started to develop customised CPUs as of the first quarter of 2001.

Q1 2002						
Q2 2002						Pentium IV M
Q3 2002					Athlon XP (2000+)	
Q4 2002		Xeon MP (32 bit)				
Q1 2003						Centrino - Pentium M (Banias)
Q2 2003	Opteron (32 and 64 bit) the first x86 CPU with a 64 bit architecture[161]					
Q3 2003			Athlon 64 and Athlon 64 FX - 64 bit architecture		Athlon 64	Mobile Pentium IV
Q4 2003						
Q1 2004				Pentium IV (Prescott) Extreme Edition (3,4 GHz)		Celeron M
Q2 2004		Xeon MP (64 bit)			Athlon 64 M - 64 bit architecture	Pentium M (Dothan)
Q3 2004			Sempron	Celeron D		
Q4 2004					Mobile Sempron	
Q1 2005					Turion 64 - 64 bit architecture	

161 Some contemporaneous documents quoted in this Decision refer to this product family by the codename "Hammer".

Q2 2005	Opteron Dual Core - dual core CPU		Athlon 64 X2 - dual core CPU	Pentium Extreme Edition Dual Core dual core desktop CPU Pentium D		
Q3 2005						
Q4 2005		Xeon Dual Core - dual core CPU				
Q1 2006						
Q2 2006					Turion 64 X2	
Q3 2006				Core 2 Duo		Core 2 Duo
Q4 2006		Xeon Quad-Core		Core 2 Extreme quad-core		
Q1 2007				Intel Core 2 Quad		
Q2 2007						
Q3 2007	Opteron Quad-Core					Core2 Extreme mobile dual-core
Q4 2007						
Q1 2008			Phenom X3 and X4			
Q2 2008					Turion 64 X2 Ultra	
Q3 2008						Core 2 Extreme Quad core
Q4 2008				Core i7		

VI. DESCRIPTION OF INTEL BEHAVIOUR CONCERNED BY THE PRESENT DECISION

1. The growing competitive threat from AMD

1.1 Introduction

(149) Intel has historically been the leading x86 CPU manufacturer in the market (see Section VII.3 for a description of Intel's dominance). This section describes the growing competitive threat to Intel which AMD CPUs represented from around 2001 on the basis of improved price and performance (section 1.2), as well as a brief description of project [project], which was a failed attempt by a number of large IT companies to collaborate and encourage a significant shift away from Intel (section 1.3).

1.2 AMD's improvement in terms of price and performance

(150) As of 2001, AMD started offering significantly improved x86 CPU products in terms of price and performance parameters.

(151) An internal HP presentation from 2002 stated that AMD's Athlon desktop processor "*had a unique architecture*",[162] was "*more efficient on many tasks*",[163] and had been "*CPU of [the] year [for] 3 consecutive years*".[164] Similarly, HP stated that "*AMD offers no-compromise performance at superior value.*"[165]

(152) AMD's improvement was particularly marked in the server segment with its Opteron product as from the second quarter of 2003. In this regard, in a submission to the Commission, Intel itself has recognised that "*AMD improved its product offerings dramatically with the introduction of its successful Opteron processor.*"[166]

(153) Contemporaneous evidence from Intel further demonstrates Intel's recognition of Opteron's growing threat at the time. For example, in December 2003, Intel's view was that although Opteron enjoyed "*limited but growing industry support*", it had "*Strong performance and price/performance vs* [Intel's] *Xeon*".[167] In a similar vein,

---

162 HP presentation of May 28 2002 (Annex to HP submission of 23 December 2005), p. 23.

163 Idem.

164 Idem.

165 Idem.

166 Intel submission of 2 March 2005.

167 See Intel submission, EC-ART18-003986, "EPG Opteron Competitive Training – December 2003", p. A000H4NJ.

in July 2004, Intel stated that "*Opteron is real threat today...IBM A PRO Opteron based workstation - may target finance market, IBM claiming it's better than Xeon...SUN WS* [workstation] *with Opteron and Solaris - potential threat in CAD* [Computer Assisted Design] *cases. FSC* [Fujitsu Siemens Corporation] *will have Opteron based WS. Opteron -based single WS-benchmarks beat Xeon in all cases...*"[168].

(154) OEMs also acknowledged the improvement of Opteron. Dell's appraisal of Opteron was positive: "*in Dell's perception this CPU generally performed approximately* [...] *better than the comparable Intel Xeon CPU at the time (which was a 32-bit CPU). AMD also released its dual-core CPU in April 2005, which significantly increased processing capacity without materially increasing CPU costs.*"[169]

(155) In a 2005 submission to the Commission, Dell stated that "*over the last two to three years, some of AMD's high-end CPUs, in particular AMD's Opteron CPU, have achieved some measure of performance and price advantages over their Intel counterparts, yielding a better price/value or price/performance equation for Dell's competitors offering AMD-based products.*"[170]

(156) IBM has also stated that "*due to the enhanced performance of the Opteron-based e325, many fewer servers are required to produce the same output. This allows the combined hardware, software and infrastructure costs to be far lower than for BladeCenter or the x335.*"[171] Indeed, IBM was concerned about Intel's inability to meet the competition from Opteron, stating that: "[...]"[172] Following the release by AMD of its dual-core processors during the spring of 2005, an IBM engineer stated that "[...]".[173]

(157) AMD's improvement in the mobile segment was also acknowledged. In March 2005, Dell stated that it was "*very nervous about the NB* [notebook] *competitive environment: AMD will launch DC with 64 bit first in NB, and will lead for 3 more quarters, Dell concerned about midterm Intel NB roadmap. Could become a*

---

168 Intel submission, EC-ART18-001122. Email from [Intel Executive] of 30 July 2004, p. A000H4HC.

169 Dell submission of 19 December 2005, p. 24.

170 Dell submission of 19 December 2005, p. 3.

171 IBM, "*To Blade or Not to Blade*", p. 12., *op. cit.*, (x335 is an Intel Xeon, 1U 2-way 32-bit server; whereas e325 is an AMD Opteron, 1U 2-Way 64-bit server).

172 See IBM presentation entitled "*Intel is not meeting Competition*", IBM 126764.

173 See "*2005 xSeries Technical Strategy – Performance*" presentation by IBM's distinguished engineer, of 18 April 2005, IBM 131464.

serious competitive threat within consumer segment if Turion succeeds and if DC and EMT64 will become tick off items. Need to watch this space."[174]

(158) Dell, which until September 2006 was an Intel-exclusive x86 CPU purchaser,[175] explicitly pointed out to Intel how AMD was a growing threat to their own products: "*AMD is a great threat to our business. Intel is increasingly uncompetitive to AMD which results in Dell being uncompetitive to* [Dell competitors]. *We have slower, hotter products that cost more across the board in the enterprise with no hope of closing the performance gap for 1-2 years*".[176]

(159) More recently, Intel has talked publicly about a significant improvement in its own products and compared the present situation with past difficulties. For example, [Intel Senior Executive] has stated: "*much has been written in the last year about Intel losing its momentum, losing its leadership in the server market space. I believe very much that with this new set of dual and quad-core CPUs we've now regained our leadership.*"[177]

1.3 Project [...]

(160) A joint project carried out by several OEMs and an important software editor provides further illustration of the increased consideration given to AMD by the industry.

(161) During the second half of 2003, soon after the launch of the Opteron CPU by AMD, four firms in the IT sector - [...] - examined the possibility of collaborating in order to encourage a significant move away from Intel and towards AMD products.[178] Discussions at CEO level between the four companies began to take place in August 2003. [OEM] subsequently joined the [project] group.[179]

---

174 See Intel submission of 6 January 2006, EC-ART18-012856, p. A000H977.

175 See http://www.dell.com/content/topics/global.aspx/corp/pressoffice/en/2006/2006_09_12_nyc_002?c=us&l=en&s=corp, downloaded and printed 14 January 2009.

176 E-mail of 29 October 2004 from a [Dell executive] to [Intel executive], copied to a [Dell executive]. F073-B00000051.

177 See http://digitaldaily.allthingsd.com/tag/centrino/?mod=ATD_search, downloaded and printed on 31 March 2009.

178 Dell was for instance considering buying [...]million warrants in AMD, which was estimated to be potentially worth up to USD [...]million. See Dell submission of 6 February 2006, Request Item 1 and 2, F073-L00000361, p. 14. See also [...].

179 See [...]'s email (AMD's external Counsel) to [...] (European Commission, DG Competition) of 27 September 2005; AMD submission of 22 August 2006, p. 3; and RBB Paper, p. 48.

(162) The partners in the alliance viewed the project as a "[...]",[180] with specific tasks for each participant. In the negotiations, [...]and Dell envisaged significant growth in units of AMD x86 CPUs as a result of the collaboration and the desired reduction in those of Intel.[181] In this regard, [...]stated that "[…]".[182] Ultimately, the project did not materialise.

(163) In its Reply to the 26 July 2007 SO, Intel attempted to portray the Commission's description of the [project] project in the 26 July 2007 SO as one of the Intel conducts against which the Commission raised objections. The reply treats the [project] project in a manner similar to the actual Commission objections,[183] even including the development of an "*as efficient competitor test*" for the [project] project inspired by the analysis conducted by the Commission with regard to Intel's conditional rebates.[184]

(164) This representation by Intel is a mischaracterisation of [project] as described in the 26 July 2007 SO. Project […] was not considered unlawful by the Commission in its preliminary conclusions. The […] project is described in the 26 July 2007 SO, and in the present Decision, as a background element in order to show that the industry gave concrete consideration to AMD. The Commission takes no position - and did not take a preliminary position in a Statement of Objections of 26 July 2007 - on the lawfulness of Intel's conduct with regard to the [project] partnership.

2. Intel's arrangements with its trading partners

2.1 Introduction

(165) This section will describe the various arrangements that are the subject matter of this Decision. These are arrangements between Intel and a number of OEMs (Dell, HP, NEC, Acer and Lenovo) and between Intel and one European PC retailer, MSH.

---

180 [...].

181 [...].

182 "[...].

183 In the Introduction and Executive Summary, Intel has a specific section on [project] in the subsection "Specific SO allegations", which is parallel to the sections on Dell, Dell Bid pot, HP, Acer, NEC and Toshiba (Intel Reply to the 26 July 2007 SO, p. 10). In Part II of the reply, entitled "Factual and economic analysis of the SO", there is a specific subsection (section A) for [project], which is parallel to the sections on Dell, HP, IBM, Acer, NEC, Toshiba, Effects on AMD and the microprocessor market, Business justification and efficiencies, Dominance (Intel Reply to the 26 July 2007 SO, p. 40).

184 Intel Reply to the 26 July 2007 SO, paragraphs 124 to 129, and Report of Professor [...], p. 34.

(166) Before describing these arrangements in detail, a number of issues need to be highlighted which apply generally to the arrangements in question, and to the assessment of the evidence relating to the arrangements. The remainder of this sub-section therefore addresses these general points by referring to certain evidence relating to various OEMs which is also part of the factual findings for each OEM (which are then described in the subsequent sub-sections).

(167) It should first be noted that upon examination of the arrangements in question, a pattern in Intel's trading methods is revealed. In this respect, a large amount of deals between Intel and its customers, including deals worth [...], are either made on the basis of handshake agreements, or at least consist of a number of separate documents and/or contain significant provisions which are unwritten.

(168) For instance, Dell described its agreement with Intel in the following way: "*there is no single, formal document setting out the contents of the revised MCP terms but they are outlined in general terms on various e-mails.*"[185] Moreover, Dell specified that that "*there is no written agreement between Intel and Dell concerning the MCP discount, rather, the discount is the subject of constant oral negotiations and agreement*".[186] The Intel rebates to Dell ranged from USD [...]in Dell's fiscal year 2004[187] to USD [...]in Dell's fiscal year 2006.[188]

(169) In the same vein, Intel's HPA arrangements with HP contained several unwritten elements which are described in detail in section 2.4.4. HP submitted that these "*unwritten conditions (...) were stated to be part of the HPA1 agreement by* [Intel Executive], [Intel Executive] *and* [Intel Senior Executive] *in meetings with HP during the negotiations.*"[189]

(170) It also emerges from the different arrangements analysed by the Commission that Intel has sought to keep certain elements of its arrangements secret. For example, in an email from [Intel Senior Executive] to [...], [Intel Senior Executive] began by stating: "[...], [...]"[190]

(172) The written documentation of Intel's arrangements with MSH also illustrates Intel's attempts to preserve the secrecy of the true nature of its arrangements. In this

---

185 Dell submission of 2 June 2006, p. 1.

186 Dell submission of 19 December 2005, p. 20.

187 Dell's fiscal year 2004 corresponds to calendar year 2003, with a one month shift.

188 See section VI.2.3.3.6.

189 HP submission of 23 December 2005, answer to question 2.6, p. 4.

190 E-mail of 18 June 2006 from [Intel Senior Executive] to [Lenovo Senior Executive]entitled *"RE: status check..."*, Annex 2 of Intel submission of 2 June 2008, document 2.

instance, the written contract includes language which states that the *"Agreement is non-exclusive; each Party is free to carry out similar activities with third parties"*.[191] However, as specified in section 2.8.4.3, the true nature of the arrangement is diametrically opposed to this. As MSH submitted: "[i]*t was clear to MSH that despite the non-exclusivity clause the exclusive nature of the relationship remained, for Intel, an essential element of the relationship between Intel and MSH. In fact,* [MSH Executive] *recalls that Intel representatives made it clear to him that the changes in the wording of the agreement had been requested by Intel's legal department, but that in reality the relationship was to continue as before, including the requirement that MSH sell essentially only Intel-based computers."*[192]

(173) Finally, evidence indicates that Intel was well aware of the use of "sensitive" language in its documents. For example, in an e-mail from an executive of Intel France in response to an e-mail from an executive of Intel Germany in which there had been reference to attempts by Intel to *"successfully inhibit further Opteron implementation in our key accounts"*,[193] it is stated: *"please be very careful using expressions like 'inhibit further Opteron implementation' which could be misinterpreted as anti-competitive – I think you mean 'win with IA vs Opteron' – If you see others use similar expressions please remind them of the current investigations by EU - FTC* [Federal Trade Commission] */ dawn raids etc."*[194] It should be noted that this communication was written before any inspections by the Commission had taken place.

(174) The remainder of this section is structured as follows: section 2.2 provides a brief summary of Intel's description of the overall framework of the price and supply arrangements it generally applies with regard to OEMs, including the various rebates that it provides. Section 2.2 also describes policies that Intel applies to certain business partners, in particular to large PC retailers. Against the background of this framework, sections 2.3 to 2.8 then examine a number of specific rebates and arrangements with regard to certain individual OEMs, which are the subject of this Decision, as well as with a European PC retailer.

---

191 See [MSH submission].

192 [MSH submission].

193 E-mail of 30 April 2004 from [Intel Executive] to [Intel Executive]entitled *"Deliverables urgently needed to fight against Opteron"*, Annex 2 of Intel submission of 2 June 2008, document 50.

194 E-mail of 30 April 2004 from [Intel Executive]to [Intel Executive]entitled *"RE:Deliverables urgently needed to fight against Opteron"*, Annex 2 of Intel submission of 2 June 2008, document 50.

2.2 *Description of Intel's pricing arrangements*

(175) The most comprehensive description of Intel's general pricing and discount policy with regard to OEMs is contained in its submission of 2 March 2005. Here, Intel specifies that it "*has a Customer Authorized Price ("CAP") at which it sells the vast majority of its microprocessors*".[195] Intel then specifies that "*in part because of the existence of competitive offers, OEMs routinely attempt to negotiate discounts from the CAP levels.*"[196]

(176) Intel outlines that it offers pricing support to OEMs relative to the CAP in broadly "*two distinct categories, depending on whether the support directly affects microprocessor price or relates to some type of marketing activity. ECAPs, rebates, and LCAPs ... are provided as discounts to the microprocessor price. For accounting purposes, Intel tracks these as "contra revenue," meaning a reduction in the net cash received for the sale of products. Intel also has programs that focus on advertising and marketing, such as the Intel Inside program. These programs are treated for accounting purposes as a marketing expense.*"[197]

(177) Under the heading of contra revenue discounts, Intel specifies four main types of rebate. These are: (i) ECAP (Exception to Customer Authorized Price) - this is a discount relative to the CAP price, and Intel specifies that "*ECAPs provide the majority of financial support to most of* [...]"[198]; (ii) LCAP - "*in addition to ECAPs, Intel provides* [...]*rebates ("LCAPs")*[199]; (iii) [...]rebates - following the introduction in [...]of [...], "*Intel developed rebate programs relating to* [this] *technology ... to accelerate the adoption and ramp of the new technology.*"[200]; and (iv) [...]Programs - these rebates applied to "*the purchase of* [...]", but have been phased out since 2004.[201]

(178) Under the heading of marketing program discounts, Intel specifies three main types of rebate. These are: (i) Marketing Contribution Agreements, under which "*OEMs and retailers are given market development funds ("MDF") for use in advertising and promoting Intel microprocessor-based computers.*"[202]; (ii) the Intel Inside

---

195 Intel submission of 2 March 2005, p. 3.

196 Intel submission of 2 March 2005, p. 3.

197 Intel submission of 2 March 2005, p. 7.

198 Intel submission of 2 March 2005, p. 7.

199 Intel submission of 2 March 2005, p. 7.

200 Intel submission of 2 March 2005, p. 7.

201 Intel submission of 2 March 2005, p. 8.

202 Intel submission of 2 March 2005, p. 8.

Program - according to Intel, this "*is a trademark licensing and cooperative marketing program that reimburses OEMs for expenditures in promoting the Intel brand.*"[203]; and (iii) Distributor Programs - Intel specifies that it "*offers customers of its distributors membership in several programs ... Among the benefits are advanced warranty support, technical information, and training.*"[204]

(179) Intel also has arrangements with PC retailers even though PC retailers are not direct customers of Intel. These companies can benefit from both indirect marketing contributions for their advertising campaigns under the Intel-Inside Program and direct payments under individually negotiated funding agreements.

(180) The Intel-Inside Program funds are attributed to the retailers via the different OEMs covered by their respective advertising campaigns, which pass on to them at least a part of the relevant funds they receive from Intel for this purpose.

(181) On top of the Intel-Inside Program funds, some large PC retailers also receive direct contributions from Intel under [...]negotiated funding agreements, also known as "contribution agreements". These contributions are [...]. The total amount of the [...]funding is often subject to a [...]. This Decision assesses the arrangements between Intel and a major European retailer: MSH.

2.3 Dell

2.3.1. Introduction

(182) Dell, although recently overtaken by HP, has in recent years been the most important PC and server vendor in terms of overall computer sales. Its market shares in terms of overall sales of computers have varied on a quarterly basis between [...]% and [...]% during the period 2002-2005.[205] Intel specifies that Dell is its largest x86 CPU purchaser.[206] Until 2006, Dell exclusively produced Intel-based computers.[207] In May 2006, Dell announced that it would produce AMD-based computers for the first time (for a relatively limited part of its product range) and shipped its first AMD-based PCs in September 2006 and its first AMD-based servers in October 2006.[208]

---

203 Intel submission of 2 March 2005, p. 9.

204 Intel submission of 2 March 2005, p. 9.

205 See Gartner OEM data (Q1 06 update).

206 Intel submission of 16 February 2005 (3rd submission), answer to question 6.

207 See Gartner OEM data (Q1 06 update).

208 Intel Reply to the 26 July 2007 SO, Annex 100.

2.3.2. Dell's consideration of AMD

(183) During the first half of 2002, AMD tried to convince Dell to adopt its new Hammer technology in its PC and server products. A Dell executive stated: *"We were looking at Hammer as a faster part that we had access to. And in the workstation market, it's driven by performance. And in this particular case, we believed that if AMD would execute, we potentially would have a performance advantage that our customers would be interested in. (...) We wanted to take advantage of the performance of the Hammer architecture of which one of the attributes of that* [sic] *was 64-bit addressability to allow workstation class applications to perform faster."*[209]

(184) Indeed, Dell was concerned that not having an AMD product in its portfolio would hamper it against its main OEM competitors. Dell refers to "[Competitor's product] *being a threat to Dell (because of its technical superiority compared to Dell's equivalent product offering from Intel).*"[210] Dell also states: "*When, in February 2004, following* [Dell competitor]*'s lead,* [Dell competitor] *announced its decision to begin shipping products with AMD microprocessors, Dell believed that the superior technical performance and attractive price of AMD's Opteron microprocessor would give the OEMs that had adopted AMD a significant competitive advantage over* [...]."[211]

(185) Dell submitted to the Commission that "*throughout this period* [2003-2005] *Dell continuously evaluated technology options, including the possibility of introducing products utilizing processors from AMD.*"[212]

(186) In view of the above, the Commission concludes that Dell had been considering the possibility to introduce AMD-based computers in its product line at least since December 2002 and until the actual shipping of Dell's first AMD-based products in September 2006.

2.3.3. Intel's Rebates to Dell

(187) Intel and Dell have both provided the Commission with data on the rebates granted by Intel to Dell. The information submitted by Intel covers the period between the fourth quarter of Dell's financial year 2003 (Q4FY03, which corresponds to November 2002 – January 2003) and the second quarter of Dell's financial year

---

209 Deposition of [Dell Executive] before the US Federal Trade Commission (FTC) on 26 March 2003, p. 59. Dell submission of 12 July 2006, annex 3.

210 Dell submission of 1 December 2005, p. 35.

211 Dell submission of 21 June 2006, p. 2.

212 Dell submission of 17 April 2007, p. 1.

2005 (Q2FY05, which corresponds to May – July 2004).[213] The information submitted by Dell covers the second quarter of its financial year 2003 (Q2FY03, which corresponds to May – July 2002) to the fourth quarter of its financial year 2007 (Q4FY07, which corresponds to November 2006 – January 2007).[214]

(188) Intel specifies that it granted to Dell "*various types of discounts on CPUs and chipsets on a meeting competition basis. Intel granted these discounts to Dell through a structured Dell Meèt Comp Program ('Dell MCP'), short-term ECAPs, and CPU LCAPs, and other more limited programs.*"[215]

(189) Dell specifies that the MCP agreements were concluded at the highest executive levels of Intel and Dell: "*Dell's negotiations with Intel, like its negotiations with other key suppliers and partners, occur at a very high level within Dell. Only a few Dell employees, all located at Dell's headquarters in Austin, Texas, are involved directly with Intel in these price negotiations*".[216]

(190) As already mentioned, Dell also makes clear that there is no complete written agreement outlining the terms of the MCP: "*There is no single, formal document setting out the contents of the revised MCP terms but they are outlined in general terms on various emails.*"[217]

(191) Referring to an external auditor's examination of certain Dell accounts, Dell goes on to specify that "*there is no written agreement between Intel and Dell concerning the MCP discount, rather, the discount is the subject of constant oral negotiations and agreement.*"[218]

(192) The terms of the rebates have changed over time, as has the way the rebates were calculated. For instance, certain rebates initially paid as a [...]were transferred to [...]around January 2004, and in the period between the fourth quarter of Dell's financial year 2004 (fourth quarter of 2003) and the second quarter of Dell's financial year 2005 (second quarter of 2004). A description of all the rebate payments made to Dell on a "meet competition basis" is set out in recitals (193 to (216).

(193) The Commission has identified 5 different types of rebates granted to Dell. These are:

---

213 Intel submission of 13 May 2005.

214 Dell submissions of 3 April 2007 and 4 May 2007.

215 Intel submission of 13 May 2005, p. 2.

216 Dell submission of 19 December 2005, p. 2.

217 Dell submission of 21 June 2006, p. 1.

218 Dell submission of 19 December 2005, p. 20.

(1) The [...][219] MCP rebates and [...] and [...]MCP rebates after February 2004 (described in more detail in section 2.3.3.1);

(2) [...] and [...]MCP rebates prior to February 2004 (described in more detail in section 2.3.3.2);[220]

(3) The [...]Rebate (described in more detail in section 2.3.3.3);

(4) Additional MCP rebates (described in more detail in section 2.3.3.4);

(5) [...]Rebates (described in more detail in 2.3.3.5).

(194) It is important to note that Dell and Intel do not use exactly the same wording for different categories of rebates. Dell generally uses the expression "MCP" to cover the largest part of the rebates it receives from Intel,[221] whereas Intel appears to limit the use of the expression "MCP" to categories (1) and (2) in recital (193) ([...]; [...] and [...]), and refers to other rebates, in particular rebates in category (4) as "programs rebates". The Commission uses the Dell categorisation, as Dell has provided the most comprehensive set of information.

2.3.3.1. The [...]MCP rebates. [...] and [...]MCP rebates after February 2004

(195) Intel outlines that "*The Dell MCP is structured as a meet comp discount program for microprocessors and chipsets. The discounts granted by Intel to Dell through this program generally are calculated as* [...] (...)*The Dell MCP has* [...]*components:* [...]*MCP,* [...]*MCP, and* [...] *MCP.*"[222]

(196) Dell's description of the rebate scheme is similar. It states that "*Dell participated in Intel's ECAP programme until late 2001*", but that then, "*Dell negotiated a new discount programme referred to as MCP or 'meet competition program' (it was initially referred to, colloquially, as the* [...]*). Under MCP, Dell receives a discount* [...]."[223]

---

219 The word "[...]" is also sometimes used.

220 Because of the close link between [...]MCP and [...] and [...]MCP after February 2004, [...] and [...]MCP after this date are described in section VI.2.3.3.1.

221 Dell employees also used the colloquial expression [...] at times to cover part or all of the rebates.

222 Intel submission of 28 December 2005, p. 20.

223 Dell submission of 1December 2005, p. 4.

(197) As regards the [...]MCP, Intel specifies that in "*August-October 2002, the MCP discount was calculated as* [...]*of Intel's* [...]. *In a more recent quarter, May-July 2004, the discount was* [...]."[224]

(198) In May 2004, two structured rebate programs, the [...] MCP program and the [...]MCP program, were added to Dell's MCP.

(199) Intel specifies that the [...] MCP program was designed "*to enable Dell to respond to unexpected marketplace conditions with enhanced flexibility.*"[225]

(200) As regards [...]MCP, Intel states that this "*is a component of the Dell MCP program that provides discounts related to specific sales and marketing goals,* [...], *as well as other funding for sales and marketing to meet competition.*"[226] Intel goes on to state that "*The program was initially named the* [...]*MCP Program and began operating during the fourth quarter of Dell's fiscal year 2004, which ran from November 2003 through January 2004. Beginning with the second quarter of Dell's fiscal year 2005, which ran from May through July 2004, the program became known as the* [...]*MCP Program.*"[227] Therefore, the first full quarter during which the [...]MCP program was applied started in February 2004, although there was a transitory period of one quarter during which the rebates were not genuinely [...] (see recital (204)).

(201) Dell's description of the [...]MCP is similar: "*Dell negotiated with Intel that a small portion of the MCP discount could vary based on Dell's success in meeting specific criteria negotiated on a quarterly basis. This portion of the MCP discount was known as* [...]*MCP ('*[...]*'), and related to* [...] *of Dell's total spend* (...) *It could potentially fall to* [...] *or rise to* [...] *depending on Dell's performance against the negotiated criteria.*"[228]

(202) Therefore, in terms of the summary of MCP rebate granted within this category, Intel specifies that "*for the second quarter of Dell's fiscal 2005 (May-July 2004), the* [...]*MCP discount to Dell was* [...] *(up from* [...] *for the August-October 2002 period). For the same May-July 2004 period, the* [...] *MCP and* [...] *MCP discounts were* [...] *and* [...], *respectively,* [...], *for a total quarterly MCP discount of* [...]. *For subsequent quarters during the August 2004 through the October 2005 time period, the* [...]*MCP percentage has remained at* [...] *and the* [...] *MCP*

---

224 Intel submission of 13 May 2005, p. 4.

225 Intel submission of 28 December 2005, p. 20.

226 Intel submission of 28 December 2005, p. 20.

227 Intel submission of 28 December 2005, p. 22.

228 Dell submission of 1 December 2005, p. 5.

percentage has remained at [...]. *The targeted budget for the* [...]*MCP portion of the Dell MCP during this period was* [...], *although the actual percentage paid by Intel for* [...]*MCP in any given quarter varies based on Dell's performance against the particular sales and marketing goals that were negotiated for that quarter. Thus, the* [...]*MCP percentage could range from* [...]*to* [...] *in a particular quarter depending on Dell's level of success in meeting or exceeding its sales and marketing goals.*"[229]

(203) As mentioned in recital (197), Intel also provided a summary of the percentage of the [...]MCP rebate it granted to Dell until Dell's Q2FY05 (ending July 2004).[230] It shows that the percentage of [...]MCP rebate granted by Intel to Dell represented [...]from August 2002 to October 2003. It then rose to [...]. That rate was applied from November 2003 to April 2004. It then rose to [...]. That rate was applied until the end of the period covered by Intel's summary (July 2004).

(204) Dell's account of the [...], [...] and [...]MCP rebate rates granted is similar. Dell specifies that "*The 'new MCP' referred to in the e-mail (...) refers to revised MCP Terms that Dell negotiated with Intel between February 2004 and April 2004.* (...) *The most important component of the revised terms was an increase in the* [...]*MCP rate from* [...] *to* [...]. *In addition, in order to obtain the opportunity to achieve an even greater level of rebate, Dell negotiated with Intel a* [...]*component of MCP. The* [...]*MCP component was targeted as* [...], *but could potentially fall to* [...] *or rise to* [...] *depending on Dell's performance against criteria negotiated each quarter. Although the* [...]*component of the MCP program was introduced in April 2004 the precise metrics by which the* [...]*component was to be calculated had still to be agreed and therefore it could not be immediately introduced. For this practical reason, it was agreed that the percentage for* [...]*MCP for Q1 FY05 should be a flat* [...] *of spend. The* [...]*metrics and program became fully operational in Q2 FY05.*"[231]

(205) Dell therefore makes no mention of the [...] MCP rebate which Intel has specified. Nevertheless, the [...] rebate figure which Dell mentions for the period from May 2004 (that is, not including the [...]MCP rebate which both Intel and Dell specify) appears to correspond to the [...] [...]MCP rebate which Intel specifies together with the [...]% [...] MCP rebate.

(206) Intel goes on to state that "*for the fourth quarter of Dell's fiscal year 2006 (November 2005-January 2006), Dell has negotiated an additional* [...] *discount to*

---

229 Intel submission of 28 December 2005, p. 23.

230 Intel submission of 13 May 2005. Table 13-12.2.

231 Dell submission of 21 June 2006, p. 1.

meet enterprise server competition, bringing its total discount for the quarter to [...] *(assuming the budgeted* [...] *for* [...]*MCP is paid).*"[232]

(207) Therefore, in summary as regards the MCP arrangements for this category, between August 2002 and October 2003, Intel granted Dell a [...]MCP rebate of [...]. Between November 2003 and April 2004, that rate rose to [...]. In May 2004, the [...]MCP rate rose from [...] to [...] depending on whether the [...] [...] MCP rate is specified or not. The [...] [...]MCP component was also added in February 2004, although it became genuinely [...]only in May 2004. In November 2005, the [...]MCP rate rose from [...] to [...], whilst the [...]MCP component remained at [...].[233]

2.3.3.2. [...] and [...]MCP rebates prior to February 2004

(208) Intel submits that until January 2004, the [...]and [...] programs mentioned above [...]existed as "*ad hoc short-term programs*" and that the [...]MCP program was named [...]MCP.[234] According to Table 13-2.2 annexed to Intel's 13 May 2005 submission, [...]MCP amounted to [...]in the fourth quarter of Dell financial year 2004 (November 2003 – January 2004). Moreover, the table lists "[...] *MCP*" rebates that [...]. They amount to [...]in the third quarter of Dell financial year 2004 (August - October 2003) and to [...]in the fourth quarter of Dell financial year 2004 (November 2003 – January 2004).

2.3.3.3. The [...]Rebate

(209) Both Intel and Dell refer to the introduction of a so-called [...]as of the fourth quarter of 2004. Intel states that "*Dell has on occasion negotiated additional meet comp discounts related to* [...]. *For example, in December 2004 Dell negotiated an incremental discount of* [...] *to respond to increased competition in* [...]*that was paid to Dell during 2005.*"[235] In the opinion of a Dell executive, the name "[...]" derives from the fact that "*Intel may have viewed these additional discounts as a short-term adjustment to reflect technical performance gaps that Intel intended and hoped to close through future innovations, whereas Dell hoped they would be incorporated into the* [...]*MCP programme through future negotiations.*"[236]

(210) Dell further states that "[...] *After negotiations, Intel agreed to a further* [...]*price discount, starting with* [...]*in Q4 FY 2005 (November 2004-January 2005), and*

---

232 Intel submission of 28 December 2005, p. 24.

233 For a summary of the timeline, see also Dell submission of 2 June 2006, p. 4.

234 Intel submission of 13 May 2005, p. 6.

235 Intel submission of 28 December 2005, pp. 23-24.

236 Dell submission of 19 December 2005, p. 34.

then [...]*per quarter for each quarter in FY 2006 (February 2005-January 2006).*"[237]

2.3.3.4. Additional MCP rebates

(211) Intel further submits that "*Dell also obtained discounts to respond to short-term or* [...] *challenges or in connection with broad programs, such as the discount program for* [...]".[238]

(212) One example of such a short term/[...] MCP program listed by Intel is the "*P4M Sell-up program*".[239] Other programs that are listed in Table 13-12.2 annexed to Intel's 13 May 2005 submission are called: IGC Rebate accommodation Kenai 32; Competitive response D315 and DT 2.4 – 2.6 Sellup program.

(213) With regard to Intel's [...]product, this is a combination of a processor, chipset and a wireless card.[240] Dell also received [...]MCP rebates named [...]and [...]for the promotion of either the combined product [...] or for the wireless device incorporated in the product [...]. [...].[241]

(214) Finally, Table 13-12.2 annexed to Intel's May 13 2005 submission lists additional ECAP and LCAP rebates targeted at various segments which are not further explained by Intel, and appear to also fall under the category of short term and *ad hoc* programmes explained on page 6 of the 13 May 2005 submission.

2.3.3.5. [...]Rebates

(215) Intel also granted Dell so-called "[...]" in a [...].[242] Such [...]sales are not taken into account in this Decision.

2.3.3.6. Summary of the rebates

(216) For the period ranging from November 2002 to January 2006 (Dell's Q4FY03 to Q4FY06) the following tables summarise:

– the total of [...], [...]and [...] MCP rebates expressed as a percentage of Dell's purchases from Intel;

---

237 Dell submission of 19 December 2005, p. 34.

238 Intel submission of 13 May 2005, p. 6.

239 Intel submission of 13 May 2005, p. 6.

240 Dell submission of 9 March 2006, Item 7.

241 Dell submission of 9 March 2006, Item 7.

242 Dell submission of 24 February 2006, Request Item 5, p. 2.

- the total amount of all MCP rebates expressed in USD;
- the total amount of all MCP rebates expressed as a percentage of Dell's purchases from Intel, where the data available to the Commission allows the computation of this percentage.

The tables use Intel data where available, and Dell data where no data from Intel are available.

Table 5 - Summary of Intel's rebates to Dell– Q4FY03 to Q4FY05

Dell Financial Year[243]	Q4 FY03	Q1 FY04	Q2 FY04	Q3 FY04	Q4 FY04	Q1 FY05	Q2 FY05	Q3 FY05	Q4 FY05
[...], […] and [...]MCP (%)[244]	[…]	[…]	[…]	[…]	[…]	[…]	[…]	[…]	[…]
Total MCP rebates (USD million)[245]	[…]	[…]	[…]	[…]	[…]	[…]	[…]	[…] […]	[…] […]
Total MCP rebates (%)	[…]	[…]	[…]	[…]	[…]	[…]	[…]	[…]	[…]

Sources:
Intel[246] and Dell[247]

Table 6 - Summary of Intel's rebates to Dell – Fiscal year 2006

Dell Financial Year	Q1 FY06	Q2 FY06	Q3 FY06	Q4 FY06
[...], […] and [...]MCP (%)	[…]	[…]	[…]	[…]
Total MCP rebates (USD million)[248]	[…] […]	[…] […]	[…] […]	[…] […]
All MCP rebates (%)	[…]	[…]	[…]	[…]

Sources: same as table above

---

243 Dell's financial year corresponds to the previous calendar year based on the following ratio: Q1 = February – April; Q2 = May – July; Q3 = August – October; Q4 = November – January.

244 […] and [...]only as of Q4 FY 04.

245 Until Q2 FY 05, the figures are based on Tab 13-12.2 from the Intel submission of 13 May 2005. After this quarter, the figures are based on Dell's submission of 3 April 2007 which does not exclude the […] rebates. Thus, the Dell figures are slightly overstated. Therefore, the figure corresponding to the MCP elements is quoted in brackets.

246 Intel submission of 13 May 2005, Table 13-12.2.

247 Dell submission of 3 April 2007.

248 Until Q2 FY 05, the figures are based on Tab 13-12.2 from the Intel submission of 13 May 2005. After this quarter, the figures are based on Dell's submission of 3 April 2007 which does not exclude the […] rebates. Thus, the Dell figures are slightly overstated. Therefore, the figure corresponding to the MCP elements is quoted in brackets.

2.3.4. Conditionality of Intel's MCP rebates to Dell

(217) Over the period from December 2002 to December 2005, Intel's MCP rebate, or at least a large part of it, was granted in return for Dell's exclusivity to Intel. Thi section outlines the evidence which demonstrates this conditionality.

(218) The evidence gathered during the administrative procedure contains proof that one condition of the payments described in section 2.3.3 was that Dell continued to source exclusively from Intel. In section 2.3.4.1, evidence gathered from Dell is presented to this effect. In section 2.3.4.2, Intel documents supporting the same conclusion are described. Section 2.3.4.3 discusses Intel's arguments which attempt to rebut the evidence described in sections 2.3.4.1 and 2.3.4.2.

2.3.4.1. Evidence from Dell

(219) There is an extensive range of contemporaneous documentary evidence from Dell showing the conditionality of Intel's MCP rebates. During the period from December 2002 to December 2005, Dell regularly analysed the impact of breaking exclusivity on the Intel rebates. Dell always based its scenarios on an MCP rebate that was at least in part conditional upon exclusivity. Dell's assumptions to this effect were confirmed by the messages conveyed by Intel to Dell, including at the highest levels of the companies.

(220) This evidence indicates that during the period in question, Dell considered AMD to be a competitive product to that of Intel, and one which it should consider sourcing. Therefore, Dell regularly analysed the pros and cons of shifting a part of its x86 CPU requirements away from Intel to AMD. Indeed, Dell confirms that: "*throughout this period* [2003-2005] *Dell continuously evaluated technology options, including the possibility of introducing products utilizing processors from AMD.*"[249]

(221) Within that context, starting from December 2002, a large part of Dell's analysis involved consideration of the effect on the Intel MCP rebate if Dell were to switch a part of its supplies to AMD. As will be described further below, there was uncertainty on the part of Dell both as to what part of the rebates (large parts or even all) would be lost if it switched a part of its supplies to AMD, and as to whether these rebates would be granted instead to competing OEMs instead in such a scenario. In any case, Dell invariably concluded that that the MCP rebate, or a large part of it, would be lost if this occurred. Examples of such analysis are as follows.

---

249 Dell submission of 17 April 2007, p. 1.

(222) In an internal Dell presentation of 23 December 2002, Dell notes that the "*Intel competitive response*" of an AMD engagement would mean that "[...] ["[...]" – [...] was a colloquial name for MCP[250]] *$ drop to zero, other than limited* [...] *programs (<$[...]) – Intel will give* [...] *$ to others to ensure no TAM* [Total Available Market] *shift to Dell/AMD*".[251]

(223) In an internal Dell presentation of 26 February 2003, Dell noted that for any scenario of AMD engagement by it, "*Retaliatory* [...]*could be severe and prolonged with impact to all LOBs* [Lines of Business]."[252] In the same presentation, Dell calculated that it would lose [...]in [...] funds ("[...] *in Ecap (COGS)* [Cost of Goods Sold] *funding and another* [...] *in Marketing (OPEX)* [Operational Expenditures] *funding*") per quarter[253] in its financial year 2004 if it "*moved a portion of* [Dell's] *processor spend to AMD*".[254]

(224) In an internal Dell presentation of 17 March 2003, Dell stated: "*Anticipated Intel response wipes out all potential* [...]*upside from going with AMD.*" [255] Another slide in the same presentation which contains an "*AMD analysis*" is entitled "*Intel funding at risk*".[256] Slide 14 of the same presentation, under the heading "*Key Business Model Assumptions*", asks the question: "[...] *Funds – How much of the Intel funding would be pulled if we moved a portion of our processor spend to AMD*?"[257]

(225) In a Dell internal e-mail of 21 July 2003, it is stated that the "*Bottom line is that I don't see how we make AMD a positive for Dell. The end game is inevitable, the cost to support AMD is high,* [...], *and the net loss of MCP will far outweigh any gain we get by doing a limited toe-dip with a couple of server platforms.*"[258]

---

250 See recital (196).

251 Dell presentation of 23 December 2002 entitled *'AMD Analysis'* p. 4. Dell submission of 12 July 2006, Annex 3 ([Dell Executive] deposition before the FTC), exhibit 18.

252 Dell presentation of 26 February 2003 entitled *'AMD Update – Dimension* LOB', p. 8. Dell submission of 6 February 2006, response to request items 1 and 2, F073-00008333.

253 That [...]are meant to be the loss per quarter results from p. 11 of the presentation where the total annual ECAP loss is quantified as [...].

254 Dell presentation of 26 February 2003 entitled *'AMD Update – Dimension* LOB', p. 8. Dell submission of 6 February 2006, response to request items 1 and 2, F073-0008333.

255 Dell presentation of 17 March 2003 entitled *'AMD Update'*, p. 2. Dell submission of 6 February 2006, response to request items 1 and 2, F073-L00088354.

256 Idem, p. 5.

257 Idem, p. 14.

258 Email from [Dell Executive] to [Dell Executive] of 21 July 2003 entitled *'ANALYSIS'*. Dell submission of 6 February 2006, response to request items 1 and 2, F073-L0009942.

(226) In an internal Dell presentation of 17 February 2004 entitled "[project] *Status Review*", Dell considers two scenarios, one which is entitled "*AMD Option*" and another which is entitled "*Enhanced MCP Option*".[259] For the former scenario, Dell assumed that it would lose [...]of Intel funding per year (entitled "*Intel Response*") compared with the actual level of MCP funding at the time. For the latter scenario, Dell assumed that it would receive [...]extra funding from Intel (entitled "*Upside*") compared with the actual level of MCP funding at the time.

(227) This is described in greater detail later in the same presentation. In a slide entitled "*Enhanced MCP*", Dell states: "*Estimate an additional* [...] *of MCP per year under this approach; Unlikely to reach higher numbers due to Intel Legal concerns*".[260]

(228) Again, later in the same presentation, in a slide entitled "*Recommendation/Decision Timeline*", it is stated "*RECOMMENDATION: Continue with AMD product development work* (...) *Final Go / No Go on* [date]".[261]

(229) In an internal Dell e-mail of 26 February 2004, it is stated: "*Boss, here's an outline of the framework we discussed with Intel.* (...) *Intel is ready to send* [Intel senior executive]/[Intel executive] /[Intel executive] *to meet with* [Dell Senior Executive]/[Dell Senior Executive]/[Dell Executive] . *(...) Background:* *[Intel senior executive]/[Intel senior executive] *are prepared for* [all-out war] *if Dell joins the AMD exodus. We get ZERO MCP for at least one quarter while Intel 'investigates the details' (...) We'll also have to bite and scratch to even hold 50%, including a commitment to NOT ship in Corporate. If we go in Opti, they cut it to <20% and use the added MCP to compete against us.*"[262]

(230) Later in the same e-mail, under the heading "*MCP RESTRUCTING* [sic]", it is stated that "*the sum total of these* [elements]*will be* ~[...] *higher than current MCP - Intel was pretty adamant that they won't go any higher than this, and I believe them*".[263]

(231) In an internal Dell e-mail of 27 February 2004, it is stated that: "*It looks 100% certain that Intel will take MCP to ZERO for at least one quarter while they 'review all of the numbers and implications.' (...) Appears likely that Intel would*

---

259 Dell presentation of 17 February 2004 entitled '[project] *Status Review*', p. 3. Dell submission of 6 February 2006, response to request items 1 and 2, F073-L00000318.

260 Idem, p. 7.

261 Idem, p. 10.

262 Email from [Dell Executive] to [Dell Executive] of 26 February 2004 entitled *'OUTLINE'*, p. 1. Dell submission of 6 February 2006, response to request items 1 and 2, F073-L00009321.

263 Idem, p. 4.

take MCP to <25% of current levels UNLESS we agree up front not to ship into [Product line]. *If we do that, we're in 'détente' mode and can keep MPC* [sic] *at 50%. However, we don't meet* [AMD Senior Executive]*'s T&Cs* [Terms and Conditions]. *So, I would plan on MCP at <20% levels if we execute AMD across* [Product line]*and* [Product line]*as AMD wants.*"[264]

(232) In an internal Dell e-mail of 5 March 2004, it is stated that "*You can see that based on our current AMD volume assumptions, AMD does not provide a significantly lower blended ASP* [Average Selling Price] *once you back out expected lost MCP$ from Intel.*"[265] Later in the same e-mail, when analysing what would occur if Dell chose to ship AMD-based computers in the consumer segment, the author of the email states that "*Dell will see minimal margin upside once MCP losses are factored in*".[266]

(233) Dell submitted to the Commission that "*during the 2003-2005 time-frame*", the "*MCP arrangement was not explicitly conditioned on exclusivity or minimum volume commitments. At the same time, it was negotiated against the historical backdrop of Dell products being based solely on Intel processors.*"[267] Dell has further specified that it "*believed that, as Intel's largest customer, it was able to obtain a higher level of discounts than its competitors (although this could not be objectively verified).*"[268]

(234) Dell therefore confirms that in its consideration of whether to shift a part of its supplies to AMD, "*Dell assumed that shifting some purchases to AMD would result in a reduction of MCP. But Dell did not know precisely how much MCP would decline, in what manner and over what time period. Dell understood that Intel would not welcome such a decision, as it would be viewed as a significant shift in the historical relationship between the companies. As indicated in the documents, the Dell team sought to forecast this negative impact across a range of potential scenarios, including some which predicted a substantial reduction in MCP, and did not rule out the possibility that such reduction might be disproportionate to the reduction in the volume of Dell's purchases from Intel.*"[269] Dell goes on to state that "*there was a general consensus* [within Dell] *that such a*

---

264 Email from [Dell Executive] to [Dell Executive] of 27 February 2004 entitled *'OUTLINE'*, p. 1. Dell submission of 19 May 2006, F073-00090700.

265 Email from [Dell Executive] to [Dell Executive] and [Dell Executive] of 5 March 2004 entitled *'INFO FOR INTEL EXEC SYNCH'*, Dell submission of 19 May 2006, F073-L0009401.

266 Idem.

267 Dell submission of 17 April 2007, p. 1.

268 Dell submission of 17 April 2007, p. 1.

269 Dell submission of 17 April 2007, p. 2.

change [switching to a dual-source strategy] *would result in a reduction in MCP, which would have a negative financial impact on Dell, and that this would need to be taken into account in evaluating the benefits of such a fundamental change in strategy.*"[270]

(235) It is also worth noting that Dell believed that any loss of its rebates from Intel as a result of it no longer remaining Intel-exclusive would also result in an accompanying increase in rebates from Intel to Dell's OEM competitors, such as [competitor]. This is illustrated in an e-mail of 26 February 2004, where it is stated that: "*They* [Intel] *believe they have* [competitor]*in the bag to move to 100% Intel.* (...) *Any Dell AMD play would result in* [competitor]*getting a few hundred million of incremented MCP to compete against Dell/AMD (and Dell/Celeron.)* "[271]

(236) The same observation is reproduced in Dell's "[project] *Status Review*" presentation of 17 February 2004 (see recitals (226) - (228)). On page 5, under the heading "*Potential Impact*", several items are mentioned, including that Intel "*Could 'redirect' Dell support $ to other OEMs and target geography's* [sic]".[272]

(237) On page 6 of the same presentation, which is entitled "*Potential Intel Responses*", Dell makes a number of predictions about Intel's likely reaction if Dell were to switch part of its supplies to AMD. In the near-term (less than 6 months), Dell believed that Intel would provide "*Incremental ECAP for* [several competitors]", "*Focused MCP effort to drive* [competitor] *to Intel-only partner (*[product line], *etc.)*" and "*Focused MCP effort to drive* [competitor]*to Intel-only Enterprise position, other than* [product line] ".[273]

2.3.4.2. Evidence from Intel

(238) A number of documents stemming from Intel, including from executives at the highest level, further demonstrate the conditionality of Intel's MCP rebates to Dell. This evidence also confirms that Dell was justified in its fear that Intel would move some of the rebates to its competitors if it switched to sourcing part of its supplies from AMD.

(239) In a presentation of 10 January 2003 on Dell rebates, [Intel Executive] outlined a list of objectives to be achieved by Intel in a high-level executive meeting with Dell. This includes the following objective: "*Get* [Dell Senior Executive]*/OOC*

---

270 Dell submission of 17 April 2007, p. 2.

271 Email from [Dell Executive] to [Dell Executive] of 26 February 2004 entitled *'OUTLINE'*, p. 1. F073-L00009321.

272 Dell presentation of 17 February 2004 entitled '[project] *Status Review'*, p. 5. F073-L00000318.

273 Idem, p. 6.

[abbreviation used by Dell meaning Office Of the Chair and specifying a certain group of Dell executives, usually [Dell Senior Executive]and [Dell Senior Executive]] *clearly understand out meet-comp process and how it applies to DELL- I.e. if they have AMD in their arsenal they'll have less meet comp exposure- hence less meet comp dollars avail to them—even the possibility that meet-comp dollars that we're applied* [sic] *to DELL go somewhere else..."*[274] This objective was reiterated in a subsequent presentation of 5 February 2003 that served as a briefing for a Dell executive dinner: "*Some how, with finesse, we need* [Dell Senior Executive]*to understand that if Dell adds AMD to their product line they no longer have a meet-comp exposure – We have a meet comp exposure so we must prioritize opportunities on a case by case situation."*[275]

(240) In an e-mail dated 17 February 2006, [Intel Senior Executive] sent an e-mail commented on a news report which stated that Dell had announced that it had no plans to begin using chips from AMD. [Intel Executive] had reported this announcement to [Intel Senior Executive], writing: "*Finally something positive...."*[276] [Intel Senior Executive] replied: "*the best friend money can buy ...."*[277] This demonstrates the direct link between Dell's policy of Intel exclusivity and Intel payments.

(241) [Intel Senior Executive] also wrote to [...] about the consequence of Dell's subsequently announced decision to introduce AMD-based computers in its portfolio. [Intel Senior Executive] wrote: [...]"[278]

(242) In the same email, [Intel Senior Executive][...]. He wrote: "[...]"[279] The Commission notes that in the period after this e-mail, the period from June 2006 to December 2007, there was indeed a significant increase of Intel rebates to Lenovo, in exchange for Lenovo's agreement to postpone and/or cancel certain AMD products and to achieve Intel exclusivity in certain segments (see section 2.7).

---

274 Presentation by [Intel Executive] of 10 January 2003 entitled '*Dell F1H '04 MCP*'. Intel submission of 2 June 2008, annex 2, document 21, p. 24.

275 Intel presentation of 5 February 2003 entitled '*Briefing for Dell Executive Dinner*',. Intel submission of 2 June 2008, annex 2, document 92, p. 7.

276 Email from [Intel Executive] to [Intel Senior Executive] and [Intel Executive] of 17 February 2006 entitled "*FW: Dell CEO: Co. Has Made No Plans To Use AMD Chips*". Intel submission of 2 June 2002, annex 1, document 14.

277 Email from [Intel Senior Executive] to [Intel Executive] and [Intel Executive] of 17 February 2006 entitled "*RE: Dell CEO: Co. Has Made No Plans To Use AMD Chips*". Intel submission of 2 June 2002, annex 1, document 14.

278 E-mail from [Intel Senior Executive] to [Lenovo Senior Executive] of 18 June 2006, entitled *"Re: status check..."*. Intel submission of 2 June 2008, Annex 2, Document 2.

279 Idem.

2.3.4.3. Intel's arguments

(243) Intel argues that its rebates to Dell were not conditioned on exclusivity.[280] According to Intel, the evidence quoted by the Commission in the 26 July 2007 SO "*does not legitimately support an inference of an exclusivity agreement between Intel and Dell.*"[281]

(244) Intel argues that the Commission has been relying on documents drafted by a Dell executive [...] who did not take proper account of the actual content of the discussions between Intel and Dell.[282] Instead, Intel refers to a declaration drawn up by [Intel Executive] of Intel,[283] and to statements from [Dell Executive], another Dell executive who was at high level meetings,[284] both of which Intel argues would demonstrate that the Intel rebates to Dell were not conditional.

(245) Intel argues that there were two "*schools of thought*" within Dell, with one school believing that Intel would hurt Dell and the other school believing that things would improve. According to Intel therefore, the Commission has not shown that anyone in a decision-making position at Dell would have belonged to the former school of thought.[285]

(246) Furthermore, Intel argues that it did not penalise Dell when it began also sourcing x86 CPUs from AMD in 2006.[286]

(247) Each of these claims is addressed in recitals (248) to (289). In addition, the Commission will also analyse arguments concerning the interpretation of certain evidence stemming from Intel raised by Intel in a submission of 5 February 2009, and arguments made by Intel in a submission of 2 March 2009 on the basis of extracts from depositions of certain Dell executives in the context of the private litigation between Intel and AMD in the US State of Delaware, are examined in recitals (290) to (322).

a) The accuracy of the documents authored by [Dell executive]

---

280 Intel Reply to the 26 July 2007 SO, paragraph 132.

281 Intel Reply to the 26 July 2007 SO, paragraph 137.

282 Intel Reply to the 26 July 2007 SO, paragraph 162.

283 Intel Reply to the 26 July 2007 SO, paragraph 162.

284 Intel Reply to the 26 July 2007 SO, paragraph 163.

285 Intel Reply to the 26 July 2007 SO, paragraph 165.

286 Intel Reply to the 26 July 2007 SO, paragraph 168.

(248) The Commission's file contains two emails in which [Dell executive][287] describes the consequences of Dell switching part of its supply requirements to AMD to his superiors. In these emails, Mr. [Dell executive] states in particular: "[Intel senior executive]/ [Intel senior executive] *are prepared for* [all-out war] *if Dell joins the AMD exodus. We get ZERO MCP for at least one quarter while Intel 'investigates the details'* (...) *We'll also have to bite and scratch to even hold 50%, including a commitment to NOT ship in Corporate. If we go in Opti, they cut it to <20% and use the added MCP to compete against us*";[288] and "*It looks 100% certain that Intel will take MCP to ZERO for at least one quarter while they 'review all of the numbers and implications.' (...) Appears likely that Intel would take MCP to <25% of current levels UNLESS we agree up front not to ship into* [Product line]. *If we do that, we're in 'détente' mode and can keep MPC* [sic] *at 50%. However, we don't meet* [AMD Senior Executive]*'s T&Cs* [Terms and Conditions]. *So, I would plan on MCP at <20% levels if we execute AMD across* [Product line]*and* [Product line]*as AMD wants.*"[289]

(249) According to Intel, the basis for [Dell executive]'s statement is unclear. [Dell executive] would not have participated in discussions between [Intel senior executive] and [Dell senior executive].[290] Intel provided the Commission with a written declaration by [Intel executive]. In this declaration, [Intel executive]declares that he is "*not aware of Intel ever conditioning all or a portion of the MCP or other discounts that Intel provided to Dell on Dell's agreement to purchase microprocessors exclusively from Intel*", and that he is "*also not aware of any threat being made by Intel to significantly reduce Dell's MCP discounts or otherwise cause Dell to suffer repercussions if Dell were to begin purchasing microprocessors from AMD.*"[291] Intel indicates that, unlike [Dell executive], [Intel executive]participated in the meetings between Dell and Intel at the highest level. Intel implies that [Dell executive]'s description is misinformed and that the proper description of the conditionality of the Intel rebates, or lack thereof, is that contained in the declaration of [Intel executive].

---

287 [Dell Executive] describes his role in Intel in these terms: "*I'm in our procurement group and manage the overall relationship with Intél, specifically our microprocessor commodity strategy, and I also coordinate all of the interface with Intel across the engineering and marketing and business groups.*" (Deposition of [Dell executive] before the US Federal Trade Commission (FTC) on 11 February 1999, pp. 5-6. Dell submission of 12 July 2006, annex 1.

288 See recital (229). This email was quoted in paragraph 109 of the 26 July 2007 SO.

289 See recital (231). This email was quoted in paragraph 111 of the 26 July 2007 SO.

290 Intel Reply to the 26 July 2007 SO, paragraph 162.

291 Declaration of [Intel executive]. Intel Reply to the 26 July 2007 SO. Annex 89, paragraph 4.

(250) Intel's arguments are not convincing. First, it is factually incorrect to state that the basis for [Dell executive]'s messages is unclear. Indeed, [Dell Executive]'s email of 26 February 2004 begins with "*Boss, here's an outline of the framework we discussed with Intel.*"[292] [Dell executive]'s message was clearly written after a discussion between Dell and Intel. It also appears that it was written in preparation for a discussion [...], and that the matters which [Dell executive] described, in particular Intel's preparedness for strong reaction (portrayed by [Dell executive] as Intel being "*prepared for* [all-out war]"), were going to be discussed in the high level meeting.

(251) Moreover, it is incorrect that [Dell executive] was not aware of Intel's communications [...]. The procurement of CPUs from Intel was [Dell executive]'s principal responsibility at Dell in 1999, and in that role he has already testified before the US FTC in February 1999. In the question and answer session, [Dell executive] responded as follows: "*Q.* [by [...], Intel's lawyer] *Now I think you did say that the relationship with Intel and procurement of chips from Intel is your principal responsibility? A. Yes. Q. I want to ask you a few questions about Dell's relationship with Intel. A. Okay.*"[293]

(252) In its submission of 5 February 2009 related to the Commission letter of 19 December 2008, Intel argued that "*the deposition took place nearly four years before the start of the exclusivity period alleged in the SO and thus cannot support a claim of an exclusivity agreement during the SO period.*"[294] However, in material from the Delaware litigation submitted by Intel, when confronted with his testimony of 1999 and asked about the position he held between that time and the time [...], [Dell executive] stated that "*Q.* (...)*were you still in charge of what's the Intel relationship overall? A. Not per se, but there were continual executive meetings, and so I was involved in the -- the coordination of many of those.*"[295] Furthermore [Dell executive] also testified that "*[i]nformally, because I had dealt with Intel quite extensively over the years, I adopted somewhat of an informal role as -- as attempting to help facilitate the relationship.*"[296] Thus, the Commission concludes on that basis, that [Dell executive] continued to be closely involved in

---

292 Email from [Dell executive] to [Dell executive] of 26 February 2004 entitled *'OUTLINE'*, p. 1. F073-L00009321.

293 Deposition of [Dell executive] before the FTC, 11 February 1999. Dell submission of 12 July 2006. Annex 1, p. 52.

294 Intel submission of 5 February 2009 related to the Commission letter of 19 December 2008.

295 Deposition of [Dell executive] before the US District Court of Delaware on 13 January 2009, p. 16, provided to the Commission by letter of 17 March 2009.

296 Deposition of [Dell executive] before the US District Court of Delaware on 13 January 2009, p. 17. Intel submission of 17 March 2009.

the business relationship between Dell and Intel and continued to have contacts with executives of both companies in relation to the negotiation of sourcing and pricing of x86 CPUs by Dell and Intel. Indeed, this is confirmed by the very nature of the communications from [Dell executive] further explained in the following recitals.

(253) E-mails written by [Dell executive] reveal who he was meeting and that he had been in contact with [executive] of Intel. For instance, in an email dated 18 December 2003, he wrote: "[Intel executives] *team did a* [...] *job of prepping him for the call on Monday on the details and specifics of our proposal*".[297] In another email, of 30 January 2002, he writes: "*I hooked up with* [Intel executives] *today. Bad news is that* [Dell senior executive] *discussion with* [Intel senior executive] *was a* [...]. "[298]

(254) As is clear from Intel's internal communication, [Intel executive]was used by [Intel senior executive]to communicate the rebate conditions and particularly the envisaged cuts in MCP to Dell. [Intel senior executive]wrote to [Intel senior executive]and others in relation to Dell MCP: "*I told* [Intel executive]*to tell them that since they [Dell] are presenting us with an all or none situation, and we cannot possibly choose "all", we therefore had no choice but to choose none.*"[299] Moreover, [Dell executive] also used [Intel executive]as a channel to communicate information to [Intel senior executive].[300] Consequently, Intel's assertion that [Dell executive] was not aware of the nature of the relationship between Intel and Dell, and could not take proper account of the actual content of the discussions between Intel and Dell is neither plausible or convincing.

(255) As regards [Intel executive]declaration, it is noted that this declaration is contradicted by contemporaneous documents that [Intel executive]drafted himself.

---

297 Email of 18 December 2003 from [Dell executive] to [Dell executive] and others entitled *'GRANTSDALE DEAL'*. Dell submission of 19 May 2006. Annex B2.

298 Email of 30 January 2002 from [Dell executive] to [Dell executive] entitled *'INTEL GOOD NEWS/BAD NEWS'*. Dell submission of 12 July 2006. Annex 3 ([Dell executive] deposition before the FTC), exhibit 5.

299 Email of 3 May 2006 from [Intel senior executive] to [Intel executive] and others entitled *'bad news'*. Intel submission of 2 June 2008. Annex 2, document 80, p. 2.

300 In an email of 19 January 2004, [Dell Executive] states: "[Intel executive] *just asked for some help on a slide to* [Intel executives] *on servers*" (Email of 19 January 2004 from [Dell executive] to [Dell executive] entitled 'RE:'. Dell submission of 19 May 2006. Annex B3, p. 2). In an email of 21 January 2004, he writes: "*FYI sent to* [Intel executive] *for his* [Intel executives] *pitch today.*" (Email of 21 January 2004 from [Dell executive] to [Dell executive] entitled 'INTEL SERVER INFO'. Dell submission of 19 May 2006. Annex B4, p. 1.)

(256) Indeed, in a presentation of 10 January 2003 on Dell rebates, [Intel executive]outlined a list of objectives to be achieved by Intel in a high-level executive meeting with Dell. This includes the following objective: "*Get* [Dell Senior executive]*/OOC*[abbreviation used by Dell meaning Office Of the Chair and specifying a certain group of Dell executives, usually [Dell Senior executive]and [Dell Senior executive]] *clearly understand our meet-comp process and how it applies to DELL- I.e. if they have AMD in their arsenal they'll have less meet comp exposure-hence less meet comp dollars avail to them—even the possibility that meet-comp dollars that we're applied* [sic] *to DELL go somewhere else...*"[301] This objective is also reiterated in a later presentation of 5 February 2003 that served as a briefing for a Dell executive dinner where it is stated: "*Some how, with finesse, we need* [Dell Senior executive] *to understand that if Dell adds AMD to their product line they no longer have a meet-comp exposure – We have a meet comp exposure so we must prioritize opportunities on a case by case situation.*"[302]

b) [Dell executive]'s testimony before the US FTC

(257) Intel claims that testimony from 26 March 2003 by [Dell executive] before the US FTC would disprove the Commission findings on the conditionality of Intel rebates to Dell. In this testimony, according to Intel, [Dell executive] characterised the evidence referred to in recital (222) of this Decision as speculation, aimed at scoping a worst case scenario for Dell. Intel claims that [Dell executive] "*categorically denied that fear of retaliation from Intel was a factor in Dell's decision not to use Opteron*".[303]

(258) Despite Intel's claims, the Commission's findings on conditionality are not contradicted by statements made by [Dell executive].

(259) In this respect, the Commission notes that [Dell executive]'s testimony was taken by the US FTC at a very preliminary stage of its investigation into Intel's pricing practices and at a point in time at which the conduct objected to by the Commission in relation to Dell had been in place for less than one financial quarter. In particular, the presentation which Intel claims is speculation dates from 23 December 2002, which is the first month of the 37 month long period examined in this Decision.

---

301 Presentation by [Intel executive] of 10 January 2003, entitled '*Dell F1H '04 MCP*'. Intel submission of 2 June , annex 2, document 21, p. 24.

302 Intel presentation entitled of 5 February 2003 entitled '*Briefing for Dell Executive Dinner*'. Intel submission of 2 June 2008, annex 2, document 92, p. 7.

303 Intel Reply to the 26 July 2007 SO, paragraph 163.

(260) It is also noted that, during his testimony, [Dell executive] was confronted with a number of contemporaneous documents that had previously been submitted by Dell and was asked to explain the general context of the documents and to interpret them. He also answered some related questions that go beyond the mere interpretation of the documents' content. Only one of these documents stems from the period assessed in this Decision as regards Dell, namely, the presentation of 23 December 2002 referred to in recital (222).[304] All the other documents discussed during the US FTC investigation stem from a period not covered by this Decision.

(261) The Commission also considers that the two quotes from the testimony on which Intel attempts to rely to explain that a potential loss of rebates was not a factor in Dell's decision not to go with AMD products within the period 2003-2005 are not "*categorical*", as Intel has attempted to portray them, and as is explained in the following recitals.

(262) Intel argues that when [Dell executive] was asked to interpret the document quoted in recital (222), he "*categorically denied that fear of retaliation from Intel 'was a factor' in Dell's decision 'not to use Opteron'.*"[305] The Commission notes in this respect that [Dell executive]'s statement relates to an AMD product, Opteron, which was launched only after [Dell executive]'s testimony, on 22 April 2003.[306] The question whether to use or not to use the Opteron product[307] as shown in section 2.3.2, was subject to a lot of further contemplation within Dell after the product was launched and was successful in the market. [Dell executive]'s testimony, on the other hand, does not address Dell's motivations for not launching products based on the AMD products existing at the time of the declaration, like the Athlon processor. [Dell executive]'s declarations to the US FTC on the absence of impact of the fear of Intel "*retaliation*" on Dell's choice for not launching AMD-based products are therefore incomplete.

(263) Intel also points to [Dell executive]'s statement to the effect that "[t]*here are no dollars that come from Intel that incent us* [Dell] *not to use any of their competitors' products*".[308] This statement, however, has to be seen in the context of the following questions and answers with the US FTC. The transcript of [Dell

---

304 Dell presentation of 23 December 2002 entitled *'AMD Analysis'*. Dell submission of 12 July 2006. Annex 3 ([Dell executive] deposition before the FTC),exhibit 18.

305 Intel Reply to the 26 July 2007 SO, paragraph 163.

306 Intel Reply to the 26 July 2007 SO, Annex 21, p. 8, last paragraph. Opteron with the code name "Hammer" or "Clawhammer" was thus in fact launched about one month after [Dell executive]'s deposition to the FTC. [...]

307 The codename used for Opteron during the FTC's interview is "Hammer" and "Clawhammer".

308 Intel Reply to the 26 July 2007 SO, paragraph 136.

executive]'s testimony continues as follows: "*Q. So the funding that you receive from Intel would not change if you were to start selling a product that included an AMD microprocessor?* A. *If the competitive threat changes, then the competitive response may indeed change. Q. Could you explain what you mean by that? A. Some of the programs that we have established are a competitive response to an alternate chipset or microprocessor. If we were to use that microprocessor or chipset, there would be no competitive response from Intel.*"[309]

(264) The follow-up question was evidently put by the investigator in order to verify the answer to the previous question that seemingly indicated that Dell's freedom to choose would not be affected by Intel's rebate payments. Consequently, the answers to the string of questions have to be considered in context. In the second part of his answer, [Dell executive] explicitly says that if Dell were to decide to start sourcing the competitive product (namely, AMD's x86 CPU and/or chipsets) then this would lead to "*no competitive response from Intel*". It is particularly noteworthy that, in its submission to the Commission, Dell identified precisely this second part of the answer as the extract of the testimony from [Dell executive] which is most relevant for the assessment of the consequences for Dell of choosing AMD as a supplier.[310]

(265) [Dell executive] identified "*competitive response*" as meaning funding received by Dell from Intel (in the context of programs established as a competitive response to an alternative chipset or microprocessor). In other words, when stating "*no competitive response from Intel*" if Dell were to use an alternative microprocessor, [Dell executive] meant no such funding would be granted. Consequently, [Dell executive] reduces the significance of his statement that there are "*no dollars that come from Intel that incent us* [Dell] *not to use any of their competitors' products*" by saying that these dollars would disappear if Dell were to source from a competitor. The quote confirms the Commission's conclusion that at least part of the rebate funding from Intel was conditional upon maintaining exclusivity.

c) Other schools of thought within Dell

(266) Intel argues that there was a way of thinking within Dell about Intel's reaction in case of a partial switch to AMD that assumed no negative or disproportionate impact on the MCP rebate.[311] In this regard, Intel makes reference to an email from [Dell executive] to [Dell executive] of 2 June 2002: " – *there are two schools of*

---

309 Deposition of [Dell executive] before the US Federal Trade Commission (FTC) on 26 March 2003, pp. 149-150. Dell submission of 12 July 2006, annex 3.

310 Dell submission of 17 April 2007, annex 1, p. 1 and p. 4.

311 Intel Reply to the 26 July 2007 SO, paragraph 165. Also Report of Professor [...], p. 8.

thoughts within Dell. One side believes that Intel will hurt us and hurt us bad and the other side is that things will get better even if they hurt us in the short term."[312] Contrary to what Intel argues, this document does not show that there was a way of thinking within Dell (that is, a "*school of thought*") according to which introducing an AMD product would not result in any Intel reaction. On the contrary, the above document makes clear that the unanimous belief within Dell was that switching, in part, to AMD would result in Intel "*hurting*" Dell. The discussion in the email within Dell then focused on whether in the long term things would improve despite Intel hurting Dell in the short term.

d) Intel's reaction to the Dell's switch to AMD in 2006

(267) In support of its claim that no part of the MCP rebates were conditional on exclusivity, Intel refers to 2006, when Dell decided to source, in part, from AMD. Intel states that it "*did not penalise Dell when it began sourcing from AMD.*"[313] In support of its assertion that it did not penalise Dell, Intel offers the following arguments:

- After the partial switch by Dell to AMD, Intel and Dell agreed to a new discount schedule that had been proposed by Dell's CEO. The new system was designed to produce comparable discounts to the program it replaced. Intel's agreement to an arrangement requested by Dell could not have been punitive. A contemporaneous email from [Intel executive] to [Intel senior executive] outlines that, under this new program, the target for the rebate for Q3FY07 (August - October 2006) was [...], but, because Dell significantly fell short of its sales expectations, it would in reality obtain only [...]from Intel. The same email outlines that *"using 'old' [...]formula their meet comp dollars would be* ~[...]]".[314]

- Intel understood the common sense proposition that reducing Dell's discounts as a punishment for buying from AMD would be counterproductive. Thus, in response to a Dell request for an increase in its discount levels in June 2006, less than a month after Dell announced its decision to release AMD-based systems, Intel approved nearly all of the [...]request. [Intel executive] wrote: "*Main motivation - all of these moves*

---

312 Email from [Dell executive]to [Dell executive] of 2 June 2002 entitled *' RE: Intel discussions with stevens'*. F073-L00216850. This document has been misquoted in footnote 309 of Intel Reply to the 26 July 2007 SO as being an email by [Dell executive] to [Dell executive] (in fact neither [Dell executive] nor [Dell executive] were involved in this email correspondence) and has been provided as an annex to the Report of Professor [...].

313 Intel Reply to the 26 July 2007 SO, paragraph 168.

314 Intel Reply to the 26 July 2007 SO, paragraphs 169 and 170, and annex 108.

help us with MSS (...) And - moreover - [Intel executive] *believes if we do not do it - they will run faster with AMD.*"[315] Intel argues that [Intel executive]email message captures an essential truth about Intel's relationship with its OEM customers: reducing discounts to a customer - and in this particular case, Intel's largest customer - is not an effective strategy for obtaining a high share of that customer's business. Rather, such a strategy would be likely to drive Dell to buy even more from AMD. A June 2006 Toshiba submission to the Commission confirms this understanding. In that submission, Toshiba stated that [...]".[316]

– The case file also contains contemporaneous evidence showing that AMD told Dell "*that things would get much better if we* [Dell] *add them* [AMD] *to the portfolio*". This is contrary to AMD's claims that Intel punishes OEMs that source from AMD.[317]

(268) Each of these arguments are addressed in turn, as well as a fourth argument raised by Intel during and after the Oral Hearing. However, as a preliminary remark, the Commission notes that Intel's reaction to Dell's partial switch to AMD in 2006 has only limited bearing on the assessment of conditionality in the relevant period between 2003 and 2005. The question of how Intel actually reacted to a subsequent switch by Dell is of minor importance compared to the fact that during the period under investigation Dell knew, on the basis of its relationship and its contacts with Intel, that it would lose a significant amount of its rebates. The harm to competition arises from the fact that Dell's expectations of what would happen to the rebates actually had an impact on Dell's decision not to switch to AMD, or not to switch earlier, or not to switch larger fractions of its purchases, as is evidenced by its internal documents.

(a) The first Intel argument outlined in recital (267)

(269) To begin with, the fact that Intel and Dell agreed on a new rebate system to replace the old MCP rebate, which, as [Intel senior executive] put it, would get "[...]"[318], is irrelevant. The Commission does not claim that Intel would no longer award Dell any rebate if it partially switched to AMD. The existence of a new agreement is therefore consistent with the Commission's position.

---

315 Intel Reply to the 26 July 2007 SO, paragraphs 171 and 172, and annex 110.

316 Intel Reply to the 26 July 2007 SO, paragraph 172.

317 Intel Reply to the 26 July 2007 SO, paragraph 173.

318 See recital (241).

(270) Nevertheless, the examination of the amount of rebates granted under these new agreements is of interest. Intel notes that, according to its computations at the time, in Q3FY07 (August-October 2006), Dell was expected to receive USD [...] million from Intel under the new programme. Intel also refers to the "*old* [...] *formula*" yielding a result of [...]. The Commission understands that Intel is suggesting that the [...]represents what Dell would have obtained from Intel under the old MCP programme, and that this is not very different from the [...].[319]

(271) Such a representation mischaracterises the facts. As outlined in section 2.3.3, the MCP programme comprised several elements. The [...] formula corresponded to only two of these elements: the [...]MCP (see subsection 2.3.3.1) and the [...]and [...] MCP (see subsection 2.3.3.2). Intel therefore compares the rebates it was to award Dell in Q3FY07 (August-October 2006) with only a part of the old MCP rebates.

(272) Table 7 provides the evolution of the total MCP rebates awarded by Intel to Dell in Dell's fiscal year 2007. Dell announced its partial switch to AMD in May 2006, that is, at the very beginning of Q2FY07 (May-July 2006).

Table 7 - Total Dell MCP rebates in fiscal year 07

Period	Total Dell MCP rebates (million USD)
Q1FY07	[...]
Q2FY07	[...]
Q3FY07	[...]
Q4FY07	[...]

Source: Dell[320]

(273) Table 7 is telling: when comparing like to like, between Q1FY07 (the last fiscal quarter before Dell's public announcement of its partial switch to AMD) and Q3FY07 (the quarter referred to by Intel), the MCP rebate fell from [...], that is, by more than [...] [([...]) / [...] = [...]%).[321] From Q1FY07 to Q4FY07, the rebate fell from [...], that is by ([...])/ [...] = [...]%.

(274) Intel's argument regarding the existence of an agreement between Intel and Dell to replace the old MCP and the comparison of the resulting foreseen value of the

---

319 However, even under this view, the Commission notes that there is a fall of ([...]) / [...]= [...]%.

320 Dell submission of 4 May 2007. Annex 1, p. 1.

321 The Commission notes that the actual amount of the rebate granted by Intel to Dell in Q3FY07 was [...], and not [...]as Intel estimated.

rebates in Q3FY07 with the result of a computation based on a [...] formula is therefore unconvincing.

(b) The second Intel argument outlined in recital (267)

(275) The fact that Intel accepted a Dell request for rebates items worth in total [...][322] in June 2006 does not demonstrate that Intel did not reduce Dell's overall rebate. A complete reasoning would need to analyse the original value to which these [...]was added. June 2006 falls within Dell's Q2FY07 (May-July 2006). As is shown in the table in recital (272), the total amount of MCP rebates which Dell received in Q2FY07 was [...], down from [...]in the period where it was Intel exclusive. Even if the [...]were additional to the [...], which Intel did not claim, this amount would still represent only a fraction of the [...]decrease from [...]to [...].

(276) Furthermore, [Intel executive] message does not necessarily lead to the conclusion that Intel did not reduce Dell's rebate as compared to the previous quarter. It only means that Intel had an interest in continuing to award Dell a part of the rebates in order to contain the extent of Dell's switch to AMD.

(277) Intel's contention that [Intel executive]message "*captures an essential truth about Intel's relationship with its OEM customers*", that is that "*Reducing discounts to a customer – and in this particular case, Intel's largest customer – is not an effective strategy*"[323] is contradicted by the way Intel itself presented its rebate to Dell: "*Get* [Dell Senior executive] */OOC* [abbreviation used by Dell meaning Office Of the Chair and specifying a certain group of Dell executives, usually [Dell Senior executive] and [Dell Senior executive]] *clearly understand our meet-comp process and how it applies to DELL- I.e. if they have AMD in their arsenal they'll have less meet comp exposure - hence less meet-comp dollars avail to them —even the possibility that meet-comp dollars that we're* [sic] *applied to DELL go somewhere else...*"[324]

(278) Intel's argument regarding its acceptance of a limited Dell request for additional discounts and the general conclusion which Intel draws from that acceptance are therefore unconvincing.

(c) The third Intel argument outlined in recital (267)

---

[322] The Dell request was [...], of which Intel rejected [...]corresponding to the item "[...]". See Intel Reply to the 26 July 2007 SO, annex 110.

[323] Intel Reply to the 26 July 2007 SO, paragraph 172.

[324] Presentation by [Intel executive] of 10 January 2003, entitled '*Dell F1H '04 MCP*'. Intel submission of 2 June 2008, annex 2, document 21, p. 24. See also recital (239).

(279) The fact that AMD might have told Dell that it would be "*better off*" if it also purchased x86 CPUs from AMD does not confirm Intel's argument. Indeed, it would be a surprising commercial strategy for AMD to tell Dell that buying its product would be detrimental. This argument by Intel is therefore not substantiated.

(d) Additional Intel argument raised by Intel in and after the Oral Hearing

(280) In the Oral Hearing, Intel made specific comments on a paragraph of the 26 July 2007 SO which referred to the evolution of the Dell rebates after the partial Dell switch to AMD. In this paragraph, the Commission stated that "*according to Dell, its quarterly rebate actually fell by* [...] *(Q2 FY07 compared to Q4 FY07 - representing a decrease of* [...]*) when it switched part of its supplies to AMD.*"[325]

(281) In a submission of 28 March 2008, entitled '*Submission of Intel Corporation following the Oral Hearing*', Intel again raised that argument and elaborated on it.

(282) In that document, Intel first alleged that "*As Intel stated during the Hearing, Dell has confirmed that it does not share the case team's view that Intel cut its effective discount level by* [...]."[326] The Commission notes that Intel did not provide any Dell statement or document to support this assertion.

(283) Instead, Intel attached a report by Professor [...] which seeks to justify the [...] drop in Intel rebates from Q2FY07 to Q4FY07. This report proposed three explanations for the drop of the Intel rebate to Dell:

- Dell's total purchase from Intel would have declined by [...] in terms of revenues during the period concerned. A [...] fall in the volume of rebates could therefore naturally be expected without a variation in the rate of the rebate.

- In July 2006, Intel would have instituted a programme resulting in a reduction of its list prices (the so called CAP prices), that is, the gross price of its x86 CPUs before any rebate. The reduction of the list price would have made a significant part of the Dell rebate redundant.[327]

---

325 26 July 2006 SO, paragraph 351.

326 Intel submission of 28 March 2008, p. 9, paragraph 4.

327 On the exact scope of the alleged redundancy, Intel refers to "*An analysis performed by Professor [...]*" (Intel submission of 28 March 2008, p. 10, paragraph 1). However, the attached report by Professor [...] does not contain any substantiation of this analysis, apart from the simple assertion that "*Analysis of Intel's data indicates that Dell's weighted-average CAP fell by about 10% at this time.*" (Intel submission of 28 March 2008, Appendix I, p. 4, section 2, indent (1)).

– The mix of processors that Dell purchased from Intel in Q4FY07 involved fewer of the microprocessors which were more heavily discounted than in Q2FY07.

(284) Before addressing each of these arguments, it is worth highlighting that the comparison between the Q2FY07 and Q4FY07 rebates provides an incomplete account of the evolution of the rebate since Dell's announcement of its partial switch to AMD. As outlined in the table in recital (272), between Q1FY07 and Q2FY07, the Intel rebates to Dell already fell from [...]to [...]. The evolution between Q2FY07 and Q4FY07 is the continuation of this fall. From Q1FY07 to Q4FY07, the rebate fell from [...]to [...], that is by ([…] – […]) / […] = [...]%.

(285) The remainder of this section concentrates on the evolution of the rebate during the sole period evoked by the Intel argument, that is, from Q2FY07 to Q4FY07.

(286) The Commission takes note of Intel's first argument as outlined in recital (283). However, even assuming that Intel's assertion that the decline of Dell's purchase from Intel would lead to a justified, proportional, decline of [...] of the volume of rebates, this would still leave a decline of [...] ([...]-[...]) which is not proportional to the drop in Dell's purchase.

(287) In this regard, the Commission does not consider the second and third justifications provided by Intel, as outlined in recital (283), convincing.

(288) As regards the second justification, it is noted that, for Dell, a drop in Intel's list price is not equivalent to a rebate. OEMs do business in a very competitive environment. The relative price of their input is therefore at least as important as the absolute price thereof, in particular for such a component as the x86 CPU, which represents the most significant proportion of a computer's cost.[328] As Dell outlined when describing the MCP rebates, "*Dell believed that, as Intel's largest customer, it was able to obtain a higher level of discounts than its competitors*".[329] In this context, the transformation of a rebate awarded only to Dell into a lower price applicable identically to all its competitors was a net lost competitive advantage for Dell.

(289) As regards the third justification, Intel has not substantiated why the mix of processor purchases by Dell in Q4FY07 would invalidate the Commission's conclusion on the existence of a drop in rebates. It may well be that the new arrangement between Intel and Dell after Dell's switch to AMD explicitly foresaw that Dell would get less rebates in certain circumstances, for instance if it

---

328 See recital (109).

329 Dell submission of 17 April 2007, p. 1, paragraph 5.

purchased more of certain types of x86 CPUs. But this is not of relevance to the subject-matter investigated by the Commission. The real question is not whether the new rebate agreement justifies the decline of rebates but whether the decline of rebates would have happened similarly under the agreement prevailing when Dell was Intel-exclusive. Intel did not address this question, and the Commission can only note that the rebate agreement which prevailed during the period when Dell was Intel-exclusive did not depend on the mix of x86 CPUs purchased by Dell.[330]

e) Intel observations on the interpretation of certain evidence stemming from Intel

(290) In a submission of 5 February 2009, Intel attempted to provide a different interpretation of evidence stemming from Intel described in section 2.3.4.2. The nature and relevance of this written submission from Intel is discussed in section IV.2. Nevertheless, in the following recitals, the main interpretations presented by Intel are addressed and the fact that they are not plausible is highlighted.

(291) Intel claims in particular that the documents mentioned in recital (256) are not "*an email sent, or presentation made, to a Dell executive, or even purports to describe conversations with Dell executives.*"[331] Intel therefore argues that they cannot be used in support of a conclusion that Intel conveyed a message on the conditionality of MCP discounts to Dell executives.[332]

(292) The Commission cannot accept this claim by Intel. Indeed, both documents quoted in recital (256) were drawn up in preparation for Intel meetings with Dell's highest executives (for the first document, a negotiation meeting and for the second document, a dinner between executives). They outline the messages that Intel would provide in these meetings, as is clearly shown by their content ("*Get* [Dell senior executive] *(...) clearly understand (...)*", " *with finesse, we need* [Dell senior executive] *to understand* ").

(293) Intel also claims that the first document mentioned in recital (256) "*merely recognizes that Dell's discounts scale with volume and that, to the extent that Dell shifted volumes from Intel to AMD, it would lose the Intel discounts associated with those volumes.*"[333] This interpretation by Intel of the presentation by [Intel executive]is not plausible. The fact that Intel would not continue to pay discounts

---

330 The MCP rebates [...]. However, the effect of this indirect dependence is already accounted for in the first of Professor [...]'s justifications for the decline of rebates, which, according to Intel, would justify only a decline of [...] thereof. The same effect cannot be accounted for twice.

331 Intel submission of 5 February 2009 related to the 17 July 2008 SSO, paragraph 357.

332 Idem.

333 Intel submission of 5 February 2009 related to the 17 July 2008 SSO, paragraph 359.

to Dell for units Dell would have purchased from AMD was obvious. No reasonable customer could have expected otherwise. It is not reasonable to assume that Intel would need high level executive meetings to '*Get* [Dell senior executive] *clearly understand*' such an obvious point, let alone executive dinners to pass this message to him '*with finesse*'.

(294) Intel argues that its interpretation of the first document mentioned in recital (256) "*is consistent with Dell's testimony concerning the MCP program.*"[334] In relation to this, Intel makes reference to the fact that [Dell executive] testified to the US FTC : "*If the competitive threat changes, then the competitive response may indeed change.*"[335] However, as was already explained in recitals (257) to (265), when read in its entirety, the testimony from [Dell executive] to the US FTC confirms that at least part of the rebate funding from Intel was conditional upon maintaining exclusivity. Furthermore, it should be highlighted that Intel seems to distort the nature of the different pieces of evidence in the file. The testimony by [Dell executive] to the US FTC is not '*Dell testimony*', contrary to what Intel argues. The Commission file contains a company statement by Dell. This statement was discussed in recitals (233) and 0. It fully supports the Commission's conclusion, as well as the Commission's interpretation of the testimony of [Dell executive].

(295) Intel also mentions the email quoted in recital (241) in support of its claim that Intel only meant that its discounts scale with volume.[336] Here again, Intel's interpretation is implausible. The word '*nullify*' cannot be reasonably interpreted as meaning that a rebate would scale with volume.

(296) As regards the email from [Intel senior executive] quoted in recital (240), Intel argues that it "*hardly demonstrates the existence of an exclusive relationship between Dell or Intel or that Intel's payments were conditioned on exclusivity.*"[337] According to Intel, "*It is clear that* [Intel senior executive] *was somewhat sarcastically commenting on the fact the Dell based its sourcing decision solely on what was beneficial to Dell itself.*"[338] This interpretation by Intel is plainly unconvincing in view of the chain of emails to which [Intel senior executive] was reacting. Indeed, [Intel senior executive]'s statement was reacting to a text which read: "*Some observers have contended that adopting AMD's chips could hurt Dell's bottom line because Dell currently reaps a "subsidy" from Intel as an exclusive*

---

[334] Intel submission of 5 February 2009 related to the 17 July 2008 SSO, paragraph 364.

[335] Idem.

[336] Intel submission of 5 February 2009 related to the 17 July 2008 SSO, paragraph 359.

[337] Intel submission of 5 February 2009 related to the 17 July 2008 SSO, paragraph 361.

[338] Idem.

Intel customer. But [Dell senior executive] *told analysts on a conference call Thursday that Dell has no formal "exclusivity commitment" regarding the chips it uses."* [339] In the context of the report relating to Dell continuing to source solely from Intel, [Intel senior executive]'s statement referring to Dell as "*the best friend money can buy*" evidently confirms the link between Intel funding and Dell sourcing solely from Intel. The fact that it was written in a sarcastic tone, as Intel underlines, only serves to put the situation in a cruder light, but it confirms rather than disproves the existence of the link.

f) Intel arguments based on depositions of Dell executives in the private litigation between Intel and AMD in the US State of Delaware.

(a) Introduction

(297) In a submission of 2 March 2009, Intel on its own initiative provided the Commission with extracts of depositions of three Dell executives [...] from the private litigation between Intel and AMD in the US State of Delaware. Intel did not specify how it had been able to supply the Commission with these extracts. Intel requested that the Commission "*obtain copies of the depositions (...) and provide them to Intel for comment*".[340] Intel did not explain why it could not immediately provide the entire depositions of the Dell executives instead of extracts, but indicated in the context of similar depositions by IBM executives that it "*cannot set out the substance of their testimony for protective order reasons.*"[341]

(298) On 12 March 2009, the Commission informed Intel that, without prejudice to the relevance and possible impact of the material in question, given that Intel had apparently been able to quote extracts from the depositions, it was still possible for Intel to seek to provide the full depositions from which it had quoted and the associated exhibits. On 16 March 2009, Intel specified that it would indeed supply the Commission with the relevant material, and by letter of 17 March 2009, Intel provided the Commission with the full text of the depositions and all the related exhibits, subject to certain limited exceptions.[342] As a preliminary point, the Commission notes that Intel was able to submit virtually the entirety of Dell's testimonies and exhibits that were produced by Dell in the course of the Delaware

---

339 Email from [Intel executive]to [Intel executive] and [Intel senior executive] of 17 February 2006 entitled "*FW: Dell CEO: Co. Has Made No Plans To Use AMD Chips*", quoting a Dow Jones news report from 16 February 2006. Intel submission of 2 June 2002, annex 1, document 14.

340 Intel submission to the Commission of 2 March 2009, p. 12, paragraph 1.

341 Intel submission to the Commission of 2 March 2009, p. 2, paragraph 2.

342 In its cover letter of 17 March 2009 by which it provided the Commission with the depositions and exhibits Intel specified that it did not have permission to provide exhibits which were originally produced by AMD or other third parties than Dell.

AMD v. Intel litigation within three working days of the Commission's letter of 12 March 2009. This calls into question Intel's claim that "*the Protective Order in the Delaware litigation prevents Intel from making use of documents produced in that matter outside the Delaware proceedings*",[343] which was Intel's stated reason for its failure to reply to the 17 July 2008 SO, and the reason for its application to the CFI for interim measures and annulment of the alleged Commission decisions on the deadline to reply to the SSO.

(299) Before addressing Intel's specific claims relating to the evidence (section (b) to section (e()), the relevance of the depositions and exhibits in the context of the present proceedings are first addressed. In this regard, on the basis of the full text of which Intel had only quoted very limited extracts that it claimed were favourable to it in its letter of 2 March 2009, the Commission was in the position to determine that the depositions are in their entirety statements made with regard to contemporaneous documents authored or received by Dell, some of which are the same as documents quoted in section 2.3.4.1. The extent to which either the exhibits to the depositions or the depositions themselves can be used as evidence in these proceedings is addressed separately in the following recitals (300) and (301).

(300) The documents on which the Commission has relied in section 2.3.4.1 have been submitted by Dell as exhibits to a company statement on 17 April 2007.[344] On the basis of an examination of Intel's submissions of 2 and 17 March 2009, the Commission has no reason to believe that Dell would have distorted the view of the facts when it presented a selection of the relevant contemporaneous documents and their interpretation. In fact, when confronted with some of Dell's statements to the Commission, which appear to be part of the file in the Delaware proceedings, and asked whether such statements would be accurate, [Dell senior executive], , stated: that "*I would assume that if this is our, you know, submission to the EU commission, that it is – is correct*".[345] Similar confirmations were made during the deposition of [Dell executive].[346]

---

343 Letter from Intel to the Commission of 6 August 2008, p. 12.

344 Dell submission of 17 April 2007.

345 The full question and answer reads: "*Q. Okay. Do you have any reason to believe that that isn't an accurate -- that that is not an accurate statement? A. I would assume that if this is our, you know, submission to the EU commission, that it is – is correct.*" Intel submission of 17 March 2009. Deposition of [Dell Senior Executive] p. 419. Furthermore, [Dell Senior Executive] has on other occasions during his deposition confirmed the accuracy of Dell Inc.'s company's statements made vis-à-vis the Commission. For example,: "*Q. (...) Are those accurate statements? A. I assume so. Again, I didn't -- didn't write this, didn't review it, didn't prepare it. But if it was submitted to the EU, I assume it's correct.*" Intel submission of 17 March 2009. Deposition of [Dell Senior Executive], p. 425.

346 When questioned about the accuracy of Dell's answers to the European Commission of 11 November 2005, [Dell executive] stated "*Q. (...) Is that accurate? A. I don't remember, but since we put it in*

(301) Furthermore, the Commission is not in the position to follow the legal theory in US law that determined the selection of the specific contemporaneous documents by the AMD counsels carrying out the depositions and that are at the basis of the US depositions in that US litigation, and the Commission cannot, therefore, assess how far that selection would be suitable to give a balanced view for an assessment under EC law. Consequently, the Commission must continue to rely on the contemporaneous evidence provided by Dell and Intel in the course of its own investigation. Nevertheless, it is noted that the exhibits to the depositions appear to contain further contemporaneous evidence which confirms the Commission's analysis of the nature of Intel's relationship with Dell during the period in question. Several examples are outlined in section (e) below.

(302) It is further noted that some of the quotes from depositions submitted by Intel in its letter of 2 March 2009 attempt to interpret several pieces of contemporaneous evidence provided by Dell and relied on by the Commission in section 2.3.4.1. Without prejudice to whether such interpretations actually square with the Commission's conclusions as described in section 2.3.4.1 (which is analysed in further detail in sections (b) to (d)), it is concluded that such subsequent interpretation of isolated pieces of contemporaneous evidence by individual executives often more than five years after such documents were authored cannot have a higher probative value than Dell's own interpretation of the entire body of contemporaneous evidence in the Commission's file. Moreover, the contemporaneous evidence on which the Commission bases its conclusions on the nature of Intel's relationship with Dell during the period in question originates not only from within Dell but also from within Intel. In this regard, the accuracy of the Commission's conclusion is also confirmed by the context of such evidence with regard to other sources. Conversely, interpretations of contemporaneous evidence long after such evidence has been authored are likely to be influenced by various additional factors that were not present at the time when the contemporaneous documents were drafted, such as a change in the market climate and environment or tactical considerations in the context of the procedure under which they were made. Consequently, the testimonies bear far less probative value than the consistent body of contemporaneous evidence on the Commission's file itself, and the Dell corporate statement to the Commission.

(303) Without prejudice to the above, in its letter of 2 March 2009, Intel made the argument that excerpts from the testimonies would rebut "*the Commission claims that (i) Intel had an exclusive agreement with Dell; (ii) Dell feared that sourcing microprocessors from that sourcing microprocessors from AMD would result in*

---

in this document, I believe it to be accurate." Intel submission of 17 March 2009. Deposition of [Dell executive], p. 65.

punishment in the form of significantly higher prices; (iii) Intel did in fact penalize Dell when Dell began to source from AMD; and (iv) the contestable share of Dell's business, on which the SO's purported economic analysis is based, was only [...] "[347]

(304) However, the analysis of the Intel claims and the extracts quoted by Intel in support of these claims show that none of them can disprove the Commission's findings in a convincing way. Sections (b) to (d) analyse Intel's first three claims individually. The fourth claim is analysed in section VII.4.2.3.2 which deals with the issue of contestable share at Dell.

(b) Exclusive agreement with Dell

(305) Intel claims that the evidence it quotes "*rebuts the Commission's claim*" that "*Intel had an exclusive agreement with Dell*".[348] Intel quotes in particular [Dell Senior Executive] deposition to the effect that "*[w]e* [Dell] *did not have an exclusive relationship with Intel*",[349] or [Dell executive]'s deposition, reading "*We always retained the right to choose*",[350] or "*we never gave up our right to choose AMD microprocessors or any other microprocessor company we though we might need in the marketplace*".[351]

(306) Intel's claim is misconceived as it misrepresents the Commission's findings. Indeed, the Commission has not stated that Intel had an agreement with Dell which precluded Dell from purchasing AMD microprocessors, as it eventually did in 2006. The Commission's findings, as illustrated in sections 2.3.4.1 and 2.3.4.2, are that Dell was free to start sourcing x86 CPUs also from AMD, but that this would have entailed the loss of a significant and disproportionate part of the Intel MCP rebates. In other terms, Dell always retained the right to choose AMD, but this right to choose was exerted in a context where opting for AMD would have had a disproportionately negative impact on the rebates that Dell obtained from Intel. The statements by Dell executives in the Delaware depositions are therefore fully consistent with the Commission's findings.

(c) The potential impact on Intel's rebates to Dell of a Dell partial switch to AMD

---

347 Intel submission of 2 March 2009, p. 2, paragraph 1.

348 Intel submission of 2 March 2009, p. 2, paragraph 1, point (i).

349 Intel submission of 2 March 2009, p. 2, paragraph 4.

350 Intel submission of 2 March 2009, p. 3, paragraph 6.

351 Intel submission of 2 March 2009, p. 3, paragraph 9.

(307) Intel claims that the evidence it quotes from "*rebuts the Commission's claim*" that "*Dell feared that sourcing microprocessors from AMD would result in punishment in the form of significantly higher prices*".[352] Intel claims that "*the Commission has sought to rely on* [Dell executive]*'s speculations (...) as authoritative statements that reflected Dell's corporate view.*"[353] According to Intel, "[Dell executives] *were questioned at their respective depositions regarding email messages authored by* [Dell executive] *that speculated about the potential impact of Dell's use of AMD microprocessors on Dell's discounts from Intel, and in their sworn testimony they made it clear that these speculations did not represent the company's view.*"[354]

(308) Moreover, Intel argues that " [Dell senior executive] *'s testimony completely rebutted the SO's allegation that Dell expected to lose at least 50% of its discounts if it sourced microprocessors from AMD*" and that it would have been unclear to it whether Dell "*would lose any discounts if it sourced from AMD*".[355] In a similar vein, Intel claims that "[Dell executive] *also confirmed that no one from Intel has ever made a threat to him in relation to Dell's contemplated use of AMD microprocessors*" and "[Dell executive] *testified that he did not participate in the negotiations between Dell and Intel and was not privy to what negotiating tactics the key decision-makers, such as* [Dell Senior Executive], *used in dealing with Intel*".[356]

(309) Intel's claims mischaracterise both the evidence on which the Commission relies in assessing the potential impact of a Dell switch to AMD on Intel's rebates to Dell and the Commission's conclusions on this issue. As regards evidence from Dell, the Commission's assessment is primarily based on Dell's submission to the Commission of 17 April 2007 and its annexes. As stated in recital (300), the evidence provided to the Commission by Dell and Dell's interpretation of that evidence, by its very nature reflects Dell's corporate view. There is no indication in the documents submitted by Intel that Dell would have changed its position on this subject. On the contrary, as shown in recital (300), Dell executives confirmed the accuracy of the statements made to the Commission in their Delaware depositions. Consequently, Dell's submissions to the Commission and in particular Dell's selection of particular information to the Commission and the explanations Dell provided together with that information constitute Dell's corporate view.

---

352 Intel submission of 2 March 2009, p. 2, paragraph 1, point (ii).

353 Intel submission of 2 March 2009, p. 3, paragraph 10.

354 Intel submission of 2 March 2009, p. 3, paragraph 10.

355 Intel submission of 2 March 2009, pp. 4.

356 Intel submission of 2 March 2009, pp. 3-5.

(310) Dell's submission of 17 April 2007 that has the purpose to [...][357] In the explanation provided together with these documents, Dell outlines that "*there was a general consensus* [within Dell] *that such a change* [switching to a dual-source strategy] *would result in a reduction in MCP, which would have a negative financial impact on Dell, and that this would need to be taken into account in evaluating the benefits of such a fundamental change in strategy.*"[358] As described in section 2.3.4.1, a large number of the documents referred to in support of this company statement lead to the conclusion that Dell would lose a disproportionate part of its rebates if it switched to AMD. None of the documents attached to this company statement allow for the conclusion that Dell did not expect not to lose any rebates if it switched to AMD or expected to lose only a proportionate amount of rebates. It is also noteworthy that many of the documents which Dell has provided as responsive to the question of potential rebate loss are authored by [Dell executive]. This indicates that Dell identifies these specific documents relevant for answering this specific question. Moreover, as described in section a), it is incorrect that [Dell executive] would not have been present at meetings between Dell an Intel and not familiar with negotiations between the two companies.

(311) Finally, as further explained in section b) which deals with the deposition of [Dell executive] before the US FTC, [Dell executive]'s position on the exact mechanism of the Intel MCP rebates to Dell is fully in line with the Commission's conclusions. In this respect, the relevant question is not whether Intel would have bluntly 'threatened' Dell to 'retaliate' against a shift to AMD, but whether the mechanism or premises of the Dell MCP rebate would have led to a disproportionate reduction in Dell's rebate if Dell had not fulfilled the condition to source only from Intel. As described in section b), [Dell executive] stated that "[s]*ome of the programs that we have established are a competitive response to an alternate chipset or microprocessor. If we were to use that microprocessor or chipset, there would be no competitive response from Intel.*"[359] As already described in recital (265), this means that in circumstances where Dell would purchase CPUs from AMD in a certain segment, Dell would be likely to no longer be awarded "*competitive response*", that is, rebates, for that segment.

(312) [Dell executive] confirmed this position in several instances in his Delaware deposition: "*Well, we certainly understood that if you had a meet-comp program and you introduced the competition, there was really no need to have a meet-comp*

---

357 Dell submission of 17 April 2007, p. 1.

358 Dell submission of 17 April 2007, p. 2.

359 Deposition of [Dell executive] before the US Federal Trade Commission (FTC) on 26 March 2003, pp. 149-150. Dell submission of 12 July 2006, annex 3.

program."[360]; *"Q. Was there a question in your mind as to how much Dell's rebates from Intel might be reduced if Dell went to AMD?. A. Much of our programs were built on competitive responses, and if you introduced the competitive response, there wasn't a need, and I worked – my job was to work to minimize that and the fact – in the event that that happened, and I was not concerned at any time of retaliation or an absoluteness of it all goes away, but certainly there was some at risk."* [361] *"any consideration that we got on a technology of product or anything that we believed as a competitive alternative existed, if you introduced the competitive alternative, we would have believed and modelled that you wouldn't have got the consideration on that series of products."* [362]

(313) What is more, the exhibits to the deposition of [Dell executive] include an email from [Intel executive] of Intel to [Dell executive] in which Intel explicitly conveys this message to Dell: *"i have to spend incremental cycles evaluating how our meet-comp program would evolve if this* [Dell using AMD's Opteron] *is inevitable..... Ie changes in competitive exposure = changes in competitive support."*[363] [Dell executive] confirmed that that Intel message was consistent with this understanding: *"Q. Okay. And did you understand that* [Intel executive] – *when* [Intel executive] *is telling you "changes in competitive exposure equal changes in competitive support," was he telling you that if Dell went with AMD, that would change the competitive exposure and, therefore, Intel would change its competitive support, which means give you less money? (...) A. I think it's consistent with the representation I've made earlier that if the competitive exposure changes, the competitive support would change."*[364]

(d) The decline in Intel's discounts to Dell after Dell's partial switch to AMD in year 2006

(314) Intel claims that the documents it quotes from *"rebuts the Commission's claim"* that *"Intel did in fact penalize Dell when Dell began to source from AMD"*.[365] Intel refers to the arguments already mentioned in section d) above, namely that the drop in the amount in MCP rebates was the consequence of a general decrease in Intel's list (or "CAP") prices, of the decrease in the volume of Dell purchase from Intel

---

360 Intel submission of 17 March 2009. Deposition of [Dell executive], p. 123.

361 Intel submission of 17 March 2009. Deposition of [Dell executive], p. 124.

362 Intel submission of 17 March 2009. Deposition of [Dell executive], p. 127.

363 Email from [Intel executive] to [Dell executive] of 7 December 2004 entitled 'FW: dell'. Intel submission of 17 March 2009. Deposition of [Dell executive], exhibit 2112.

364 Intel submission of 17 March 2009. Deposition of [Dell executive], pp. 559 and 560.

365 Intel submission of 2 March 2009, p. 2, paragraph 1, point (iii).

and of the change in the mix of Dell's purchases from Intel, and was not a 'retaliation' against Dell.

(315) As described in recital (268), Intel's reaction to Dell's partial switch to AMD in 2006 has only a limited bearing on the assessment of conditionality in the relevant period between 2003 to 2005. The Commission's conclusion on the justifications for the drop in Intel rebates to Dell in 2006 following the partial Dell switch to AMD are described in detail in section d) above. Intel did not provide any additional substantive arguments in this respect.

(316) If anything, it is observed that Intel does not seem to contest the fact that its discounts to Dell dropped significantly. Furthermore, the Delaware depositions and associated exhibits confirm the Commission's conclusion described in recital (288) that a reduced CAP price applied to the entire industry did not provide Dell with a benefit equivalent to that of a rebate which Dell alone received. For instance, the deposition of [Dell executive] reads: "*Q. Is it better for Dell when Dell alone gets rebates as opposed to a price reduction for the entire industry? A. Yes.*" [366] In the same vein, in an email written in 2004, [Dell executive] pictured a general decrease of Intel's CAP prices as the worst possible scenario for Dell and one which would likely be the consequence of a broad Dell shift to AMD: "- *There is no way Intel can allow Dell to shift market shares to AMD – they have expensive fabs to keep filled. – Therefore they will do one of two things: *they will give incremental ECAPs/lower pricing to one of our competitors which we will have to WAPP* [Weighted Average Price Point – for Dell "to WAPP" means to lower its prices] *against, which will negate AMD goodness. * Or, they will* [...] *do industry price cuts across the board.*"[367]

(e) The exhibits of the depositions s ubmitted by Intel in fact contain contemporaneous evidence which confirm the Commission's findings

(317) As specified in recital (301), the exhibits to the depositions contain contemporaneous evidence which confirm the Commission's conclusion as regards Intel's conduct with regard to Dell. Only a few examples are illustrated in recitals (318) to (322).

(318) In an email to [Dell executive] and [Dell executive] of 31 December 2002, [Dell executive] wrote: "*My data indicates that we can expect* [[...] *money of* [...]*per quarter in Q1 and Q2, going higher in 2H03 to the extent that Hammer becomes a legit threat. An AMD play of any type would result in this dropping to* [...]*per*

366 Intel submission of 17 March 2009. Deposition of [Dell executive], p. 148.

367 Email from [Dell executive] to [Dell executive] of 16 February 2004 entitled '*REF0211508_RE:?*'. Intel submission of 17 March 2009. Deposition of [Dell executive], exhibit 10 027.

quarter. Intel can justify this through the fact that our selling 'comp' reduces the [...] *'meet comp' commitments. It would probably get back to* [...] *per quarter, which is where we think* [...] *is today.*"[368]

(319) In an email to [Dell executive], [Dell executive] and [Dell executive] of 13 January 2003, [Dell executive] wrote: "*Some cheatsheets items on potential Intel response to a Dell AMD play. MCP PROGRAM IS KILLED: * Intel eliminates the MCP program as we know it. It is redefined as a tactical ECAP program on limited SKUs. (...) * Intel will take some of our lost* [...] *money and gives it to our competitors*".[369] The same email estimates the lost [rebate] funds as ranging between [...]to [...]out of [...], [...] or [...] depending on the quarter.

(320) In an email to [Dell executive] of 21 March 2003, [Dell executive] wrote: "*Dell is clearly getting more 'MCP-class' money than* [...] *by virtue of our Intel-only status. The number is* [...]*% more, which has been floating depending on Intel price sheets AND* [...] *AMD shipments. This is in synch with what* [Intel senior executive] *has constantly communicated as our advantage. It's perfectly reasonable to expect that Dell MCP drops* [...]*% in we went for an AMD solution*"[370]

(321) In an email to [Dell executives] of 27 June 2003, Mr. [Dell executive] wrote: "*No matter how many AMD systems we win or lose, the net effect to Dell will be negative by >*[...] *in 2004.* [Intel senior executive] *will cut MCP.*[...]"[371]

(322) In an email to [Dell executive] of 12 February 2004, [Dell executive] wrote: "*In general we believe there is a maximum* [...]*% reduction Intel would make to our existing or planned MCP consideration. Working from there we build a "request" formal that we could use back with Intel to justify future support. The request balanced with the* [...]*% reduction, so we are somewhat confortable with the* [...]*% assessment. From a legal perspective the question is still open as to how*

---

368 Email from [Dell executive] to [Dell executive] and [Dell executive] of 31 December 2002 entitled '*REF0086726_FW:AMD ROADMAPS*'. Intel submission of 17 March 2009. Deposition of [Dell executive], exhibit 1333.

369 Email from [Dell executive] to [Dell executive], [Dell executive] and [Dell executive] of 13 January 2003 entitled '*REF0215602_COMPETITIVE ANALYSIS*'. Intel submission of 17 March 2009. Deposition of [Dell executive], exhibit 1335.

370 Email from [Dell executive] to [Dell executive] of 16 February 2004 entitled '*REF004158_FYI*'. Intel submission of 17 March 2009. Deposition of [Dell executive], exhibit 1306.

371 Email from [Dell executive] to [Dell executive], [Dell executive] and [Dell executive] of 27 June 2003 entitled '*RE: AMD*'. Intel submission of 17 March 2009. Deposition of [Dell executive], exhibit 2061.

aggressively Intel would respond. Their fear being any reduction too significant could be interpreted as an anti-competitive action toward AMD."[372]

2.3.4.4. Conclusion on facts

(323) In light of the consistent contemporaneous evidence from within Intel and Dell described above as well as the company statement provided by Dell, it is concluded that the level of Intel MCP rebates to Dell in the period between December 2002 and December 2005 was conditional upon Dell remaining exclusive with Intel. The evidence in question demonstrates that during the period in question:

- Dell had internal discussions about breaking its Intel exclusivity and starting to engage with AMD.
- 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.
- Intel made clear to Dell, including at the very highest levels, that its MCP payments would significantly diminish if Dell were to discontinue its exclusivity with Intel. Dell indeed assumed that this would be the case.
- Dell feared that Intel would move the MCP advantage to one of its competitors.
- as a result of its remaining exclusivity with Intel, Dell's MCP rebate was not cut but in fact increased.

(324) It is noted that Intel has not directly addressed the evidence adduced by the Commission in this section. Moreover, it is concluded that Intel's claim that the level of the MCP rebates during the period in question was not conditional on exclusivity is not plausible. Intel's main factual argument relies on one piece of non-contemporaneous evidence ([Dell executive]'s testimony), which when assessed for its actual content and viewed in the light of the context of that evidence, Dell's subsequent submission to the Commission and the significant amount of contemporaneous evidence at the Commission's disposal, cannot be considered as supporting Intel's contentions.

---

372 Email from [Dell executive] to [Dell executive] of 12 February 2004 entitled '*REF0097005_MCP Impact.* Intel submission of 17 March 2009. Deposition of [Dell executive], exhibit 2078.

2.4 HP

2.4.1. Introduction

(325) In 2005, Intel specified that *"Hewlett Packard ("HP") is one of Intel's ten largest direct customers based on overall CPU purchase volumes."*[373] HP and Compaq merged in 2002.[374] Between 2002 and 2005, HP's overall computer market shares - including desktops, notebooks and servers - varied between [...]% and [...]% annually.[375]

(326) This section will first describe HP's consideration of AMD products in 2002 (section 2.4.2). It will then detail the amount and duration of Intel's rebates to HP under the HPA1 and HPA2 agreements (section 2.4.3). Section 2.4.4 describes the conditions attached to the HPA1 and HPA2 agreements, and includes an assessment of Intel's arguments concerning the conditionality of the rebates. Section 2.4.5 provides conclusions on these issues.

2.4.2. HP's consideration of AMD

(327) HP states that on 19 August 2002, it launched an AMD-based business desktop in the United States - the Compaq D315.[376] HP was the first large OEM to offer a business desktop with an AMD x86 CPU. The launch of this product by HP derived from a demand from IT managers from the United States for an AMD-based desktop from a top tier OEM. According to an HP internal memo, 343 IT managers from the United States had petitioned for an AMD-based desktop from a top tier OEM. In addition, AMD-based corporate desktops had already won several big tenders (EDF, Siemens AG, City of Berlin) in the EMEA region.[377][378]

(328) Whilst the D315 was "*targeted at SMB* [Small and Medium Business segment]", it was also deemed "*suitable for enterprise deployments*"[379] and "*ready to launch in*

---

373 Intel submission of 30 June 2005, p. 1.

374 The merger was approved by the Commission on 31 January 2002, SG (2002) D/228300, Case No. COMP/M.2609 – HP/COMPAQ. HP stated that *"HP and Compaq agreed to merge in September 2001 and the merger eventually completed in May 2002."* HP submission of 23 December 2005, answer 2.10(b).

375 Gartner data, Top 10 OEMs' Market Shares. Extracted on 27 May 2008.

376 HP submission of 23 December 2005, answer 2.12 and Appendix 12.

377 HP submission of 23 December 2005, [HP executive] deposition, Exhibit 14, pp. 11-12.

378 The Commission uses the reference terms HP used to distinguish between the annexes to its submission of 23 December 2005 (Appendices) and the annexes to the [HP executive]deposition (Exhibits) submitted together with HP submission of 23 December 2005.

379 In HP's vocabulary, non SMB corporate customers are known as "enterprise" customers. The corporate desktop segment is therefore divided in two subsegments: SMB and enterprise.

all regions summer 2002" including *"Americas, EMEA and Asia Pacific"*.[380] HP was committed "*to ship* [...] *units in the first 12 months with potential* [...] *additional upside*".[381]

(329) To coincide with its release of the D315, HP published a press release on 19 August 2002 that was also referred to in the Wall Street Journal. In this press release, [HP Executive] announced that [HP Executive]company had received "*inquiries from large companies about Athlon based machines*" and stated that HP "*didn't rule out the possibility that H-P might use Hammer, too* [the next generation of AMD x86 CPUs] *in some machines.*"[382] The press release also stated that HP considered that AMD's new architecture for PCs and servers ('*Hammer*') had "*very interesting performance and cost attributes*"[383] and was considered to be "*a disruptive product to Intel*".[384]

(330) HP specifies that prior to the launch of the D315 in August 2002, it "*had been in negotiations with Intel to secure a block rebate agreement.*"[385] HP then highlights the fact that "[s]*hortly after HP's 19 August 2002 launch of the AMD-based D315, Intel ceased negotiations on a rebate deal for HP BPC* [HP's business desktop business unit]."[386]

(331) In addition, HP states that following the launch of the D315, "*Intel made a request of a senior HP executive to have* [...]"[387] HP goes on to state that it "*believes that this request was made in the days immediately following 19 August 2002 - the date on which HP launched its D315 business desktop product* (...) *To the best of HP's knowledge and belief, this request was made by* [senior executive]*of Intel; it is possible that* [Intel senior executive]*was also on the call when this request was made. Again to the best of its knowledge, it believes that the request was made of* [HP executive]."[388] As regards the reasons for the request, HP states that it "[...]"[389] (see recital [...] above).

---

380 HP submission of 23 December 2005, [HP executive]deposition, Exhibit 14, p. 14.

381 HP submission of 23 December 2005, [HP executive]deposition, Exhibit 14, p. 14.

382 HP submission of 23 December 2005, Appendix 12.

383 HP submission of 23 December 2005, [HP executive]deposition, p. 67 and Exhibit 10, p. 2.

384 HP submission of 23 December 2005, [HP executive]deposition, p. 70 and Exhibit 10, p. 9.

385 HP submission of 23 December 2005, answer 2.13.

386 HP submission of 23 December 2005, answer 2.15.

387 HP submission of 23 December 2005, answer 2.16.

388 HP submission of 24 April 2006, pp. 1-2.

389 HP submission of 24 April 2006, p. 2.

(332) As regards what Intel refers to as the '[...] incident',[390] Intel states that [...], [...],[391] and that the incident merely reflected the strain in the personal relationship between [...]and [...]. According to Intel, "*the* [...]*incident reflects the fact that in the business world, as in other walks of life, some individuals do not get along well. Such friction is a matter for human resources managers, and not for the competition laws.*"[392]

(333) It is noted that Intel's request to [...] is not in itself part of the abusive conduct identified in this Decision. Nevertheless, the incident provides a revealing insight into the nature of Intel's relationship with HP as well as Intel's reaction to HP's launch announcement of 19 August 2002. Furthermore, the timing of the event shows the extent of Intel's sensitivity to HP entertaining more than occasional business transactions with AMD. The strength of Intel's reaction, as well as the fact that it was initiated at the highest level in Intel's hierarchy also give relevant background information as to Intel's readiness to put pressure on HP. It is noted that Intel did not deny the event in its Reply to the 26 July 2007 SO.

(334) HP highlights that following the cessation of negotiations on a HP-Intel business desktop rebate deal (see recital (330)), "[n]*egotiations* (...) *were subsequently resumed* (...) *which resulted in the HPA1 agreement*".[393]

(335) Section 2.4.3 describes Intel's HPA1 and HPA2 agreements with HP.

2.4.3. Intel rebates to HP

(336) This section describes the HP Alliance Agreement (HPA), and in particular the first two generations of this agreement, referred to as HPA1 and HPA2 (see sections 2.4.3.1- 2.4.3.2). It should be noted that HP highlights that "*these bPC* [business PC] *block rebates obviate the need for HP's bPC unit to negotiate individual ECAP deals for business desktops products covered by the block rebate during every cycle of the period covered*",[394] and that "*the bPC block rebate agreement [HPA agreements] only relate to rebates, HP purchase volumes and marketing but do not*

---

390 Intel Reply to the 26 July 2007 SO, p. 130, paragraph 341.

391 Intel Reply to the 26 July 2007 SO, p. 129, paragraph 339.

392 Intel Reply to the 26 July 2007 SO, p. 130, paragraph 341.

393 HP submission of 23 December 2005, answer 2.18.

394 HP submission of 6 August 2004, p. 10, answer 11.8.

otherwise govern the terms on which Intel supplies x86 microprocessors to HP."[395] In this regard, HP specifies that "[...]",[396] and that "[...]".[397]

(337) [HP specifices that its commercial discussions with Intel should be viewed in the context of the financial position of its desktop business at the time] and (ii) HP's merger with Compaq, which was completed in May 2002[398] - at this time, HP states that it "*was giving much thought to how the merger would impact its relations with its partners, including Intel and AMD.*"[399]

2.4.3.1. HPA1

(338) HP outlines that HPA1[400] was "*primarily negotiated by* [HP Executive], [HP Executive] *and* [HP Executive], *for HP, and by* [Intel executives], *for Intel.* [HP Executive], *and* [Intel senior executive], *at the time Intel's* [...], *were also directly involved in the negotiations.*"[401] HPA1 was concluded at the end of 2002, for a year, starting on 1 November 2002, which is the start of HP's fiscal year.[402] Intel outlines that "*HPA had a term of twelve months*" but that "*either party to the agreement was free to withdraw from the agreement on 30 days notice.*"[403]

(339) Under the agreement, Intel paid HP USD [...] rebate per quarter [...].[404] Intel confirms that "*HP received its* [...] [...] *rebate in each of its* [HP's] *fiscal quarters in 2002.*"[405] Therefore, over the period 1 November 2002 to 31 October 2003, Intel paid HP [...]under HPA1.

(340) Upon the expiry of HPA1 on 31 October 2003, HP and Intel had to decide whether to [...], or remain in the framework of an alliance agreement, that is to say, extend HPA1.

---

395 HP submission of 6 August 2004, p. 10, answer 11.9.

396 HP submission of 6 August 2004, p. 9, answer 11.1.

397 HP submission of 6 August 2004, p. 10, answer 11.9.

398 HP submission of 23 December 2005, answer 2.10.b.

399 HP submission of 23 December 2005, answer 2.10.b.

400 Intel/HP Commercial Desktop Initiative [HPA1 agreement], HP submission of 6 August 2004, Annex 3, pp. 3 and 4.

401 HP submission of 23 December 2005, answer 2.1.

402 Intel submission of 30 June 2005, pp. 1-2 and footnote 1.

403 Intel submission of 30 June 2005, p. 2.

404 HP submission of 4 June 2004, p. 2, footnote 1 explains that *"HP's fiscal quarters are: 1 November – 31 January (Q1); 1 February – 30 April (Q2); 1 May – 31 July (Q3); and 1 August – 31 October (Q4)."*

405 Intel submission of 30 June 2005, p. 2.

(341) Intel and HP continued HPA1 on a [...]for seven months and then signed a new one-year alliance agreement: HPA2. Intel submitted that "[a]*t the end of the 12 month term of HPA* [HPA1], *the parties, by mutual agreement, continued the agreement on a* [...]*basis. HP received rebates* [...], *from November 2003 until May 2004.*"[406] Over the period November 2003 to May 2004, Intel therefore provided HP with USD [...]in rebate payments under HPA1.

2.4.3.2. HPA2

(342) The HPA1 business desktop alliance agreement and its six-month extension on a monthly basis until May 2004 were followed by a similar alliance agreement between Intel and HP, called HPA2.[407] In this regard, Intel specifies that "*in June 2004, HP approached Intel about entering into a new alliance agreement, again, requesting meet comp discounts for its commercial desktop business, based on competitive pricing that it received from AMD. After a series of negotiations, the parties entered into the HP Alliance Agreement 2 ("HPA2").*"[408]

(343) HP specified that HPA2 was negotiated by the same HP and Intel executives who negotiated HPA1 and that similar to HPA1, it was also for a one-year term.[409]

(344) The payments made by Intel to HP under HPA2 were higher than those received under HPA1. Intel confirmed that: "*Intel committed to provide HP, based on volume estimate information provided by HP, with* [...]*per quarter.*"[410] Intel also specified that "[a]*dditionally, the parties agreed, based on estimated volume targets and growth projections in emerging markets provided by HP, that Intel would grant to HP an additional credit of* [...]*if HP shipped a total volume of* [...]*units for business desktop systems, in accordance with HP's own volume target by the close of the fourth quarter (defined as 3/1/05-5/31/05). Intel could grant the* [...]*in quarterly increments* [...] *per quarter), if HP achieved a quarterly run rate, on a linear basis, that corresponded to that unit figure.*"[411]

(345) Intel confirmed that "*HP received its USD* [...]*rebate for the first portion of the agreement (June 2004-August 2004) in September 2004. HP also received USD* [...], *representing an accrual of half of the USD* [...]*payment, as well as its USD*

---

406 Intel submission of 30 June 2005, p. 2.

407 HPA2 agreement, HP submission of 6 August 2004, Annex 3, pp. 1 and 2. Note that the agreement has no title, and only mentioned *'Intel/HP Confidential'* is specified on the top of the first page.

408 Intel submission of 30 June 2005, p. 2.

409 HP submission of 23 December 2005, answer 3.1.

410 Intel submission of 30 June 2005, pp. 2-3.

411 Intel submission of 30 June 2005, p. 3.

[...]*rebate for September – November 2004, in December 2004.*"[412] HP similarly confirmed that it received USD [...]of rebates for each corresponding quarter of HPA2.[413]

2.4.3.3. Summary of Intel payments to HP under HPA1 and HPA2

(346) The following tables provide a quarterly overview of Intel HPA payments to HP in USD million.[414]

Table 8 - HPA payments received from Intel by HP during HPA1

Period	Nov 02 - Jan 03	Feb 03 - Apr 03	May 03 - Jul 03	Aug 03 - Oct 03	Nov 03 - Jan 04	Feb 04 - Apr 04	May 04
Payments	[...]	[...]	[...]	[...]	[...]	[...]	[...]

Table 9 - HPA payments received from Intel by HP during HPA2

Period	Jun 04 - Aug 04	Sept 04 - Nov 04	Dec 04 - Feb 05	Mar 05 - May 05
Payments	[...]	[...]	[...]	[...]

Source: HPA1 and HPA2 and evidence outlined in recitals (344) to (345) above.

(347) While this Decision is limited to HPA1 and HPA2 with regard to HP, it should be noted that subsequent to HPA2, Intel and HP have already entered into HPA3,[415] the third generation of the alliance agreements for business desktops.

2.4.4. Conditionality of Intel rebates to HP

2.4.4.1. Evidence from HP

(348) In a reply to a request for information pursuant to Article 18 of Regulation (EC) No 1/2003concerning the operation of the HPA1 rebates, HP stated that: "*HPA1 was subject to a number of conditions, only some of which appear in the HPA1*

412 Intel submission of 30 June 2005, p. 3, footnote 6.

413 HP submission of 11 August 2006, p. 9, answer 12 and HP submission of 6 August 2004, answer 11.4.

414 It should be noted that while rebates under HPA1 were given for each HP fiscal quarter, as explained in footnote 404 above, rebates under HPA2 were paid for HPA2 quarters that were not linked to HP's fiscal quarters. The month of May 20004 appears alone because it is a bridge between the last full fiscal quarter of application of HPA1 and the first quarter of application of HPA2.

415 HPA3 agreement, Intel/HP Confidential, HP submission of 23 December 2005, Appendix 5.

agreement."[416] HP specified that "*Intel granted the credits subject to the following unwritten requirements:*

a) that HP should purchase at least 95% of its business desktop system from Intel;

b) that HP's distribution (...) *model for AMD-based business desktops should:*

(i) direct HP's AMD-based business desktops to SMB [Small and Medium Business] *and government, educational and medical (GEM) customers rather than to mainstream (or "enterprise") business customers; and*

(ii) preclude HP's channel partners from stocking the AMD-based business desktops, so that these desktops would only be available to customers by ordering them from HP (either directly or via HP channel partners acting as sales agent). This is known within HP as a direct/"top config" go-to-market model;

c) that HP would defer the launch of its AMD-based business desktop in the EMEA [Europe, Middle East and Africa] *region by six months.*"[417]

(349) HP indicated that despite the fact that the conditions mentioned in recital (348) were unwritten, Intel had made it clear to HP, including at the highest level of the two companies, that they were integral conditions to the HPA1 agreement: "*unwritten conditions (...) were stated to be part of the HPA1 agreement by* [Intel executive]*r,* [Intel executive] *and* [Intel senior executive] *in meetings with HP during the negotiations.*"[418]

(350) HP also submitted that HPA2 "*was subject to the same unwritten conditions*"[419] as those referred to in the recitals above and that *"it was stated by Intel to HP during the negotiations that the HPA2 rebates were conditional on HP complying with these unwritten conditions.*"[420] Moreover, HP specified that "[a]*s under the HPA1 agreement,* [HP Executive] [of HP] *recalls that during these meetings* [HP Executive]*and* [Intel executive]*discussed HP's compliance with the 95% Intel-alignment requirement.*"[421]

---

416 HP submission of 23 December 2005, answer 2.1.

417 HP submission of 23 December 2005, answer 2.5.

418 HP submission of 23 December 2005, answer 2.6.

419 HP submission of 23 December 2005, answer 3.1.

420 HP submission of 23 December 2005, answer 3.1.

421 HP submission of 23 December 2005, answer 3.3.

(351) HP supported those statements by submitting that *"As to documentary evidence that HP has been able to identify (...) shows the existence of the unwritten conditions.* [sic]"[422] This evidence is presented in recitals (352) to (360).

(352) In an email dated 14 July 2002, [HP Executive], a senior HP executive, summarised the conditions attached to the deal in negotiation. [HP Executive]wrote:

"HP commitments to Intel

1. For the duration of the contract, HP will purchase at least 95% (based upon an annual average) of its IA-32 compatible processors for commercial desktop PC products from Intel.

2. If HP sells commercial desktop PC products using a non-Intel IA-32 compatible processor then:

- these products will not be sold using the EVO brand.

- these products will be sold only direct or in response to a specific RFP. [Request for Proposal]

- these products will be positioned for the SMB market [Small and Medium sized Business].

(...)

3. If Intel can reasonably demonstrate that HP is not fulfilling the above commitments then a joint-HP Intel executive escalation session will be held to review and discuss this disagreement. If the HP and Intel executives agree that HP has not met its requirements, HP will be given a reasonable time period to cure the problem. If HP fails to remedy the problem then Intel has the option to terminate the agreement. If this termination occurs, no further payment will be due to HP beyond the quarter prior to which the unremedied problem occurred. Payments made to HP for quarters after this point will be refunded to Intel."[423]

(353) Although the e-mail quoted in recital (352) is dated a few months before the conclusion of HPA1, HP explained that the correspondence that had taken place in summer 2002 related to the same agreement. According to HP, the 95% alignment requirement and the AMD distribution model were expected to be a requirement of a block rebate deal that was to be negotiated between Intel and HP early in the summer of 2002 and while that agreement was in itself not signed, these conditions were carried over into HPA1.[424]

---

422 HP submission of 23 December 2005, answer 2.7.

423 E-mail from [HP Executive]to [HP Executive]of 14 July 2002 entitled "*Intel Deal Summary*": HP submission of 23 December 2005, Appendix 10, pp. 2 and 3.

424 HP submission of 23 December 2005, answer 2.7.a.

(354) HP also refers to a subsequent internal e-mail from [HP Executive]to [HP Executive] and other HP executives, in which [HP Executive]wrote: "*PLEASE DO NOT... communicate to the regions, your team members or AMD that we are constrained to 5% AMD by pursuing the Intel agreement.*"[425]

(355) Intel outlines that "[t]*he agreement provided for the parties to hold meetings to discuss opportunities and issues arising from the agreement at the end of each quarter. At these meetings, the parties would review HP sales out information and Intel sales data*".[426] HP also outlined that there were "*monthly senior management meetings*" to discuss the HPA1 agreement and that "*during these meetings* [HP Executive] *and* [Intel executive] *discussed HP's fulfilment of the 95% Intel-alignment requirement.*"[427]

(356) An internal HP presentation of 24 October 2002 relating to the terms and conditions of HPA1 states that HP will put "*restrictions on the D315 product*", and specifies a "[d]*elay in regional launches (from August 2002) - LA/AP* [Latin America/Asia Pacific] *2-3 months - Europe 6 months*".[428]

(357) In December 2002, a few days after the signature of HPA1, [HP executive]of HP announced to [HP executive]team: "*D315 launch date in EMEA is TBD* [to be determined], *not in 1H'03* [first semester 2003] *for sure.* (...) *Request AMD to discontinue proactive sales to enterprise customers until then.*"[429]

(358) An internal HP presentation from 2004 also relates to the D315 launch. It specifies a "[d]*irect-only delayed EMEA launch despite being* [an important AMD market]", and "*AMD* -[...] *forecasted - direct only terms (*[...] *had been forecasted by regions if direct & indirect).*"[430]

---

425 E-mail from [HP Executive]to [HP Executive]and others of 15 July 2002 entitled "*Negotiations Update*". HP submission of 23 December 2005, Appendix 11. See also Intel Reply to the 26 July 2007 SO, Annex 150.

426 Intel submission of 30 June 2005, p. 2.

427 HP submission of 23 December 2005, answer 2.8.

428 HP submission of 23 December 2005, [HP executive]deposition, Exhibit 19, p. 1.

429 E-mail from [HP executive]to [HP executive]and others dated 28 December 2002 entitled '*D315 Launch in EMEA*'. HP submission of 23 December 2005, Appendix 14.

430 HP internal presentation entitled '*Managing Intel and AMD to maximize value to BPC*', Final draft, slide 6, HP submission of 23 December 2005, Appendix 15, p. 6. It should be noted that although the exact date of this presentation is not certain, on the basis of its content - in particular that HP was considering its strategy for the second half of 2004 and beyond - it can be established that it was prepared sometime during the first half of 2004 and before the conclusion of HPA2 in July 2004.

(359) On 3 September 2004, [HP executive] asked [HP executive] about the manner in which AMD-based commercial desktops could be commercialised in the EMEA: "[...], *Quick question. Instead of asking* [...] *to add localized pavilion for some ISE countries (Poland, Turkey..), can we consider using the commercial AMD line up inside the channel in those countries or do you believe we at least need to change the Bezel and call it Presario (Which will mean additional complexity and therefore resources?) Alternatively I could let 2/3 countries to try (To see if it works at least), and let Intel react if they discover it?* [...]."[431]

(360) On the same day, [HP executive]replied: "*You can NOT use the commercial AMD line in the channel in any country, it must be done direct. If you do and we get caught (and we will) the Intel moneys (each month) is gone (they would terminate the deal). The risk is too high.*[...]."[432] [HP executive]then informed [HP executive]of his sales team that HP EMEA could not make available its AMD-based Presario through its channel partner: "*Cannot do what we talked about* [...]".[433]

2.4.4.2. Intel's arguments on the alleged absence of conditionality

(361) Intel alleges that the HPA agreements were not subject to any of the binding conditions described in sub-section 2.4.4.1.

(362) Intel's arguments to this effect are described in this section. Section a) addresses Intel's horizontal argument concerning the relevance of evidence preceding the signature of HPA1. Sections b) and c) address, respectively, the market share condition on AMD-based HP products (condition a) in recital (348)) and the conditions restricting the sales and marketing conditions of AMD-based HP products (conditions b) and c) in recital (348)).

(363) Intel also asserts that the Commission alleged that the HPA agreement[s] were conditional upon HP not selling AMD-based desktop PCs under the Evo brand.[434] This characterisation of the Commission's preliminary conclusions in the 26 July 2007 is incorrect. The Commission presented its preliminary conclusions on the conditionality of Intel's rebates to HP in paragraph 195 of the 26 July 2007 SO.

---

431 E-mail of 3 September 2004 from [HP executive]to [HP executive]entitled 'AMD', HP submission of 23 December 2005, Appendix 19.

432 E-mail of 3 September 2004 from [HP executive]to [HP executive]entitled 'RE: AMD', HP submission of 23 December 2005, Appendix 19.

433 E-mail of 6 September 2004 from [HP executive]to [HP executive]entitled 'FW: AMD', HP submission of 23 December 2005, Appendix 19.

434 Intel Reply to the 26 July 2007 SO, paragraph 331.

These conclusions, and in any event the conclusions drawn in this Decision, do not refer to any condition regarding branding.

(364) Before addressing Intel's arguments about the alleged absence of conditionality in the HPA agreements, it is noted that Intel did not provide any specific comment on or explanation of HP's submission quoted in recital (348). In its Reply to the 26 July 2007 SO, Intel ignored the fact that HP had submitted clear statements on the conditionality of the HPA rebates.

(365) When the Commission questioned Intel on this matter in the Oral Hearing, after HP had again confirmed the accuracy of all statements it had submitted to the Commission, Intel stated that the discrepancy between its views and HP's statements was likely to be due to a lack of common understanding of the actual conditions of the agreements.

(366) This position is unconvincing. Indeed, it is not plausible that large, multinational companies such as Intel and HP would enter into agreements worth at least USD [...]per year without knowing exactly what the conditions associated with such agreements were. In this regard, HP's explanations of the unwritten conditions are credible, not least because of the contemporaneous evidence adduced. Furthermore, Intel's interpretation is not consistent with HP's statement that Intel's highest executives had specified to HP in person that the unwritten conditions formed part of the agreements.[435]

a) Intel's horizontal argument on the relevance of evidence preceding the signature of HPA1

(367) In several instances, Intel has made the argument that evidence which predates the conclusion of HPA1, in particular evidence preceding 19 August 2002 is irrelevant for the assessment of the actual provisions of HPA1.[436] Intel argues that HPA1 was a different arrangement from the one in negotiation during the months of July-August 2002. This is because in August 2002, Intel rejected the arrangement which was then in negotiations.[437]

(368) This argument by Intel is contradicted by several pieces of evidence in the Commission's file. It is noted that HP made it clear that the HPA1 agreement was the natural successor of the rebate agreement which was in negotiations in July-August 2002 (see recital (353)). Moreover, it carried over all the relevant conditions thereof: "*the 95% alignment requirement and the AMD distribution*

---

435 See recital (349).

436 See in particular Intel Reply to the 26 July 2007 SO, paragraphs 319, 321, 332, 352-354.

437 Intel Reply to the 26 July 2007 SO, paragraph 319.

model were to have been a requirement of a three year block rebate deal negotiated between Intel and HP early in the Summer of 2002 (...). [...]"[438] HP also submitted that *"*[t]*hese negotiations* [with Intel] *resulted in the HPA1* [HP Alliance 1][439] *agreement, containing the restrictions described above* [restrictions that would have been part of the failed agreement negotiated over summer 2002]".[440]

(369) HP's depiction of the events is supported by several pieces of contemporaneous evidence, as illustrated in recitals (370) and (371).

(370) In an e-mail dated 14 July 2002, [HP executive], a senior HP executive, described the conditions of the summer 2002 agreement in detail.[441] The conditions concerning Intel's market share and the distribution model for AMD-based products were almost identical to the unwritten condition of the HPA agreement as described by HP (see recital (348)). As the two sets of conditions are essentially the same, they confirm that the negotiated summer 2002 agreement and the formally concluded HPA1 agreement are the same in this respect.

(371) A contemporaneous HP presentation of 17 October 2002 entitled *'intel update'* is also relevant. That presentation explains the link between the negotiations over summer 2002 and autumn 2002 eventually ending with the conclusion of the HPA1 agreement, and also demonstrates that they relate to the same agreement. Slide 10 of the presentation describes: *"History: 1. HP reached agreement at the term-sheet level in mid July with Intel and AMD (...); 2. Intel stalled contract negotiations until HP-AMD launch; 3. Intel reacted very negatively to HP-AMD launch and terminated negotiations."*[442] 'History' in this context refers back to the negotiations over summer 2002 and explains why those negotiations were terminated: because of HP launching an AMD-based product. Slide 11 explains the status at the time of the presentation, that is to say mid-October 2002: *"Status: Intel negotiations have resumed."* and *"Key Messages: (...) Some tensions may have been created between the two companies around the HP-AMD launch – HP may have "pushed the envelope" with the launch, but at the same time Intel had stalled closing on an agreement when HP launched the product."*[443] This shows that a few months after

---

438 HP submission of 23 December 2005, answer 2.7.

439 It should be noted that the first HP-Intel commercial desktop alliance agreement was originally abbreviated to HPA and it was only subsequent to the conclusion of the second generation of these alliance agreements, HPA2, that HPA began to be referred to as HPA1.

440 HP submission of 23 December 2005, answer 2.18.

441 See recital (352).

442 HP presentation of 17 October 2002 entitled 'intel update', slide 10. Exhibit 12 to [HP executive]Deposit, submitted with HP submission of 23 December 2005.

443 HP presentation of 17 October 2002 entitled 'intel update', slide 11. [HP executive]Deposit, Exhibit 12, submitted with HP submission of 23 December 2005.

the negotiations were stalled ('History'), HP and Intel resumed the same negotiations from the point they were interrupted. In other words, the presentation bridges the two negotiations in time by demonstrating their identical content and why there was a break.

(372) On the basis of the elements set forth in recitals (367) to (371), it is concluded that HP's submissions and contemporaneous documents demonstrate that HPA1 was essentially the same block rebate agreement as the agreement negotiated during the summer of 2002 between Intel and HP, but which was not formally agreed until HPA1 was signed at the end of 2002.[444] In particular, it included the same conditions on the percentage and marketing conditions of HP AMD-based corporate desktops as the ones that were already agreed in mid July 2002.

b) Intel's arguments on the alleged absence of a 95% MSS condition

(373) Intel claims that the HPA agreements contain no binding MSS [Market Segment Share] condition (of 95%).[445] According to Intel, HP spontaneously offered to Intel that it would fulfil the MSS condition in order to extract higher rebates from Intel,[446] but Intel rejected such conditions from the outset[447] because of business and antitrust concerns.[448]

(374) The relevance from a legal point of view of whether HP or Intel first came up with the suggestion of the 95% MSS condition for the finding of an abuse of a dominant position according to EC law will be discussed in section VII.4.2.2.3.b) below. This section deals with the question of whether the HPA negotiation process, and in particular the discussions on MSS conditions between the parties, support Intel's factual argument that it rejected such conditions.

(375) The case file, including the documents quoted by Intel, does not contain definitive evidence as to whether HP or Intel first came up with the suggestion of the 95% MSS condition. Intel has not provided any evidence to support its argument apart from stating that HP "*sent Intel a draft contract proposing a three-year HPA1 agreement under which Intel was to provide HP rebates totalling approximately* [...], *and HP was to commit to buy 95% of its microprocessors for its corporate desktops PCs from Intel.*"[449] Intel did not provide the Commission with a copy of

---

444 Intel submission of 30 June 2005, pp. 1-2.

445 Intel Reply to the 26 July 2007 SO, paragraph 46.

446 Intel Reply to the 26 July 2007 SO, paragraph 293.

447 Intel Reply to the 26 July 2007 SO, paragraph 293.

448 Intel Reply to the 26 July 2007 SO, paragraph 306.

449 Intel Reply to the 26 July 2007 SO, paragraph 293.

this draft contract, nor of any contemporaneous evidence which would support the notion that this draft contract was the first instance when the 95% MSS condition was introduced by the negotiating parties.

(376) Even if Intel's assertion that the 95% MSS condition appeared for the first time in this contract (that is to say that it was originally HP's idea) were correct, for the argument to have any merit, Intel would still have to demonstrate that it genuinely and effectively rejected this condition and that, as a consequence, the condition was eventually not implemented in any manner (written or unwritten). Intel has failed to demonstrate this. In fact, none of the documents in the file, including those provided by Intel, support Intel's assertion that it rejected a 95% MSS condition, whichever party first introduced it in the HPA1 negotiations.

(377) The documents provided by Intel, as well as all other contemporaneous evidence, show that Intel's only concern about the arrangement was the extent (in terms of time and volume) of the rebates to be granted to HP in order to get the deal. As is described in an internal HP email dated 15 July 2002, that is to say(about 5 months before the final signature of the agreement), the only open question before the signature of the agreement was a specific pricing arrangement: "*We are closed with Intel on all but one term* [...]."[450]

(378) The same email also makes clear that the Intel agreement, which was settled apart from the question of the specific pricing arrangement referred to in recital (377), included a 95% MSS condition for Intel: "*PLEASE DO NOT ... communicate to the regions, your team members or AMD that we are constrained to 5% AMD by pursuing the Intel agreement.*"[451]

(379) The Commission takes note of Intel's argument that the message mentioned in recital (378) "*could only reflect HP's internal decision to hold AMD to the 5% level because of HP's preference to focus its corporate desktop product line on Intel-based platforms so long as it could extract a favourable price from Intel.*"[452] However, this argument is unconvincing. Indeed, the language used in the message, in particular the words "*constrained (...) by pursuing the Intel agreement*" make no sense if it concerned only an internal HP preference. It is also further noted that HP itself, which is the best placed to interpret language used in its own

---

450 Email from [HP executive]to [HP executive]and others of 15 July 2002 entitled "*Negotiations Update*". HP submission of 23 December 2005, Appendix 11. See also Annex 150 to Intel Reply to the 26 July 2007 SO.

451 Idem.

452 Intel Reply to the 26 July 2007 SO, paragraph 321.

documents, presented this document as evidence of the existence of the 95% MSS condition.[453]

(380) In support of the argument that it rejected an unsolicited 95% MSS condition offer, Intel provided the Commission with contemporaneous documents in which it allegedly expressed "*antitrust concerns*" over the agreement "*from the outset*".[454] Intel suggests that these "*antitrust concerns*" were the reason for Intel's rejection of the conditions offered by HP, which eventually led to the signature of a different agreement which contained no written or unwritten 95% MSS condition.[455]

(381) However, the "*antitrust concerns*", as they appear from the documents in question,[456] do not relate to the potential unlawfulness of the conditionality of the rebates. Rather, they relate to Intel's alleged concern that its rebates may be construed as pricing below the offer of a competitor.[457] An e-mail dated 15 October 2002 from Intel's lawyers to HP's lawyers summarises this very clearly: "*it may be useful to provide some explanation of the principal legal concerns, in order to enable HP to provide the additional information that may support the financial commitment that it is seeking. Because HP has been unable to disclose the prices, products, and volumes that AMD has offered (even within ranges), Intel has had to extrapolate the potential magnitude of AMD's offer, taking into account some reasonable estimate of the relevant processors, prices, and volumes. Based on reasonable estimates regarding the contestable volume of microprocessors over the relevant period and the known differences between Intel's and AMD's prices and processors, it appears that the financial support that HP is seeking from Intel would creates* (sic - create) *a substantial risk that Intel would beat AMD's offering rather than simply meeting it.*"[458]

---

453 HP submission of 23 December 2005, answer 2.7.a and Appendix 11.

454 Intel Reply to the 26 July 2007 SO, paragraphs 305 and 306.

455 Intel Reply to the 26 July 2007 SO, paragraphs 306 and 319.

456 The Commission notes that Intel redacted many of the documents in question (for instance annexes 138, 139, 140, 143 and 146 of the Reply to the 26 July 2007 SO) and claimed Legal Professional Privilege over the redacted parts. It seems that at least part of the sections redacted would not be covered by the Legal Professional Privilege under Community Law, as they were written by in-house counsels or lawyers that are not admitted to practise in the EU. Intel did not provide any specific justifications for its claims. Because of the magnitude of the redacted sections, the Commission lacks important parts of the documents in question, which are critical to understand their precise scope.

457 In certain instances in the law of the United States of America, pricing below costs is possible for a company with market power, to the extent that the company's offer only matches the offer of a competitor, but does not beat it. The Robinson Patman Act is an example of such a legal provision.

458 Email from [Intel executive] to [Intel executive] of 15 October 2002 entitled "*"Meet Comp" Issues*". Annex 145 to Intel Reply to the 26 July 2007 SO.

(382) It is further noted that Intel's assertion in paragraph 309 of the Reply to the 26 July 2007 SO that: "*It is not seriously subject to dispute that Intel sought information from HP to ensure that Intel did not price below cost*" is a misrepresentation of facts. The documents Intel provided only show that Intel was seeking information that would help it represent that it was not pricing below AMD's offer, that is, the competitive offer. This is different from not pricing below costs because AMD's price offer was zero, which is well below any cost benchmark.

(383) Accordingly, Intel's "*antitrust concerns over the deal*", if they were genuine, had nothing to do with the conditionality of the rebates. For this reason, they are of no avail to the assertion that they led Intel to abandon suggested rebate conditions in the final version of the agreement. Intel's argument in this respect is further weakened by HP's submission that the conditions were carried over into the final version of the agreement.[459]

(384) In fact, contemporaneous evidence shows that Intel was satisfied with the 95% MSS condition and was even pushing for a 100% MSS condition, in exchange for granting HP even more rebates (see recital (386)).

(385) On 9 July 2002, an Intel executive summarised the status of the negotiations of the agreement with HP, as well as Intel's preferred options for the future of the negotiations in view of an Intel-HP meeting scheduled for 11 July 2002. The document first describes the status of the negotiations, which was based on a 95% MSS condition: "*Latest hp proposal giving Intel the opportunity to compete for 95% of hp's total corporate desktop business (including smb + large biz). (...) Intel gets: 95% of hp's commercial desktop business (smb + large biz)*".[460] It then goes on to review the three options that Intel was considering for the negotiation:

(386) Option 1 was: "*Provide best offer (given hp agreement to maintain corporate dt. alignment)*".[461] In other words, this means that higher Intel rebates should be offered if HP were to agree to stay 100% aligned with Intel in the corporate desktop PC segment, as it had always been historically at the time of the negotiation of HPA1. This would equate to a 100% MSS condition in that segment.

(387) Option 2 was: "*Provide some assistance (per hp's suggestion on maintaining 95% Intel alignment)*".[462] In other words, this means that Intel rebates would be offered

---

459 See recital (353).

460 Email from [Intel executive] to [Intel senior executive]and others of 9 July 2002 entitled "[...]". Annex 137 to Intel Reply to the 26 July 2007 SO.

461 Idem.

462 Idem.

if HP were to agree to a 95% MSS condition (which was HP's position at that time of the negotiation), but at a lower level compared to the 100% MSS situation;

(388) Option 3 was to not pursue the agreement.

(389) The brief then recommends: "*If we get* [HP executive]/[HP executive] *agreement that we have the opportunity to maintain alignment in smb & large biz, then offer Option #1. If hp maintains current position, then offer Option #2*".[463] This shows that Intel was fully ready to enter into the agreement with the 95% MSS condition (option 2), and was even offering an agreement with 100% MSS condition (option 1), in exchange for higher conditional rebates.

(390) In view of the above, it is concluded that Intel has not provided arguments that would disprove the existence of the 95% MSS condition.

c) Intel's arguments on restrictions on the marketing and commercialisation of HP's AMD-based desktops

(a) Intel's argument that HP un ilaterally self-imposed the channel restrictions

(391) Intel claims that the channel limitations were self-imposed by HP and that the HPA agreements did not contain any unwritten restrictions on the marketing and commercialisation of HP's AMD-based desktops.[464]

(392) According to Intel, [HP executive]testified before the US FTC[465]that HP intended to commercialise its AMD-based desktops from the outset, including the D315 model, under terms that equate to the restrictions mentioned in recital (348).[466] For instance, [HP executive]described the restrictions accepted by HP as "*basically part of our fundamental plan for the product to begin with*" and "*sleeves out of our* [HP's] *vest*".[467] Therefore, Intel argues that giving them up in the negotiations with Intel was no sacrifice to HP because HP would have chosen this course of action anyway.[468]

(393) However, this passage from the testimony by [HP executive]is contradicted by other passages from the same testimony. Indeed, another fragment of the testimony

---

463 Idem.

464 Intel Reply to the 26 July 2007 SO, paragraph 348.

465 HP submission of 23 December 2005, [HP executive]deposition, pp. 5-6. [HP executive]testified that between spring 2002 to December 2002 he was [...].

466 Intel Reply to the 26 July 2007 SO, paragraphs 334-335.

467 HP submission of 23 December 2005, [HP executive] deposition, pp. 108-109.

468 Intel Reply to the 26 July 2007 SO, paragraph 335.

reads: "*Q: Were these all restrictions* [sic] [the restrictions mentioned in recital (348)] *that Intel was insisting on in the negotiations or were these restrictions that HP affirmatively offered up? A: Well, we wouldn't have voluntarily done these unless it was part of a negotiation for where we would receive something else in return. Q: What was that that you were going to receive in return? A: We were hoping some advantaged pricing and potentially ECAP funds.*"[469] These contradictions in [HP executive]testimony alter the probative value of [HP executive]assertions in this context. In view of this, the Commission considers that it is well-founded to rely on HP's corporate statement to the Commission, as well as the contemporaneous documents on the file, which all point to the fact that the restrictions in question were unwritten conditions in the HPA agreements.

(394) Intel further argues that in July 2002, four months before the conclusion of HPA1, HP had already communicated to AMD that it would distribute the AMD products only in the direct channel. According to Intel, this would prove that HP would have decided unilaterally to limit the distribution of AMD-based systems, in advance of any agreement with Intel.[470] Intel alleges that, also in July 2002, AMD itself understood that HP had independently decided on these restrictions.[471]

(395) However, contemporaneous evidence on the file does not demonstrate that HP unilaterally decided to limit the distribution of AMD-based systems, but rather the opposite, that is to say that these were restrictions which were conditions agreed in exchange for the Intel rebates. This conclusion is reinforced by the fact that the 15 July 2002 e-mail, on which Intel relies, mentions that HP had nearly closed a deal with Intel ("*We are closed with Intel on all but one term*"[472]), and makes explicit references to the fact that the Intel agreement already puts constraints on HP ("*PLEASE DO NOT... communicate to the regions, your team members or AMD that we are constrained to 5% AMD by pursuing the Intel agreement*"[473]). As was described in section a), the agreement negotiated over summer 2002, already fixed the restrictive conditions under which HP would distribute its AMD-based corporate desktop PCs. HP itself stated that *"Shortly after HP's 19 August 2002 launch of the AMD-based D315, Intel ceased negotiations on a rebate deal for HP BPC. (...) Negotiations between HP and Intel for a block rebate for HP BPC were*

---

469 HP submission of 23 December 2005, [HP executive] deposition, p. 107.

470 Intel Reply to the 26 July 2007 SO, paragraph 332.

471 Intel Reply to the 26 July 2007 SO, paragraph 336.

472 Email from [HP executive]to [HP executive]and others of 15 July 2002, entitled "*Negotiations Update*". HP Submission of 23 December 2005, Appendix 11. See also Intel Reply to the 26 July 2007 SO, Annex 150.

473 Email from [HP Executive]to [HP Executive]and others of 15 July 2002, entitled "*Negotiations Update*" (Intel Reply to the 26 July 2007 SO, Annex 150).

subsequently resumed. These negotiations resulted in the HPA1 agreement, containing the restrictions described above."[474] This indicates that even after the cessation of the negotiations with Intel, HP conducted its business with regard to AMD as if the agreement with Intel, including the restrictive conditions, had been formally agreed to. This was the way HP hoped to ensure that Intel would eventually resume the negotiations and conclude the same agreement as that being finalised in summer 2002.

(396) Contrary to its assertion, Intel did not present any convincing element which would prove that AMD understood that the HP sales restrictions were decided unilaterally. The evidence put forward by Intel shows nothing more than the fact that AMD was aware, as of 30 July 2002, of some of the restrictions which HP had agreed with Intel in mid July 2002 - presumably without knowing that these were conditions resulting from the Intel/HP deal.

(397) The notion that HP would have unilaterally decided to limit the distribution of the AMD-based systems, in advance of any agreement with Intel is further disproved by an e-mail from [HP executive]to [HP executive]dated 29 October 2002. This email presented the alternatives HP was considering with respect to its AMD-based commercial desktop. One of the alternatives says *"offer to allow reseller inventory.* (...) *only if no Intel deal."*[475] With this e-mail, HP also submitted a one-page handwritten note written by [HP executive]concerning the AMD desktop alternatives described in that e-mail. The note mentions: *"If GTM* [go-to-market] *restrictions aren't going to* be *lifted, doesn't make good business sense to pursue at all."*[476] This sentence is self-explanatory: [HP executive]considered that the imposition of channel restrictions on HP's AMD desktop would most likely result in low sales.

(398) An internal HP presentation of 2004 also disproves Intel's contention. After the expiry of HPA1 on 31 October 2003 and its continuation on a monthly basis until May 2004 as described in section 2.4.3.1, HP was considering whether to extend the term of HPA1 with Intel or break away from the HPA alliance. An HP presentation of 2004 entitled *'Managing Intel and AMD to maximize value to BPC*

---

474 HP submission of 23 December 2005, answers 2.15 and 2.18, p. 7.

475 [HP executive] deposition, p. 116, submitted with HP submission of 23 December 2005.

476 Handwritten notes by [HP executive]on the e-mail from [HP executive]to [HP executive]of 29 October 2002 entitled 'Hammer Product'. [HP executive]deposition, p. 117, submitted with HP submission of 23 December 2005. It should be noted that that there is no name indicated on the handwritten notes. However, Mr[HP executive]Deposition before the FTC confirms that. *"Q: Your counsel has told us that these – that the handwritten notes are from* [HP executive]." [HP executive] deposition, p. 117.

[Business PC][477] shows the pros and cons HP was evaluating before that decision. The presentation captures the scenarios in front of HP: *"Today's decision: • Should we widen distribution for BPC* [Business PC] *AMD? When? • Should we continue long-term agreements like HPA with Intel?"*[478] It provides the following recommendation: "[HP considered expanding distribution of the AMD-based product to the indirect channel]"[479] In other words, HP thought that one of the advantages of breaking away from the Intel alliance would be that it could do away with the channel restrictions (direct only distribution) and widen the distribution of the AMD-based desktops to indirect distribution. HP considered a middle-way strategy: continuing the HPA agreement containing the HPA restrictions only for the [...] segment and breaking away from the distribution restriction and going back to transactional relation in the [...]segment, with the possibility of selling the AMD-desktops via the traditional channels as well.

(399) Commenting on the exchange of emails between [HP executive] and [HP executive]mentioned in recitals (359) and (360), Intel again argues that "*the channel limitation had been self-imposed by HP*", and that "*a concern that Intel could terminate the agreement going forward does not establish that the agreement included unwritten binding conditions.*"[480]

(400) However, there is no doubt about the content of the e-mails. The wording used ("*You can NOT*", "*if (...) we get caught*")[481] is wholly inconsistent with the notion of self-imposed limitations. Rather, it demonstrates that the agreement was conditional.

(b) Intel's argument that there was insufficient demand for AMD-based PCs

(401) Intel further argues that the reason why HP did not sell AMD-based PCs to enterprise customers was because of *"Insufficient market demand"* and *"Roadmap complexity"* as described in an HP internal presentation.[482] Those arguments cannot be accepted for several reasons:

---

477 Internal HP presentation of 2004 entitled 'Managing Intel and AMD to maximize value to BPC – Final draft'. HP submission of 23 December 2005, Appendix 15.

478 Idem, slide 3.

479 Idem, slide 4.

480 Intel Reply to the 26 July 2007 SO, paragraph 348.

481 See recital (360).

482 Intel Reply to the 26 July 2007 SO, paragraph 332, quoting from an HP presentation of 2004 entitled 'Managing Intel and AMD to maximize value to PBC', slide 5, Intel Reply to the 26 July 2007 SO, Annex 8. See also HP submission of 23 December 2005, Appendix 15, p. 5.

(402) Firstly, Intel's interpretation of the HP document mentioning the "*Insufficient market demand*" and "*Roadmap complexity*" associated with the sale of the D315 to enterprise customers is incorrect. These HP considerations have to be considered in the context of the document they are extracted from. In that document, drawn up during the negotiation of HPA2, HP was analysing whether HP had an interest in prolonging the HPA agreement with Intel, and keeping the associated rebates, or to break free of the HPA constraints, but lose the rebates. All HP assertions concerning the interest of pursuing the option of selling more AMD-based products have to be understood in the context of a comparison with the option of staying with Intel and keeping the rebates. The HP document therefore should not be understood as meaning that there is an "*Insufficient market demand*" or a too big "*Roadmap complexity*" for the D315 in the absolute, but rather than there is too little demand and too big roadmap complexity to outweigh the loss of Intel rebates.

(403) Secondly, an internal HP presentation of June 2002, that is to say before HP agreed with Intel on any marketing restriction and shortly before the launch of the D315, referred to the model as *"targeted at SMB but suitable for enterprise deployments*".[483] This shows that, absent the conditions in the Intel agreements, HP considered that the D315 model could meet the requirements of enterprise customers.

(404) Thirdly, when claiming that HP did not sell the D315 to enterprise customers because of *"Insufficient market demand"* and "*Roadmap complexity"* (see recital (401)), Intel quotes from an HP presentation prepared in 2004, therefore well after the conclusion of the HPA1 agreement. As explained in recital (398), at that time, HP was considering the business strategy to pursue after the expiry of HPA1. The exact text on the same slide reads as follows: *"Offer AMD in enterprise "dc"* [direct channel only] *line? – No – Insufficient market demand. Roadmap complexity."*[484] In other words, the question before HP was not whether to offer AMD-based desktops to enterprise customers as such, but about the best sales methods to reach that customer segment.

(405) Finally, Intel's assertions on the alleged insufficient demand for HP AMD-based computers in the enterprise subsegment are contradicted by Intel itself. Indeed, in the part of its Reply to the 26 July 2007 SO concerning the contestable share of HP's supply needs, in the context of [...], Intel has provided documents in which it allegedly estimated that during HPA1, [...]units per year could be switched by HP

---

483 HP submission of 23 December 2005, [HP executive]deposition, Exhibit 14, HP presentation of 13 June 2002 entitled 'Commercial AMD desktop – strategic rationale'.

484 HP presentation of 2004 entitled 'Managing Intel and AMD to maximize value to PBC', slide 5, Intel Reply to the 26 July 2007 SO, Annex 8. See also HP submission of 23 December 2005, Appendix 15, p. 5.

to AMD in the enterprise subsegment,[485] and up to [...]per year during HPA2.[486] Without prejudice to the exact correctness of these figures, it demonstrates at a general level that Intel believed that AMD – HP cooperation would have been a credible threat to Intel.

(c) Intel's argument that the EMEA region was not ready for the launch

(406) Intel further argues that the delay in the launch of the D315 in EMEA was not due to conditions from Intel to that effect, but to HP's internal decisions for its own business reasons. According to Intel, HP's go-to-market strategy for the EMEA was not finalised in time.[487] Intel also argues that the delay was a consequence of the limited volumes HP was ready to sell via its go-to-market strategy and lack of customer interest for AMD-based desktops.[488]

(407) These Intel arguments are not meritorious. Intel wishes to create the impression that HP decided to delay the launch of the D315 in Europe because of its unpreparedness, for reasons not linked to Intel's restrictive conditions. However, the precise analysis of the documents quoted by Intel in support of its claim, as well as their time context disprove Intel's assertion.

(408) The HP documents quoted by Intel[489] date from after HP reached an agreement with Intel on the limits to be put to the sale of HP AMD-based business desktops, and the agreement was ready to be signed. The HP decisions described in those documents do not therefore represent the decisions which HP would have taken of its own will absent any constraints resulting from the agreements with Intel.

(409) The documents indeed outline that the EMEA branch of HP had difficulties to in launching the D315 product because of HP's "*go-to-market strategy*" (that is, the strategy adopted to distribute the product). [HP executive]wrote in an email of 28 December 2002: "*EMEA launch of D315 – open questions are: 1) When will EMEA be ready to launch consistent with the go-to-market direction that has been set within PSG* [Product Systems Group[490]] *(direct fulfilment only for SMB*

485 [...].

486 [...].

487 Intel Reply to the 26 July 2007 SO, paragraph 333.

488 Intel Reply to the 26 July 2007 SO, footnote 609.

489 Intel refers to the HP presentation entitled "*EMEA Q4 focus*" of August 2002, p. 7 (Intel Reply to the 26 July 2007 SO, Annex 153) and an email from [HP executive] to [HP executive]and others of 28 December 2002, entitled "*D315 launch in EMEA*" (Intel Reply to the 26 July 2007 SO, Annex 155).

490 HP submission of 6 August 2004, p. 4. HP describes that HP's Personal System Group (PSG) contains the following business units: consumer PCs (cPC), business PCs (bPC), notebooks and workstations.

customers)".[491] However, this go-to-market strategy was precisely the consequence of the conditions on HP's distribution policy negotiated with Intel, that is, a "*direct fulfilment only for SMB customer*". As [HP executive]explained, HP EMEA is "*focused on Major Account* [major accounts means the largest HP customers] *Direct as it's top priority.*"[492] This is also confirmed by the HP EMEA presentation which outlines the same go to market restrictions as an issue: "*EMEA not ready for D315/SMB/Direct*".[493] Another HP presentation from the first half of 2004 reads: "*Direct-only delayed EMEA launch despite being* [an important AMD market]".[494] The delays faced by the EMEA division of HP were therefore a direct consequence of Intel's restrictive conditions, which were in conflict with the distribution model it would have normally adopted.

(410) HP submissions confirm this analysis by the Commission on restrictions on the sales of the D315 in EMEA: "*HP confirms that* [HP executive], *in charge of HP* [...], *may, absent the direct-only distribution model, have distributed the D315 through HP's channel partners, at least in some countries in the EMEA and to some customer segments. The decision to accept the written and unwritten conditions in the HPA1 agreement and therefore not to distribute the D315 through HP's channel partners anywhere in the world (including the EMEA) was taken by HP's management in the US, in particular* [HP executive]. *Once that decision was taken, HP EMEA PSG implemented this policy*".[495]

(411) Finally, Intel's arguments on the reasons for the delay in launching the D315 in EMEA do not explain the reason why the successor product to the D315, the D325, was not launched in EMEA either.

(d) Conclusion

(412) In view of the above, it is concluded that Intel did not provide arguments that would disprove the existence of restrictions on the marketing and commercialisation of HP's AMD-based desktops.

---

491 Email from [HP executive]to [HP executive]and others of 28 December 2002, entitled "*D315 launch in EMEA*". Intel Reply to the 26 July 2007 SO, Annex 155.

492 Idem.

493 Presentation entitled "*EMEA Q4 focus*", from August 2002, p. 7. Intel Reply to the 26 July 2007 SO, Annex 153.

494 Internal HP presentation of the first half of 2004 entitled 'Managing Intel and AMD to maximize value to BPC – Final draft'. HP submission of 23 December 2005, Appendix 15, p. 6.

495 HP submission of 23 December 2005, answer 2.24.

2.4.5. Conclusion on facts

(413) On the basis of contemporaneous evidence and of the HP submissions, it is concluded that the rebates provided for under the HPA1 and HPA2 agreements, in the period between November 2002 and May 2005, were subject to the following unwritten conditions:

(1) HP had to source at least 95% of its corporate desktop x86 CPUs from Intel;

(2) HP's AMD-based business desktops could only be sold to SMB and GEM customers and not to mainstream business customers;

(3) HP's channel partners could not sell AMD-based business desktops, so that these could only be obtained direct from HP; and

(4) HP would delay the launch of its AMD-based business desktop (D315) in the EMEA region by six months.

2.5 Acer

2.5.1. Introduction

(414) Acer is one of the top PC and server vendors worldwide. Most of Acer's activities are concentrated on PCs. During the period 2002-2005, Acer's worldwide market share varied between [...]% and [...]% per quarter in terms of overall computer sales and its worldwide share in the commercial notebook segment varied between [...]% and [...]%.[496] As regards its regional focus, in 2006, Acer stated that *"Acer achieves around [70-80%]% of its sales in EMEA".*[497] Acer sourced its x86 CPUs exclusively from Intel until the fourth quarter of 2001, when it started buying small quantities of x86 CPUs also from AMD.

2.5.2. Acer's consideration of AMD

(415) In January 2003, Acer made plans to launch both notebook and desktop platforms with AMD's new Athlon 64 microprocessor in the autumn of 2003.

(416) According to an internal AMD e-mail of 25 August 2003, reporting on a meeting with Acer earlier that day, "[o]*ne of the key topics discussed was Acer's platform readiness and support status for the upcoming Athlon 64 launch*". Acer announced that it was "*fully committed and prepared to support Athlon 64 launch with desktop*

---

496 Gartner data, OEM Market Shares, Q4 2006.

497 Acer submission of 9 February 2006, response to question 22, p. 8.

and notebook shipments commencing on or shortly following the Sept 23 launch event [of the Athlon 64 x86 CPU]."[498]

(417) According to a statement provided on 19 July 2005 to the Commission pursuant to Article 19 of Regulation (EC) No 1/2003 by [Acer Executive] the launch of the Athlon 64 Acer notebook was scheduled for October-November 2003.[499] This was also stated in the Acer submission of 9 February 2006.[500] However, contemporaneous e-mails show that Acer planned the launch event for 23 September 2003.[501] Therefore, the Commission considers this date to be the originally envisaged launch date.

2.5.3. Link between Intel rebates and delay in the launch by Acer of the AMD-based notebook

(418) In January 2003, discussions took place between Intel and Acer executives. According to Acer, Intel offered to negotiate [...] support [...].[502] An arrangement whereby Acer would increase its alignment to Intel over the course of the year was outlined (with a requirement for Acer to source respectively per quarter [...]).[503]

(419) The remainder of this sub-section outlines how, against this background, Intel requested Acer to delay the launch of the Athlon-based notebook it had planned, and how Acer indeed ultimately did so.

(420) Intel's request to delay the launch of the AMD-based notebook is evidenced by a number of Acer submissions and contemporaneous e-mails. In its submission of 28 April 2006, Acer confirmed that there had been "*certain more or less explicit requests by Intel that Acer curtail or scale back its use of AMD products, including but not limited to the postponement of the launch of certain AMD based Acer products*".[504]

---

498 E-mail by [AMD Executive] to [AMD Executives] of 25 August 2003, AMD submission of 26 November 2003, Annex 17.

499 Statement given by [Acer Executive] to the European Commission pursuant to Article 19 of Regulation 1/2003 on 19 July 2005, p. 3.

500 Acer submission of 9 February 2006, response to question 42, p. 14.

501 See e-mail from [Acer Senior Executive] to [Intel Executives] of 26 August 2003 entitled *'Acer's Marketing Plan on AMD K8.'* Intel submission of 2 June 2008, Annex 2, document 52. See also e-mail from [Intel Executive] to [Intel Executives] of 27 August 2003 entitled *'IJKK and APAC market watch notes for Jason (PVD acting)'"* Intel submission of 2 June 2008, Annex 2, document 47.

502 Acer submission of 9 February 2006, p. 3, response to question 5.

503 E-mail from [Acer Senior Executive] to [Intel executive] of 29 January 2003 entitled " [...] ". Acer submission of 28 April 2006.

504 Acer submission of 28 April 2006, p. 2.

(421) In an e-mail of 20 January 2003, Acer's chief negotiator with Intel, [Acer Executive][505] reported that at an Intel-Acer meeting of mid-January 2003, Intel requested Acer *"reducing AMD weight in our business and do not introduce K8"*.[506] "K8" was the code name used by Intel for AMD's Athlon 64 x86 CPU.[507]

(422) Intel finalised its overall offer to Acer in a draft letter of intent to Acer shortly afterwards. In fact, in this letter, Intel requested that Acer delay not only the launch of the AMD-based notebook it had planned, but also the launch of an AMD-based desktop. Intel's first version of the draft *"Letter of intent"* specified that *"Acer decides, per its own business discretion, will not plan K8 desktop product to be launched before 4/14 internal executive meeting."*[508] The reaction of [Acer Senior Executive] to Intel's [Intel executive] in an e-mail of 29 January 2003 specified: *"NO SUCH COMMITMENT, AS THIS IS BEYOND ACER'S EXECUTIVE CONCLUSION RECENTLY WHICH WAS BASED ON "NO K8 NOTEBOOK" REQUESTED BY INTEL'S MANAGEMENT AND THUS CONCLUDED IN OUR EXECUTIVES MEETING, IF WE NEED TO ADD SO, ACER NEEDS TO GO*

---

505 There are three executives with very similar names from both Acer and Intel who feature in contemporaneous evidence. This footnote provides, on the basis of evidence submitted by both Acer and Intel, clarification with respect to their corporate positions and involvement in decision-making relevant to this Decision.

- [Intel Executive] (see for example e-mail from [Intel Executive] to [Acer Executive] of 18 January 2003 entitled 'Acer/Intel full scale corp level strategic engagement plan', Acer submission of 9 February 2006, Annex 28, p. 1). According to Acer, it was probably [Intel Executive] who prepared Intel's quarterly rebate offers and alignment targets to Acer as of January 2003. (Acer submission of 9 February 2006, response to question 29, p. 10.)

- [Acer Senior Executive]" (Acer submission of 9 February 2006, response to question 31, p. 11.)

[Acer Senior Executive] in August 2003. In Q3 2004 (Acer submission of 9 February 2006, response to question 29, p. 11) or December 2004 (Declaration by [Acer Senior Executive] of 3 January 2008, Annex 465, p. 1 to Intel Reply to the 26 July 2007 SO), he became [...].

- According to Acer, both [Acer Senior Executives] regularly reviewed the documents containing Intel's quarterly rebate offers and alignment targets to Acer between 2002 and 2004, with [Acer Senior Executive] only doing so until early 2005. (Acer submission of 9 February 2006, response to questions 28 and 29.) [...] (Acer submission of 9 February 2006, response to question 1, p. 1.) The Intel-Acer ECAP negotiations in January 2003 and the revision of the "Letter of intent" that set out the detailed provisions including the condition to delay the AMD Athlon 64-based Acer desktops and notebooks were conducted by [Intel Executive] on Intel's side and [Acer Senior Executive] on Acer's side. There are numerous e-mails by or addressed to [Acer Senior Executive] on the file about discussions and meetings with Intel about Intel rebates and Acer-AMD cooperation.

506 Internal Acer email by [Acer Senior Executive]to [Acer Executive] of 20 January 2003, Acer submission of 9 February 2006, Annex 16.2.

507 Acer submission of 9 February 2006, p. 5, response to question 16.

508 String of emails between [Acer Senior Executive]and [Intel Executive] (Intel) of 29 January 2003. Annex to Acer submission of 28 April 2006.

THROUGH ANOTHER EXECUTIVES MEETING."[509] As a result of this e-mail exchange, the *"Letter of intent"* was modified accordingly [...].[510]

(423) An Acer document dated 26 August 2003 shows that Acer indeed modified its notebook plans as a consequence of Intel's request. In this regard, Acer decided to postpone the AMD launch and restrict it to certain geographic areas. [Acer Senior Executive] wrote to Intel: *"In view of Intel shows tremendous concerns on Acer's move on K8 launch on September 23rd, after our internal review, here is our adjusted actions accordingly, I am sure Intel could perceive Acer's sincerity to respond to Intel's request, and let's quickly conclude Q4 business plan to continue enhancing business scale between two companies, whereas, we assume Intel would recognize Acer's sincerity and continue to provide same, or even better support to Acer as in last 3 quarters.*

- *Acer will not launch and ship K8 products in Asia Pacific and Greater China in 2003.*
- *Acer will have only Acer Europe to join AMD Europe on launch event, simply because this has been a continuous activity in where business has been a constant base. Shipments of K8 will also be effective.*

In US, Acer America will not join AMD US' launch events, and will only ship to limited channels after launch period of time."[511]

(424) However, in an e-mail dated 27 August 2003, [executive] of Intel reported to [Intel Executive]Intel executive and [Intel Executive]: *"APAC Summary* [Asia-Pacific]: *K8 launch planned for Sept 23. Acer (via Wistron)*[512] *planning on launching.* [Intel Senior Executive] *met w/their key players. This is a HUGE issue and a richter scale 10 issue for* [Intel Executive]. *He is mtg w/*[Acer Senior Executive] *in HK in two weeks - will be VERY blunt. We had a commit w/them - US, co-mktg, tv ads, on today show, etc."*[513] This e-mail shows that Intel's perception was that Acer was not

---

509 E-mail by [Acer Senior Executive] to [Intel Executive] of 29 January 2003 entitled 'letter of intent of both Acer and Intel'. Acer submission of 1 June 2006, in document 3.

510 E-mail by [Intel Executive] to [Acer Senior Executive]of 30 January 2003 entitled 'letter of intent of both Acer and Intel'. Acer submission of 1 June 2006, document 4. The same e-mail is also submitted in Acer submission of 9 February 2006, Annex 16.3, p. 17.

511 E-mail from [Acer Senior Executive] to [Intel Executives] of 26 August 2003 entitled *"Acer's Marketing Plan on AMD K8."* Intel submission of 2 June 2008, Annex 2, document 52.

512 Wistron is Acer's former manufacturing arm. It became a separate company from Acer in 2001. Wistron manufactures PCs that are then sold under OEM brand names, including Acer.

513 E-mail from [Intel Executive] to [Intel Executive] and [Intel Executive] of 27 August 2003 entitled *"IJKK and APAC market watch notes for Jason (PVD acting)."* Intel submission of 2 June 2008, Annex 2, document 47.

living up to what Intel had requested in that it was still launching the K8 in the Asia-Pacific region in 2003. The e-mail also shows that as a consequence, Intel reacted negatively to Acer's decision and would highlight its dissatisfaction to Acer.

(425) On 3 September 2003, [Intel executive] wrote in an internal Intel e-mail about the prospect of reducing Acer's ECAP payments because Acer was still going ahead with the K8 launch. His e-mail states: *"Name of our Q4 Strategy ------- Scale Down of ECAP (similar tone to their response on K8 to us) 1. Reduce the ECAP dollar to between* [...] *(around half) 2. Reduce the WW* [...]*by half too 3. Reduction in the* [...]*support* (...) *If we still continue to offer the Q4 ECAP (as it is today), Acer will think Intel is "chicken", despite they will launch K8 this month* (...) *Acer is saying one thing in front of our management to enjoy $, benefits, support yet doing another thing at the back* [...]".[514] [Intel executive] highlighted the utmost importance of ECAPs to Acer: "[...]"[515]

(426) As a consequence of this pressure to reduce Intel funding, just two days later, Acer accepted to comply with Intel's requests even going beyond what it had undertaken on 26 August 2003 (see recital (423)): Besides not introducing AMD-based notebooks in the Asia-Pacific region in 2003 and not participating at AMD launch events, Acer decided to delay the AMD notebook launch in all other regions, including in Europe. On 5 September 2003, [Intel Executive] reported: *"All, A thrilled good news just came from* [Acer Senior Executive] *that Acer decides to drop AMD K8 throughout 2003 around the world. We've been talking with them all the way up to* [Intel Senior Executive]*'s level recently including* [Intel Executive], [Intel senior Executive] *and* [Intel Executive] *through FTF* [face-to-face] *or con call to understand their biz plan and their ideas of launching AMD K8 product when industry ecosystem is not ready for 64bit CPU. They keep pushing back until today, after the call with* [Intel Executive]*this morning,* [Acer Senior Executive] *just confirmed that they decide to drop AMD K8 throughout 2003 around the world.* [Acer Senior Executive]*has got this direction from* [Acer Senior Executive] *as well and will follow through in EMEA. This not only demonstrates Acer's good will of maintaining strategic relations with Intel, but also, as a major win for corp., our leading technology is still the key that the industry wants to embrace. Big Thanks to all executives for 'this significant WINBACK!!!"*[516]

---

514 E-mail from [Intel Executive] to [Intel Executives] of 3 September 2003, entitled *"Thoughts on Q4 Strategy, please comment!"* Intel submission of 2 June 2008, Annex 2, document 54.

515 E-mail from [Intel Executive]to [Intel Executives] of 3 September 2003, entitled *"Thoughts on Q4 Strategy, please comment!"* Intel submission of 2 June 2008, Annex 2, document 54.

516 E-mail from [Intel Executive] to [Intel Executives] of 5 September 2003, entitled *"Acer decides to drop K8!!!"* Intel submission of 2 June 2008, Annex 2, document 53.

(427) This e-mail confirms information contained in a contemporaneous internal AMD e-mail, in particular the fact that [Intel Senior Executive], had personally intervened in the Acer matter. On 9 September 2003, [AMD executive] reported a discussion he had had with [Acer Senior Executive] to [AMD Executive]. This e-mail stated: *"*[Acer Senior Executive]] *indicated to me that Acer participation was compromised by the extremely specific request from Intel to avoid any public support to AMD64 and Athlon 64. He volunteered to tell me that this is the first time he has ever seen* [Intel Senior Executive] *PERSONALLY intervene in such a matter* (...). *The threat to Acer was described to me as not completely defined yet but could be as drastic as 100% suppression of their Intel marketing funds.* [Acer Senior Executive] *indicated that with 85% of their business coming from Intel, the damage to Acer would be significant. Thus, although he reassured me of his commitment to the relationship, and the long term success of AMD64, he told me that Acer is reviewing what compromise they can reach to still support us yet satisfy Intel's ultimatum. He indicated that there were several alternatives Acer was contemplating: delaying the official launch until next year* (...)."[517][Intel Senior Executive]'s direct involvement is also confirmed by the e-mail of 27 August 2003 referred to above in recital (424). In that e-mail, [Intel executive] reported: *"K8 launch planned for Sept 23. Acer (via Wistron) planning on launching.* [Intel Senior Executive] *met w/their key players."*[518]

(428) On 17 September 2003, [AMD Executive] reported on a meeting he had had with Acer executives: *"A dinner took place on 9/15* [15 September 2003] *between AMD and Acer management in Milan, specifically* [Acer Executives]. *I expressed my frustration and disappointment regarding their late decision to cancel the launch of their K8 notebook platform.* [Acer Executive] *immediately corrected me and indicated that the platform was not cancelled but rather that Intel had coerced Acer into postponing the launch."*[519]

(429) In his statement pursuant to Article 19 of Regulation (EC) No 1/2003 to the Commission, [Acer Executive] also confirmed that: "*Acer* [postponed the launch of the Athlon 64-based Acer notebook] *to January 2004* [...]."[520]

---

517 E-mail of 9 September 2003 from [AMD executive] to [AMD executive] entitled [...]. AMD submission of 26 November 2003, AMD Memorandum on Competition Complaint, Annex 17.

518 See footnote 513.

519 E-mail of 17 September 2003 from [AMD executive]to [AMD Executive] entitled 'Brief Summary of dinner with Acer in Europe'. AMD submission of 26 November 2003, AMD Memorandum on Competition Complaint, Annex 17.

520 Statement by [Acer Executive] pursuant to Article 19 of Regulation 1/2003 on 19 July 2005, p. 3.

(430) Subsequent correspondence from the beginning of 2004 also shows that Acer complied with Intel's request not to introduce K8-based notebooks until February 2004.[521] In an e-mail of 13 February 2004, [Acer Senior Executive] of Acer had to explain to Intel the reasons for the ultimate launch of K8 in February 2004: *"products been* [sic] *in the channels by now, we can't take them back, and such action was fully in compliance with our original commitment that we won't be the leading major brand, i.e. should be behind HP, however, as HP announced during last Comdex* [Computed Dealers Exhibition] *that Feb. 11 will be the date they will ship K8 notebook to customers, therefore Acer planned for week Feb. 15th delivery has honored our original commitment."*[522] [Acer Senior Executive] continued by describing the restrictions Acer would nevertheless implement on its K8 offering: *"Acer will stop both flyers and advertisements for any Acer sub-brand K8 notebook worldwide from now on, until any other major brand, such as HP, Toshiba, Sony, Fujitsu and Fujitsu-Siemens, or similar class, announces their K8 notebook. although many joint-marketing activities been planned with AMD, Acer will also withdraw to do any public activity* (...)."[523]

(431) Acer submitted to the Commission its press release for the launch announcement of the Athlon 64-based Aspire 1500 model in Western Europe which indicates that the product was launched on 4 February 2004.[524]

(432) As described in recitals (425) and (426), the means by which Intel requested and ensured that Acer would indeed shelve its AMD Athlon 64-based notebook plans was by indicating that agreed ECAPs may be reduced or cancelled and/or offering incremental ECAP funding.

(433) According to internal AMD correspondence, " [Acer Executive] *volunteered to say that Intel had put in the balance in excess of 15M$ of marketing funds if Acer would agree to cancel the AMD K8 project."*[525] As regards the sums received from Intel, Acer received [...] ECAP and [...] MDF [Marketing and Development Fund]

---

521 The fact that Acer eventually introduced AMD products in February 2004 is without prejudice to the Commission's conclusion that Intel requested Acer to delay the launch until January 2004. Therefore, for the purposes of this Decision, the Commission took January 2004 as the end of Intel's abusive practices with respect to Acer.

522 E-mail from [Acer Senior Executive] to [Intel Executive] and [Intel Executive] of 13 February 2004 entitled *"Further to Our Conference Call"*. Intel submission of 2 June 2008, Annex 2, document 48.

523 Idem.

524 'Acer present their first notebook featuring the new 64bit – AMD Athlon 64 processor', Acer News Release of the launch announcement, Acer submission of 9 February 2006, Annex 42, p. 4.

525 E-mail of 17 September 2003 from [AMD executive] to [AMD executive] entitled 'Brief Summary of dinner with Acer in Europe', AMD submission of 26 November 2003, AMD Memorandum on Competition Complaint, Annex 17.

for the fourth quarter of 2003 and [...] ECAP and [...] MDF for the first quarter of 2004.[526] It is unclear whether the MDF amounts are cumulative to the ECAP amounts or included in them. Acer has submitted that these amounts were [...].[527] Intel has submitted that MDF was included in the ECAP amounts.[528]

(434) As highlighted in recital (425), Intel recognised Acer's financial dependence on the Intel funds. Acer was also fully aware that funding from Intel was an important element in maintaining its balance positive. In this regard, Acer outlined that *"at the end of 2003, Acer was in negotiations for* [...] *USD of ecap funding with Intel for the next quarter* [Q1 2004]. *At that time, Acer's economic position was such that this ecap funding could have made the difference between nearly breaking even or showing a profit for Acer's computer sales operations."*[529]

(435) The fact that Intel was serious that it may cut rebates in case Acer did not comply with its requests is further evidenced by e-mails contained in the material obtained from Intel by the Commission in June 2008, in response to a request for information pursuant to Article 18 of Regulation (EC) 1/2003:[530] In December 2003, Acer introduced a new notebook in India, co-branded with Ferrari, based on AMD's K7 x86 CPU (K7 was a 32bit AMD x86 CPU, as opposed to the 64bit enabled K8 "Athlon 64"). On 9 December 2003, in an internal Intel e-mail, [Intel executive] reported this event to two Intel executives, [Intel executive] and [Intel executive]: " [Intel executives], *Acer has launched an AMD based notebook co-branded with Ferrari at the high end (Rs.160,000 or -$3500)."*[531] This triggered an immediate response within Intel the very same day: " [Intel executive] *: Please cancel all MDF for Acer India for 2004 effective immediately.* [...]. [Intel executive] *will stop ecap requests."*[532]

---

526 Acer submission of 14 June 2007, response to questions 2.1 and 2.2.

527 Acer submission of 14 June 2007, response to questions 2.1 and 2.2.

528 Intel submission of 5 February 2009 related to the Commission letter of 19 December 2008, paragraph 29.

529 Acer submission of 9 February 2006, response to question 43, p. 16.

530 Intel submission of 2 June 2008.

531 E-mail from [Intel Executive] to [Intel Executive] and [Intel Executive] of 9 December 2003 entitled *"Acer AMD notebook / URGENT."* Intel submission of 2 June 2008, Annex 2, document 51.

532 E-mail from [Intel Executive] to [...] (Intel executives) of 9 December 2003 entitled *"Fw: Acer AMD notebook / URGENT."* Intel submission of 2 June 2008, Annex 2, document 51.

2.5.4. Intel's arguments

(436) Intel argues that *"Acer expressly denied AMD's allegation (...) that it had an arrangement with Intel that precluded the use of AMD processors."*[533]

(437) To support this argument, in its Reply to 26 July 2007 SO, Intel provided two "declarations" signed by two Acer executives, [Acer Senior Executive], and [Acer Senior Executive], who succeeded [Acer Senior Executive].[534] Intel claims that in their declarations, the two Acer executives confirmed that, at a meeting held on 25 August 2003, no specific topic of penalty or incentive for delaying and/or canng the launch of Athlon 64-based Acer notebooks was discussed.[535]

(438) It should first be noted that the Commission did not raise the issue of a specific meeting of 25 August 2003 in the 26 July 2007 SO. In itself therefore, whether or not there was a specific request by Intel at that particular meeting is of no direct relevance for the overall findings of this Decision as regards Intel's conduct with regard to Acer.

(439) Secondly, the declarations are phrased in a very prudent way and have a limited object. The two executives only state that during a specific meeting, the meeting of 25 August 2003, identified as only one of several regular meetings with Intel they attended, Intel did not request the postponement of the launch of Acer's AMD products. As a matter of fact, the evidence outlined in recitals (421) to (428) indicates that Intel's requests were made throughout 2003. In this context, contemporaneous evidence quoted in recitals (424) to (427) shows that, in reality, Intel's pressure reached its climax at the turn of August and September 2003, when frequent encounters took place between Intel and Acer's highest executives. Declarations concerning exclusively the content of the 25 August 2003 meeting are therefore of no avail to support Intel's arguments.

(440) Thirdly, these declarations were collected in an unknown way, under unclear circumstances, do not contain any reference or explanation with regard to their purpose or the procedure under which they were obtained and they do not reveal the questions asked by Intel to the Acer executives. It is also not known under which legal provisions the declarations were taken; therefore, it is also not known what the legal consequences would be in case they were incorrect. Furthermore, the Commission has no information whether [Acer Senior Executive] and [Acer Senior Executive] lawyers attended or had the right to attend and review the declarations.

---

533 Intel Reply to the 26 July 2007 SO, paragraph 443.

534 Intel Reply to the 26 July 2007 SO, Annexes 464 and 465.

535 Intel Reply to the 26 July 2007 SO, paragraph 431.

Lastly, it is to be noted that on Acer's side, negotiations with Intel over ECAP funds were led not by [Acer Senior Executive] but [Acer Senior Executive].[536] Therefore, it is possible that [Acer Senior Executive] gave the declaration that at the 25 August 2003 meeting with Intel, Intel did not raise the issue of delaying the AMD notebook launch and at the same time not contradict the events that took place since he was not involved in all the relevant meetings and exchanges.

(441) For these reasons, it is concluded that the legal value of the two declarations given by [Acer Senior Executives] to Intel is entirely unclear. The evidence contained in Acer's statements in its submissions to the Commission, contemporaneous evidence contained therein, and [Acer Senior Executive's] Article 19 statement, have more probative value.

(442) Intel also takes issue with the Commission's conclusion that Intel indicated it would delay Acer's ECAP payment if it did not delay the launch of the AMD Athlon 64-based notebooks, invoking statements from [Acer Senior Executive] stating that the quarterly meet comp negotiations were not unusually delayed.[537] However, this is not relevant to the findings of this Decision or to the allegations outlined in the 26 July 2007 SO in which the Commission stated that there was a conditional link between the Intel payments and Acer's decision to delay the launch of its AMD-based notebook. In any case, given that Acer complied with Intel's requests, there would be no reason for a delay in the quarterly meet comp negotiations.

(443) In its Reply to the 26 July 2007 SO, referring to an interview with Acer executive [...] in the IT magazine PC World, Intel also claims that with regard to *"Acer's decision to postpone the launch of its Athlon 64 notebook PC, Acer explained that, in view of a worldwide shortage of Athlon 64 microprocessors, it decided to launch the system "when more Athlon 64 chips are expected to be available"* [sic]."[538]

(444) It should first be noted that the quote referred to by Intel does not show that a shortage of Athlon 64 chips may have delayed the launch of the Acer Athlon 64 notebook PC. The quote reads as follows: *"The company will roll out its first Athlon 64 systems in Europe during the first quarter, with worldwide availability*

---

536 See footnote 505 on the clarification of the positions and role of [Intel Executives] and [Acer Senior Executives].

537 Intel Reply to the 26 July 2007 SO, paragraphs 435 to 438.

538 Intel Reply to the 26 July 2007 SO, paragraph 439, referring to an article published in PC World entitled 'Sneak a Peek at Next Year's Tech Tools', commenting on Acer's plans with AMD, submitted in Intel Reply to the 26 July 2007 SO, Annex 36, p. 2.

during the second quarter, when more Athlon 64 chips are expected to be available he says."[539]

(445) It should also be noted that [Acer Executive] pointed out certain Intel shortages. In this regard, he stated that *"Intel, in terms of fulfilment of product commands are not in a totally satisfactory situation. They have product shortages sometimes starting in Q4/2004 and may have capacity issues. We have sometimes difficulties getting the product."*[540]

(446) Intel also argues in its reply that Acer submissions[541] demonstrate that Acer did not consider the volume share requirements referred to in recital (418) binding on Acer and that its x86 CPU purchases from Intel usually represented a lower share than the volume target percentages put forward by Intel.[542] In this regard, without prejudice to Intel's argument, it is noted that the existence of market share targets in Intel's agreement with Acer was not part of the objections covered by the 26 July 2007 SO, and on the facts, does not relate to Intel's requests that Acer delay the planned launch of its AMD-based notebook (and Acer's compliance with those requests).

(447) Finally, Intel has provided data showing the evolution of the AMD and Intel share of Acer supplies and comparing them with the rate and volume of Intel rebates to Acer. Intel argues that *"While AMD was gaining market segment share at Acer at Intel's expense, Intel continued to increase the discounts that it provided to Acer."*[543] Intel claims that *"this directly refutes the Commission's assertion that Intel "punished" Acer when it purchased from AMD."*[544]

(448) Intel's argument is unconvincing. To begin with, as described in recital (446), the Commission's case concerning Intel's conduct with regard to Acer is not about a loyalty rebate. The fact that AMD's share at Acer would have increased and/or that Intel's rate of discounts to Acer would have increased while AMD was gaining market share at Acer is therefore irrelevant to the subject matter of the case. As described in section 2.5.3, Intel's conduct with respect to Acer that is covered by this Decision is Intel's request for the delay of the launch of an Acer notebook based on AMD's K8 x86 CPU. As discussed in recitals (429) to (431), Acer

---

539 Article of 29 September 2003 in the online PC World, in which [Acer Executive], head of Acer's desktop product is interviewed. Annex 36 to Intel Reply to the 26 July 2007 SO.

540 Statement by [Acer Executive] pursuant to Article 19 of Regulation 1/2003 on 19 July 2005, p. 5.

541 In fact, Intel makes reference only to Acer submission of 9 February 2006.

542 Intel Reply to the 26 July 2007 SO, paragraph 442.

543 Intel submission of 5 February 2009 related to the 17 July 2008 SSO, paragraph 385.

544 Idem.

accepted Intel's request, and indeed postponed the launch of its planned product from September 2003 to January 2004. Intel's assertion that the increase of its rate of rebates to Acer disproves that it "punished" Acer would therefore be misconceived even if it was related to the proper conduct at stake: as Acer fulfilled Intel's request, there would have been no reason for Intel to "punish" Acer.

(449) In any case, it is noted that the figures provided by Intel do not support its assertions. Indeed, as regards the level of discounts, Intel states that "*From the third quarter of 2003 through the second quarter of 2004, Intel provided Acer discounts that were* [...]*% of revenue for each quarter. From the third quarter of 2004 through the fourth quarter of 2005, Intel provided Acer with discounts equal to* [...]*% of revenue for each quarter.*"[545] Intel's discounts were therefore stable during most of the period. This contradicts Intel's assertion that "*As Intel's share of Acer's business steadily declined and AMD's increased, Intel increased the discount levels to Acer*",[546] all the more so as the single quarter where the level of Intel discounts increased (from the second to the third quarter of 2004) is one where the share of AMD at Acer decreased (from [...]% in Q2 2004 to [...]% in Q3 2004). A table submitted by Intel summarising the market shares of AMD and Intel at Acer between Q1 2003 and Q4 2005 as reported by Gartner is included below.[547]

Table 10 - Market shares of AMD and Intel at Acer

Period	AMD	Intel
Q1 '03	[...]	[...]
Q2 '03	[...]	[...]
Q3 '03	[...]	[...]
Q4 '03	[...]	[...]
Q1 '04	[...]	[...]
Q2 '04	[...]	[...]
Q3 '04	[...]	[...]
Q4 '04	[...]	[...]
Q1 '05	[...]	[...]
Q2 '05	[...]	[...]
Q3 '05	[...]	[...]
Q4 '05	[...]	[...]

545 Intel submission of 5 February 2009 related to the 17 July 2008 SSO, paragraph 385.

546 Idem.

547 Intel submission of 5 February 2009 related to the 17 July 2008 SSO, table in paragraph 384.

Source: Intel[548]

2.5.5. Conclusion on facts

(450) In light of the evidence discussed in sections 2.5.1 to 2.5.4, it is concluded that Acer delayed the launch of its AMD Athlon 64 x86 CPU-based notebooks from September 2003, as initially planned, to January 2004 because of Intel's request to do so.[549] Acer's understanding was that if it did not, the previously agreed ECAP funding would be decreased.

2.6 NEC

2.6.1. Introduction

(451) NEC is one of the top ten PC and server vendors worldwide. Its market shares in terms of overall computer sales which reached between [...]% and [...]% during the period 2000-2002 have more recently varied between [...]% and [...]% over the period 2004-2005.[550]

(452) During these periods, NEC's operations as an OEM were managed by two different fully owned subsidiaries: NEC Japan and NEC Computer International ("NECCI"). NEC Japan managed NEC's operation in Japan and the Americas, whereas NEC operations in the rest of the world were handled by NECCI. NECCI was based in Europe, but it did not only manage NEC's operations in Europe. It also managed NEC's operations in Asia – with the exception of Japan – via its Asia Pacific Countries ("APAC") branch.

(453) As of April 2005, the corporate structure was modified: the APAC division was hived off from NECCI and transferred back to NEC Corporation. In November 2005, NECCI's EMEA (Europe, Middle East and Africa) division was renamed "Packard Bell B.V.", and the professional business sector (*inter alia* the server business) was also transferred to NEC Corporation. Packard Bell B.V. was sold by NEC to PB Holding Company S.a.r.l in 2006. Packard Bell B.V. continued to operate the former NECCI EMEA branch[551] until it was purchased by Acer in 2008.

---

548 Intel submission of 5 February 2009 related to the 17 July 2008 SSO, table in paragraph 384.

549 On the basis of the above, it would seem that, in the Asia-Pacific region at least, the launch was postponed even until May 2004. However, this decision only covers the postponement until January 2004.

550 Gartner data, OEM market shares.

551 [NEC] submission of 29 March 2007, p. 1.

2.6.2. NEC's increasing use of AMD

(454) In the 2001-2002 period, NEC had decided to embrace AMD x86 CPUs more actively in its client PC offering.[552] According to Gartner data, during the period between the first quarter of 2001 and the first quarter of 2002, the proportion of NEC's client PC x86 CPU requirements sourced from AMD increased from [...]% to [...]%.

2.6.3. Conditional rebates to NEC

2.6.3.1. Conditionality

(455) In the course of 2002, NEC and Intel entered into discussions regarding a revised business relationship between Intel and NEC. The intention of Intel and NEC was to increase Intel's x86 CPU share in NEC's purchases. This strategy was called the "Realignment Plan", i.e. a plan that reversed the trend of Intel's decreasing x86 CPU share at NEC.

(456) In May 2002, NEC [...] held formal discussions with Intel in Santa Clara, California to redefine the terms of their cooperation as regards Intel's x86 CPUs.[553] [...][554] The agreement which resulted from the discussions is referred to as the 'Santa Clara agreement'. Under the Santa Clara agreement, NEC and Intel agreed on the content of the Realignment Plan. Prior to the conclusion of the Santa Clara agreement in April 2002, NEC intended to purchase [...]% of its x86 CPUs for client PCs worldwide from Intel, with [...] having a [...]% share and [...] one of [...]%. The Realignment Plan foresaw that NEC's worldwide share of Intel x86 CPUs in its client PCs should reach 80%, with [...] share increasing to 90% and [...]share increasing to 70%.[555] In return for the market share realignment, Intel awarded significant rebates to NEC in different forms. This is evidenced hereunder.

(457) Shortly after the Santa Clara meeting, an [NEC] executive reported on the results of the negotiations: "[NEC] *has been working how to realize the ratio of Intel 80% and AMD 20%*".[556]

---

552 "Client PC" refers to desktop and notebooks PCs. It does not include servers.

553 [NEC] submission of 15 December 2005, p. 13.

554 [NEC] submission of 15 December 2005, p. 8, response to question 18.

555 NEC presentation of 27 January 2003 entitled [...]. [NEC] submission of 15 December 2005. Exhibit 15.1, p. 4 (chart entitled [...]).

556 E-mail from [NEC Executive] to [NEC Executive] and [NEC Executive] of 10 May 2002 entitled [...]. [NEC] submission of 15 December 2005, annex 32.1.

(458) Some days later, the same executive confirmed how the terms of the agreement would be achieved: "*Today I had a teleconference with* [Intel executive] *and other Intel people. The following is the conclusion. NEC will have* [...] *and increase WW Intel market share from* [...]*% to 80%.*"[557]

(459) NEC's reason to increase the percentage of Intel x86 CPUs was the rebate paid by Intel in exchange for it. Intel's claim that NEC wanted to "*reassert technological leadership by strengthening NEC's collaboration with Intel*"[558] is contradicted by the contemporaneous evidence cited below.

(460) In fact, the evidence shows a clear link between the rebates and the condition relating to the share of Intel x86 CPUs.

(461) A contemporaneous NEC document shows in a flow chart that the Realignment Plan was conditioned on "*Intel Support* [which included]

- [...]
- [...]
- [...]
- [...]"[559]

(462) The two internal NEC e-mails concerning the realignment originally cited in recitals (457)-(458) also confirm the conditionality. As [a NEC Executive] explains to [a NEC Executive]: "*NEC will have* [...] *and increase WW Intel market share from* [...]*% to 80%. Intel will give NEC* [support] *and aggressive* [...] *price.*"[560] and

> "[NEC] *has been working how to realize the ratio of Intel 80% and AMD 20%.*
>
> *Our proposal is the following.*
>
> [...]*will reduce the percentage of AMD CPU DT* [Desktop] [...]*% to* [...]*% NB* [...]*% to* [...]*% and get* [...] *out of* [...] [support].
>
> [...] *will reduce the percentage of AMD CPU DT* [...]*% to* [...]*% NB* [...]*% to* [...]*% and get* [...] *out of the* [...] [support]. *(...)*
>
> *The attached file shows the procedure.*"[561]

---

557 E-mail from [NEC Executive]to [NEC Executive] of 15 May 2002 entitled [...]. [NEC] submission of 15 December 2005, annex 32.2

558 Intel Reply to the 26 July 2007 SO, paragraph 448.

559 NEC presentation of 27 January 2003 entitled [...]. [NEC] submission of 15 December 2005. Exhibit 15.1, p. 4 (chart entitled [...]).

560 E-mail from [NEC Executive] to [NEC Executive] of 15 May 2002 entitled [...]. [NEC] submission of 15 December 2005, annex 32.2. [...]

561 E-mail from [NEC Executive] to [NEC Executive] and [NEC Executive] of 10 May 2002 entitled [...]. [NEC] submission of 15 December 2005, annex 32.1.

(463) During the period between the third quarter of 2002 and the second quarter of 2003, NEC received from Intel [support] totalling at least [...].[562]

(464) Further to the [support], Intel also granted [prices] in the form of "*aggressive prices*".[563] These "[prices] *depend*[ed] *on the agreement on 70% MS* [Market Share], *not on volumes.*" [564] The submission of [NEC][565] and other contemporaneous documents[566] indicate that there was a conditional link between the Realignment Plan as a whole and Intel payments. Several NEC and/or Intel contemporaneous documents drawn up during the negotiation of the Santa Clara agreement show the entire list of Intel payments for the first quarter of the implementation of the agreement (Q402) which were given in exchange for NEC accepting the market share condition (see recital (462)). In the latest of these documents,[567] as many as [...] distinct payments accepted by Intel are listed.[568] [Support] are only [...] of these, the other [...] being [prices] [...]. Agreement was already reached for the exact unit value of all these payments, with the exception of [...] item,[569] for which agreement was already reached for a certain level of [prices], but negotiations were ongoing about the possibility for Intel to award even more.

(465) The same structure of payments by Intel, including [support] as well as [prices] for [...] was carried over for the next two quarters (Q1 and Q2 2003). The precise level of [prices] was negotiated quarterly between Intel and NEC.

(466) After 1 July 2003, the structure of Intel payments changed. [Support] were subsumed within classical Intel [prices], and were renamed "[prices]". In this respect, [NEC]specifies that: "[F]*rom 1 July 2003 the system changed* (...) *instead of one single amount (for* [support]*), the special pricing was included in the* [price] *for the consumer segment*".[570] The NEC purchasing manager specified that these [prices] were conditional on the fulfilment by NEC of an Intel market share in the

---

562 [...] ([NEC] submission of 29 March 2007, p. 3). [...].

563 E-mail by [NEC Executive] to [NEC Executive] of 15 May 2002, [NEC] submission of 15 December 2005, annex 32.2.

564 [NEC] submission of 15 December 2005, p. 7, reply to question 14.

565 Idem.

566 See for example the chart entitled [...]. NEC presentation of 27 January 2003 entitled [....]. [NEC] submission of 15 December 2005. Exhibit 15.1, p. 4.

567 NEC presentation of 15 May 2002 entitled [...]. Intel Reply to the 26 July 2007 SO, annex 269.

568 [...].

569 [...].

570 [NEC] submission of 15 December 2005, response to question 7. See also email by [NEC Executive] to [NEC Executive] entitled [...] of 9 June 2003, document JH 202, and [...], document ND 1, p. 6.

consumer PC segment broken down as follows: "[support/certain prices] *offered to* [...] *are indeed contingent upon* [...] *meeting the 70%+MSS* [market segment share], [...] *90% and NEC WW 80%+ market shares.* [Certain other prices] *(as opposed to* [certain prices]*) are not contingent upon market shares threshold.*"[571]

(467) NEC has not been able to provide the Commission with the specific amount of [prices] granted to NEC as of the third quarter of 2003 [...]. In this respect, [NEC] further explains that since July 2003, "*the credit claim process of* [NEC] [...]."[572]

(468) Intel argues in its Reply to the 26 July 2007 SO that "*NEC developed its realignment plan unilaterally, before it received any discount offer from Intel*".[573] In support of this contention, Intel presented documents pre-dating the Santa Clara meetings, the earliest of which is a NEC document from 15 April 2002.[574] Intel presented this document as the source of the Intel/NEC agreement on the Realignment Plan which was concluded in May 2002. Intel describes the objectives in the NEC document as originating from NEC, as opposed to from Intel. Intel claims that the document is proof of the fact that NEC independently developed the Realignment Plan.[575]

(469) Without prejudice to the relevance of this argument, however, there exists an Intel document written in preparation for the 15 April 2002 meeting. This document describes the Intel objectives for the meeting, the first of which was: "*To get commitment of increasing intel MSS* [Market Segment Share] *in Q4'02 (target: IJKK* [Intel Japan and Korea] *target* [...]*/ sales target* [...]*)*".[576] Topics for discussion include: "*NEC roadmap direction - Keep* [...]*% MSS at commercial, - Gain MSS at consumer (what is criteria to maximize intel MSS for* [...]*!)*".[577] The following "success indicator" is indicated for the meeting: "*Make an agreement on 1) higher MSS target in Q4'02*".[578]

(470) The document then describes Intel's strategy vis-à-vis NEC: "*Get NEC commitment of specific target # at Q4'02 MSS (target: IJKK target* [...]*%/sales target* [...]*%) -*

---

571 [NEC] submission of 15 December 2005, response to question 21.

572 [NEC] submission of 3 April 2007, response to question 3.

573 Intel Reply to the 26 July 2007 SO, paragraph 445.

574 NEC presentation of 15 April 2002 entitled [...]. Intel Reply to the 26 July 2007 SO, Annex 252.

575 Intel Reply to the 26 July 2007 SO, paragraph 448.

576 Intel document entitled *'Meeting with* [NEC Executive]*/NEC(Rev1.0)'*. Intel submission of 2 June 2008, annex 2, document 87.

577 Idem.

578 Idem.

Ask what intel needs to do for increasing MSS# (Key: price, supply)".[579] Intel claims that "*the briefing document* (...) *does not refer to any discount offer at all.*"[580] This is incorrect: The briefing document mentions "*price*" as a key element to be offered to obtain an MSS commitment by NEC. A price offer means the offer of a discount over Intel's list price. The document states that the first key message to be delivered to NEC by [Intel executive] of Intel should be "*Intel expects* [...] [NEC Executive] *to maximize WW NEC PC biz by utilizing intel technology/resource*".[581]

(471) Contrary to what Intel claims in its submission of 5 February 2009 related to the SSO[582], this internal Intel document demonstrates that NEC did not independently develop the Realignment Plan. The opposite is in fact the case as the document makes clear that before 15 April 2002, it was Intel's objective to ensure that there were conditions for the share of Intel x86 CPUs in its arrangement with NEC. Intel's assertions described in recital (468) are therefore incorrect. Therefore, although Intel claims that the *"Realignment Plan would have been prepared in advance of the 15 April 2002 meeting"*[583], Intel has not been able to prove this claim. Moreover, Intel was in possession of this document and did not submit it to the Commission. It is therefore concluded that Intel voluntarily provided a truncated, misleading description of its negotiations with NEC to the Commission.

(472) According to Intel, presenting the "*briefing memo as evidence* (...) *is deficient as a matter of logic and evidence*".[584] Instead, Intel filed minutes related to the 15 April 2002 meeting,[585] and alleges the these minutes should be relied upon rather than the memo. Intel makes reference to the minutes of [Intel executive] and claims that they show that "*the consolidation of NEC's PC business on the Intel roadmap* (...) *was done for the most practical of reasons – "to make more profit."*"[586] However, Intel's reasoning does not disprove the Commission's findings. As specified in other instances, the Commission is not questioning that it may be commercially rational or profitable for an OEM to enter into a conditional rebate arrangement

---

579 Idem.

580 Intel submission of 5 February 2009 related to the 17 July 2008 SSO, paragraph 414

581 Idem.

582 Intel submission of 5 February 2009 related to the 17 July 2008 SSO, paragraph 411.

583 Intel submission of 5 February 2009 related to the 17 July 2008 SSO, paragraph 412.

584 Intel submission of 5 February 2009 related to the 17 July 2008 SSO, paragraph 412.

585 Intel submission of 5 February 2009 related to the 17 July 2008 SSO, Annexes 633-634.

586 Intel submission of 5 February 2009 related to the 17 July 2008 SSO, paragraph 418.

with Intel. That question does not, however, relate to the factual question of the conditionality of the arrangement.

(473) Intel also argues that the 80%, 70% and 90% figures were simply "share expectations" which were agreed in May 2002 for a period of two quarters (the fourth quarter of 2002 and the first quarter of 2003). Furthermore, Intel states that, after this period of two quarters, Intel rebates were no longer linked to any such share expectations.[587] This is not consistent with the contemporaneous evidence.

(474) As regards the first two quarters of the NEC/Intel arrangement, contemporaneous evidence in the file, including evidence provided for the first time to the Commission by Intel in its Reply to the 26 July 2007 SO, shows that the arrangement negotiated in May 2002 between NEC and Intel provided for Intel rebates in exchange for NEC committing to meet certain market share requirements.

(475) This is confirmed for instance by an email from [a NEC Executive] which explains the deal to [a NEC Executive]: "*NEC will have* [...] *and increase WW Intel market share from* [...]*% to 80%. Intel will give NEC* [support] *and aggressive* [...] *price.*"[588] This email clearly shows the basic principle of the deal: NEC increases Intel's market share and Intel provides the rebates.

(476) Another NEC document summarises the principle of the Realignment Plan in the form of a flow chart. Here again, the fulfilment of the "*Intel share* [...] *70%* [...] *90% WW* [Worldwide] *80%*" is represented as going together with *"Intel Support* [which included]

- [...]
- [...]
- [...]
- [...]"[589]

(477) Furthermore, Intel itself had made clear in documents drawn up in preparation for the negotiation of the Realignment Plan that its objective was "*To get commitment* [from NEC] *of increasing intel MSS* [Market Segment Share] *in Q4'02*".[590] The existence of the market share condition is confirmed by a [NEC] e-mail, according

---

587 Intel Reply to the 26 July 2007 SO, paragraph 445.

588 E-mail by [NEC Executive] to [NEC Executive] of 15 May 2002, [NEC] submission of 15 December 2005, annex 32.2. [...].

589 Chart entitled [...]; Exhibit 15.1., [NEC] submission of 15 December 2005.

590 Document *"Meeting with* [NEC Executive]*/NEC(Rev1.0)".* Intel submission of 2 June 2008, Annex 2, document 87.

to which "[c]*oncerning Q4* [2002], *we are currently not committed to any volume but to a split 70%/30%.*"[591]

(478) All these elements render the notion proposed by Intel that the 80%, 70% and 90% figures were simply "share expectations" implausible. In reality, these figures were obtained by Intel from NEC in exchange for the rebates.

(479) As regards the following quarters, NEC submitted to the Commission that [certain prices] were conditional on the respective market segment share figures.[592]

(480) In support of its claims that its rebates after the first two quarters of the Realignment Plan were not conditional, and were not even linked to a "market share expectation", Intel points to an internal NEC email dated 15 July 2003,[593] entitled [...] in which a [NEC] executive informs a [NEC] executive that a certain "[one category of prices]" is not subject to the 80% MSS condition: "*conditions of 80% MSS is not applied for* [one category of prices]". According to Intel, this would make clear that Intel discounts were not conditional on any share requirements.[594]

(481) In fact, the document cited by Intel demonstrates the opposite: it would make no sense for the NEC Executive to clarify that the 80% MSS condition is not applicable "*for* [one category of prices]" if no such condition existed, and if it did not apply to other [categories of prices]. The same chain of emails contains an attachment summarising the [prices] approved by Intel for NEC for Q303. The attachment contains a list of [prices], to which is appended a list of "*Conditions*", which includes: "[...] *will maintain current MSS position from Q2'03 to Q3'03*... [...] ", "[...] *will increase current MSS to 80% ([...]) across* [...]". This is also in line with what [NEC] submitted to the Commission.[595]

(482) Furthermore, [NEC] confirmed in its submission that "[support/certain prices] *offered to* [...] *are indeed contingent upon* [...] *meeting the 70%+ MSS,* [...] *90% and NEC WW 80%+ market shares*".[596] Intel's allegation that these [categories of

---

591 E-mail of 9 December 2002 from [NEC Executive] to [NEC Executive].

592 [NEC] submission of 15 December 2005, response to question 21, p. 9.

593 [NEC] submission of 15 December 2005, Annex 7

594 Intel Reply to the 26 July 2007 SO, paragraph 469.

595 [NEC] submission of 15 December 2005, response to question 7, p. 5.

596 [NEC] submission of 15 December 2005, response to question 21, p. 9.

prices] would have been only [categories of prices] "*restricted to use by* [...] *for the* [...] *retail segment*" is contradicted by the [NEC] submission.[597]

2.6.3.2. Reporting obligation of NEC

(483) In order to show that it had reached the required MSS, [...] and [...] were obliged to report their market shares to Intel on a quarterly basis.[598] Although "[...] *has not been following strictly this obligation*"[599], Intel regularly checked the MSS data received to see whether the 70% market share was met, and requested clarifications when necessary. [...] reports that during the Quarterly Business Review meetings, Intel also "*assesses whether or not* [...] *has complied not only with the reporting obligations, but also with the 70%+ market share agreed with Intel.*"[600]

(484) This is confirmed by an e-mail from [Intel executive] to [NEC Executive] which states:

> *"Dear* [...],
>
> *Regarding Q 4* [2002] *number we have based on the Q4 agreement is* [...]. *This is based on 70% of last years overall sales out and the assumption you will grow overall* [...]*% year on year. Please let me know if this is correct as the data will be used at next management meeting and we don't want to have the wrong data."*[601]

(485) Intel argues that there was no such reporting obligation. In its Reply to the 26 July 2007 SO, Intel states that there was no "*mechanism for enforcing share requirements*" and that "*Intel* [n]*ever sought to return of any ECAP discount*"[602]. This is not convincing for the reasons explained in recitals (486) to (489).

(486) Firstly, as referred to in recital (483), Intel regularly required sales figures to check whether the respective market segment share figures were met. For the fourth quarter of 2002, Intel had a doubt on whether NEC had fulfilled its commitment. As a consequence, "*Intel requested an explanation from NEC* (...) *whether the Gartner data accurately reflected* [...] *use of Intel microprocessors.*"[603]

---

597 [NEC] submission of 15 December 2005, response to question 7, pp. 4-5.

598 [...] submission of 15 December 2005, reply to question 1, p. 2. [...].

599 [...] submission of 15 December 2005, reply to question 1, p. 2.

600 Idem.

601 Email by [Intel executive] to [NEC Executive] of 9 October 2002, annex 2.2. of [NEC] submission of 15 December 2005.

602 Intel Reply to the 26 July 2007 SO, paragraph 469.

603 Intel Reply to the 26 July 2007 SO, paragraph 456.

(487) Furthermore, [...]".[604] Intel also provided a contemporaneous email which demonstrates this. In this email, entitled [...], [a NEC Executive] asked [a NEC Executive] to provide MSS data which would allow [NEC] to ask for the payments of outstanding Intel rebates for CQ1 2003: "*Intel is ready to pay CQ1,2003* [support] *(total* [...],[...] *for* [...] *and* [...] *for* [...]*). Now Intel Japan asks me some proof. Can you give me the data of the following by return? CQ1 Intel PC shipment (...) CQ1 Total (Intel+AMD) PC shipment*".[605]

Secondly, [NEC] makes clear that: "*if* [...] *does not fulfil the MSS obligation for a specific quarter, it compromises negotiations of* [prices] *for following quarters.*"[606] In other words, Intel's argument that "*Intel* [n]*ever sought return of any ECAP discount*"[607] does not in any case apply to the sanction mechanism described by NEC of future rebates being compromised.

(489) This mechanism is such that the use of [...] renegotiations enables Intel to enforce its conditionality by reducing rebates of disloyal customers in the [...] following the time where their AMD share exceeded the relevant threshold. Since customers are not legally entitled to any rebate beyond the [...] period, Intel has freedom to implement (or indicate that it will implement) such reductions in rebates. The same mechanism is at work for Dell (see section 2.3), for MSH (see section 2.8) and for HP (see section 2.4), although in the case of HP, the tool which Intel uses to retain its freedom to stop rebates at any time is the 30 day notice clause. It is to be noted that this system of *ex post* enforcement is not incompatible with a certain amount of *ex ante* control. In the case of NEC, for the first three quarters of the relevant period, a small part of the rebate - the [support] - were also subject to an *ex ante* control mechanism which allowed Intel to implement reductions for this part of the rebates in the running quarter as opposed to only in the subsequent quarter. This difference is only a variation in the modalities of the enforcement mechanism of the conditional rebates. It does not alter the fact that both types of rebates, irrespective of their conditionality enforcement system, were awarded in exchange for a promise on the part of Intel's customer to obtain all or most of its requirements exclusively from Intel.

---

604 [NEC] submission of 15 December 2005, reply to question 4, p. 3.

605 E-mail of [NEC Executive] to [NEC Executive], 16 May 2003, Intel's submission of 5 February 2009 related to the 17 July 2008 SSO, Annex 629, p. 11.

606 [NEC] submission of 15 December 2005, response to question 21., p. 9.

607 Intel Reply to the 26 July 2007 SO, paragraph 469.

(490) Intel also claims that it "*did not seek similar information from NEC regarding* [...] *use of Intel microprocessors in connection with any other discounts to NEC. Other discounts provided to NEC consisted principally of* [prices], (...) *without regard to NEC's overall purchases of microprocessors from Intel or AMD.*" However, it is clear that if Intel required the relevant information regarding the [support], it would not have needed the very same information regarding other discounts.

2.6.3.3. The duration of the Santa Clara Agreement

(491) Intel argues in its Reply to the 26 July 2007 SO that the Santa Clara agreement was limited in time: it "*did not extend beyond the first quarter of 2003, and discounts provided to NEC in other quarters were not linked to share expectations.*"[608] Intel adds that during the negotiations between Intel and NEC concerning the second quarter of 2003, Intel rejected the 80% share target "offer" of NEC in exchange for the [...] [support]. According to Intel therefore, the conditionality would not have existed.[609] However, the fact that Intel refused to award a [...] [support]payment in exchange for conditionality during the negotiations does not prove that no conditional [support] payment at all was awarded at the end of the negotiations, nor that no other, [...], conditional payments were awarded. It only shows that Intel sought to award a lower than [...] conditional [support] payment. This is clear from the contemporaneous evidence provided by NEC which shows that, when the negotiation and the deal was closed, a conditional [support] payment was indeed agreed - the opposite of what Intel claims: "*During our discussion with Intel this morning we agreed that: Intel will give us* [...]"[610]. The NEC e-mail confirms the existence of the agreement on conditional [support] payments, at least at the [...] level. Moreover, evidence originating from Intel demonstrates that Intel Japan confirmed to NEC that for the second quarter of 2003, a rebate of [...] was conditional upon a certain volume of Intel x86 CPUs: "[f]*or achieving during that time* [...] *units in Europe, Intel will pay* [...] *to* [...]."[611]

(492) Intel claims that "*this document makes no reference to any share-based condition to the agreement, and none exists*",[612] and quotes a [NEC] internal e-mail, which states that the "*commitment for this CQ2 [2003] is not market share based but*

---

608 Intel Reply to the 26 July 2007 SO, paragraph 454.

609 Intel Reply to the 26 July 2007 SO, paragraph 463.

610 The e-mail of [NEC Executive] to [NEC Executive], 25 April 2003, [NEC] submission of 15 December 2005, Annex 12.3.

611 Letter from Intel ([Intel executive]) to NEC ([NEC Executive]), 31 August 2003.

612 Intel's submission of 5 February 2009 related to the Commission letter of 19 December 2008, paragraph 38.

volume."[613] Nevertheless, a NEC presentation clearly confirms that this amount corresponded with the relevant 70% market segment share.[614] This has also been confirmed by [NEC].[615] Furthermore, other contemporaneous evidence disproves Intel's claim and demonstrates the existence of the market segment share condition: the same person cited by Intel confirmed the existence of the MSS condition in an earlier e-mail: "*We committed* [...] *to this agreement. We have to adjust our mix to 70/30.*"[616] Another e-mail from [...] to [...] concerning the second quarter of 2003 confirms that "[t]*he market share that need to be achieved by* [...] *is 70%.*"[617]

(493) The MSS condition also remained in force after the second quarter of 2003. In this regard, [NEC] itself has explained that the Santa Clara agreement, and the associated conditions, remained in force until November 2005 at least.[618] Indeed, in December 2005, [NEC] reported that "*the 2002 deal is still in force. No new deal has been struck.*"[619]

2.6.3.4. Meeting the share requirements

(494) In addition to arguing that there was no conditionality in the rebates, Intel argues that "*NEC had purchased less than 80% of its worldwide microprocessor requirements from Intel and that* [...] *purchases were significantly less than the targeted 70% of its requirements*".[620]

(495) [NEC] submitted that: "*Since* [...] *has occasionally failed to meet the required threshold* [...]"[621] In this regard, contemporaneous evidence shows that [NEC] took care not to send Intel any data that would have shown lower figures than 70%. [...]. An internal e-mail concerning the fourth quarter of 2002 illustrates this: "*Enclosed find the detail file of our Intel and AMD split. To reach the 70% market share we will have to buy* [...] *more CPU's [sic] from Intel than our current plan.* (...) *Also be aware that we have started the quarter with* [...] *of Intel CPU in stock.*

---

613 E-mail of 22 May 2003 from [NEC Executive] to [NEC Executive].

614 NEC presentation [...] September 2004, [NEC] submission of 15 December 2005, Annex 32.6.

615 [NEC] submission of 15 December 2005, response to question 38, p. 16. and [NEC] submission of 27 March 2007, response to question 7, p. 5.

616 E-mail of 13 January 2003 from [NEC Executive] to [NEC Executive].

617 E-mail of 8 April 2003 from [NEC Executive] to [NEC Executive].

618 [NEC] submission of 27 March 2007, response to question 1.

619 [NEC] submission of 15 December 2005, response to question 10, p. 6.

620 Intel Reply to the 26 July 2007 SO, paragraphs 456, 475.

621 [NEC] submission of 15 December 2005, response to question 21, p. 9.

Therefore (…) *we are in line.*"[622] [...][623] Consequently, Intel was not aware of any potential breach of the market segment share requirements.

(496) On the basis of documents received in the course of the access to file procedure, Intel argues as regards the fourth quarter of 2002 that the market segment share thresholds described by the Commission were not met. According to Intel, the Intel share was in fact […]% for [...].[624] However, contrary to what Intel claims, in fact, […]% is the figure for [...] Branch of [...]. [...] also included [...] Branch known as [...]. According to the internal break-up of the overall 80%, the 70% figure for [...] included the [...]. [...] reached the 70% because [...] was [...]% Intel. Indeed, NEC specified this to Intel.[625]

(497) Intel makes a similar argument for the second quarter of 2003,[626] but commits the same error: the presentation cited by Intel ("[...] *and* [...]*% MSS*") concerns only the [...] figures of [...]. Intel adds that "*Intel hoped to secure increased orders of* [...] *units from* [...], *for a total of* [...] *units in the quarter.*"[627] First of all, it should be noted that Intel fails to mention that the [...] units in question would have increased Intel's market share at [...] to [...]%.[628] However, in fact, the agreed order, as per the e-mail of [Intel executive] dated two days after the e-mail referred to by Intel, states: "*The Q2 wwide agreement is to provide support to* [...] *to the maximum of* [...] – *this is constructed in two parts* [...] *in* [prices] *and* [...] *in rebated revenue based onthe* [sic] *volume to be at the agreed level of* [...] *shipped to you in Q2 03 for* [...] [sic]."[629] This e-mail also makes it clear, that a part of it - "*around* [...]*will go to* [...] ". [NEC] has confirmed that "*the agreed volume does correspond to the 70%+ MSS.*"[630]

---

622 Email of 3 December 2002 from [NEC Executive] to [NEC Executive].

623 Email of 4 December 2002 from [NEC Executive] to [NEC Executive].

624 Reference to quarter 4 of 2002, Reply to the SO, paragraph 456.

625 "*Using* [...] *data sent to me yesterday, I explained that* [...] *achieved more that [sic] 70% Intel share and they understood the situation.*" E-mail of [NEC Executive] to [NEC Executive] and [NEC Executive], 7 February 2003. In a similar vein, [NEC] submitted to the Commission that: "*Since* [...] *has occasionally failed to meet the required threshold*[...] [NEC] submission of 15 December 2005, response to question 21, p. 9.

626 Intel Reply to the 26 July 2007 SO, paragraph 464.

627 Intel Reply to the 26 July 2007 SO, paragraph 465.

628 Annex 275 of Intel Reply to the 26 July 2007 SO.

629 Annex 8.3 of [NEC] submission of 15 December 2005.

630 [NEC] submission of 15 December 2005, p. 16.

(498) The error is the same with respect to the period between 2003 and the first half of 2005.[631] The evidence referred to by Intel[632] concerns only [...], which is clearly indicated on the front page of the presentation.

(499) Intel claims that it *"received access to an expanded range of* [...] *case file documents* (...) *clearly and incontrovertibly establish[ing] that* [...]*purchase of AMD microprocessors routinely exceeded the 30% level".*[633] However, as outlined above, Intel has not demonstrated this.

(500) In sum, even if it were the case that [...] or [...] had occasionally not met the market segment share requirements, which is not conclusively demonstrated, the conclusion (see section 2.6.4) that Intel made the payment of rebates to NEC conditional on market segment share requirements is not invalidated.

2.6.4. Conclusion on facts

(501) On the basis of the evidence highlighted in sections 2.6.3.1-2.6.3.4, it is concluded that over the period between the fourth quarter of 2002 and the second quarter of 2003, Intel made the payment of rebates to NEC conditional on NEC purchasing at least 80% of its client PC x86 CPU requirements worldwide from Intel (this was broken down into a 70% requirement for [...] and a 90% requirement for [...]).

(502) In addition, the Commission concludes that the rebates paid by Intel to NEC from the third quarter of 2003 to November 2005 was conditional upon NEC fulfilling an Intel market share requirement of 80% in the client PC segment.

(503) [...].

2.7 Lenovo

2.7.1. Introduction

(504) Lenovo describes itself as *"one of the world's leading personal computer companies, with annual revenues of approximately USD 15 billion and over 20 000 employees. Lenovo gained a worldwide presence when it acquired the former IBM Personal Computing Division in 2005."*[634] Until 2008 when it started to also sell

---

631 Intel Reply to the 26 July 2007 SO, paragraph 475.

632 Intel Reply to the 26 July 2007 SO, annex 255-A.

633 Intel submission of 5 February 2009 related to the SSO, paragraph 407. It shall be noted that the majority of the evidence submitted by Intel suffers from the same deficiency outlined in recitals (495)-(497), that is to say only concerns [...].

634 Lenovo submission of 27 November 2007, p. 1.

servers,[635] Lenovo sold desktops and notebooks. In 2006, in terms of overall sales of computers in these two segments, Lenovo held an overall market share of [...]% per quarter. The share of Intel x86 CPUs in Lenovo computers with regard to the two segments was [...]% per quarter in the same period. Lenovo's worldwide share of notebook sales in 2006 was on average [...]% per quarter. Since 2003 until at least May 2008, for notebooks, including both commercial and consumer, Lenovo was sourcing x86 CPUs only from Intel. For desktops, Lenovo sources both from Intel and AMD.[636]

2.7.2. Lenovo's consideration of AMD

(505) According to Lenovo's submission of 27 November 2007, in 2005 and at the beginning of 2006, Lenovo experienced *"problems of the Lenovo-Intel relationship across all parts of the business."* Lenovo considered that the *"Intel platform brand is increasingly not cost competitive"* and "[o]*ver time, Intel was losing the battle with AMD on price and reliability."*[637] A draft Lenovo-Intel CEO Briefing Document of February 2006 stated that there were also problems with supplies. *"Intel shortages in 2005 caused* [a substantial amount][638] *in lost revenue (...),* [...]" Furthermore, [...]"[639] *"Intel's support of Lenovo's marketing efforts was disappointing:* [...]"[640]

2.7.3. Lenovo's dual source strategy for notebooks

(506) In view of the unreliability of Intel supplies and the fact that in some executives' views *"the combination of price and performance favoured at times AMD over Intel"*, Lenovo concluded that just as it had for its desktop products, it should also contemplate a dual-source strategy for notebooks.[641] [In] 2005, it was suggested at an internal meeting to "[e]*stablish dual source to mitigate Intel supply constraints."*[642] [Lenovo executive] wrote to [Lenovo executive]: *"The supply is still tight in 2006. We cannot solve this problem without two in one box supply*

---

635 Lenovo submission of 10 June 2008, response 1.(f) to question 1.

636 Gartner, OEM Market Shares 2000-2007, extracted on 27 May 2008, AMD submission of 4 June 2008.

637 Lenovo submission of 27 November 2007, answer to question 4, p. 12.

638 Paraphrase of the original text as provided by Lenovo.

639 Lenovo submission of 27 November 2007, Annex 23, Intel-Lenovo CEO Meeting Briefing Document – DRAFT of 27 February 2006, pp. 3-4.

640 Lenovo submission of 27 November 2007, answer to question 4, p. 12.

641 Lenovo submission of 27 November 2007, answer to question 4, p. 12.

642 Lenovo submission of 27 November 2007, Annex 23, Draft Lenovo PowerPoint presentation of 12 August 2005 entitled "[...] *Alliance Update (Draft)*", slide 4.

fuarantee [sic – guarantee]."[643] The dual source strategy also functioned to "[o]*ptimize aggregate investments from Intel and AMD alliances*" and to achieve "[c]*ompetitive price pressure on Intel.*"[644]

2.7.4. Agreement to launch AMD-based Lenovo notebooks

(507) At the same time as Lenovo was experiencing problems in its relations with Intel, it also experienced market demand for AMD-based notebooks. In August 2005, [Lenovo executive] wrote to [Lenovo executive]: *"If the AMD notebook product in* [geographical area] *is what is required to meet customer requirements then we should get the product announced and shipped."*[645] In September 2005, at an internal Lenovo meeting to evaluate Intel's rebate proposal for 2006, Lenovo assessed the competitive environment prevailing at the time with the following comments: *"AMD has widespread penetration";*[646] *"AMD is Especially Strong in Small Business; AMD Has the highest penetration in the market Lenovo is targeting for growth";*[647] *"AMD gaining momentum in Notebooks";*[648] *"AMD Gaining Momentum in the Enterprise; AMD technologies are competitive; Lenovo sales teams are asking for an AMD alternative";*[649] *"AMD CPU Prices Are Significantly Below Intel; ASP* [Average Sales Price] *Gap growing due to Intel ASP increasing while AMD ASP is decreasing";*[650] *"AMD Gaining* [geographical area] *Market Share; EXPECTATIONS: Large CPU cost gap will continue to drive AMD*

---

643 Lenovo submission of 27 November 2007, Annex 22, e-mail [between Lenovo executives] of 15 March 2006 at 04:56 AM entitled *"Re: UPDATE: Lenovo* [geographical area] *Notebook Letter of Intent."*

644 Lenovo submission of 27 November 2007, Annex 23, Lenovo presentation of January 2006 entitled *"AMD Update* – [...] *Alliances"*, slide 3.

645 Lenovo submission of 27 November 2007, Annex 22, e-mail [between Lenovo executives] of 19 August 2005 at 06:22AM entitled *"Re: Fw: LC non-Intel Mobile product status."*

646 Lenovo submission of 27 November 2007, Annex 23, Draft Lenovo PowerPoint presentation entitled *"Intel "Meet Comp" Program for Lenovo in 2006 – DRAFT"* of September or October 2005, slide 8. It should be noted that there is no exact date on the presentation but on the basis of the first slide, it is evident that it was a preparatory document for a meeting scheduled for 5 October 2005.

647 Lenovo submission of 27 November 2007, Annex 23, Draft Lenovo PowerPoint presentation entitled *"Intel "Meet Comp" Program for Lenovo in 2006 – DRAFT"* of September or October 2005, slide 9.

648 Lenovo submission of 27 November 2007, Annex 23, Draft Lenovo PowerPoint presentation entitled *"Intel "Meet Comp" Program for Lenovo in 2006 – DRAFT"* of September or October 2005, slide 10.

649 Lenovo submission of 27 November 2007, Annex 23, Draft Lenovo PowerPoint presentation entitled *"Intel "Meet Comp" Program for Lenovo in 2006 – DRAFT"* of September or October 2005, slide 11.

650 Lenovo submission of 27 November 2007, Annex 23, Draft Lenovo PowerPoint presentation entitled *"Intel "Meet Comp" Program for Lenovo in 2006 – DRAFT"* of September or October 2005, slide 12.

share; [Lenovo notebook product] *will increase mobile share."*[651] On 13 September 2005, an internal Lenovo presentation prepared to brief [Lenovo Senior executive] on Intel's rebate proposal, summarised: *"AMD acceptance and share is greater in* [certain] *segments in 2006; AMD continuing to drive down processor costs;* [...]. *"*[652]

(508) Lenovo specified that "[d]*uring 2006 and 2007 Lenovo discussed with AMD ([...]) the possibility of launching* (...) *a range of notebook computers based on the AMD platform."*[653] In November 2007, Lenovo stated that the plans encompassed four models, [two models] to be launched in 2006, and [another two models] to be launched in 2007.[654]

(509) The launch in [geographical area] was originally envisaged for June 2006, followed up by a [geographical area] notebook line in September-October 2006.[655] These originally planned launch dates have been determined by the Commission on the basis of contemporaneous e-mail correspondence between Lenovo executives referred to in footnote 655. Furthermore, following Intel's request that the Commission obtain more documents from AMD concerning its relations with Lenovo, on 8 October 2008, AMD submitted evidence that strengthens or even goes beyond the Commission's findings (and that was submitted to Intel for comment).[656] Therefore, the above launch dates that the Commission established in the 17 July 2008 SSO, which are also maintained for the purposes of this Decision, are very favourable to Intel.

---

651 Lenovo submission of 27 November 2007, Annex 23, Draft Lenovo PowerPoint presentation entitled *"Intel "Meet Comp" Program for Lenovo in 2006 – DRAFT"* of September or October 2005, slide 13.

652 Lenovo submission of 27 November 2007, Annex 23, Lenovo PowerPoint presentation entitled *"Intel "Meet Comp" Proposal for 2006 – Preliminary Lenovo Counterproposal"* of 13 September 2005, slide 8.

653 Lenovo submission of 27 November 2007, answer to question 4, p. 12.

654 Lenovo submission of 27 November 2007, answer to question 4, pp. 10-11.

655 Lenovo submission of 27 November 2007, Annex 22, e-mail between two Lenovo executives of 3 April 2006 at 04:21 PM entitled *"AMD meeting"*. See also for example e-mail from [Lenovo executive] to [Lenovo Senior executive] of 6 April 2006 at 09:13 PM entitled *"AMD notebook"*; and e-mail from [Lenovo executive] to [Lenovo Senior executive] of 7 April 2006 at 09:23 AM entitled *"AMD notebook"*. It should be noted that Annex 22 contains several e-mails dated between 3 and 7 April 2006 that are entitled *"AMD notebook"* or *"AMD meeting."* Therefore, reference to the exact time of the e-mail identifies the individual e-mails within these e-mail chains.

656 AMD submission of 8 October 2008.

(510) Lenovo claims that the original launch date was envisaged for October 2006, rather than June 2006[657] The Commission considers that this claim is not accurate. It is important to note that Intel has not commented on or contested the original launch dates as specified by the Commission in the 17 July 2008 SSO. On the contrary, the Commission's conclusion is reinforced by evidence in Intel's submission of 5 February 2009 related to the SSO. In particular, an Intel presentation of 30 May 2006 entitled 'Lenovo 2H'06 NB Meet Comp Response' mentions *"Considering launch of AMD based* [...] *offering in July for* [geographical area] *SMB notebook market; Already have machines/components in inventory."*[658] This provides direct evidence relating to the launch date which is contrary to what Lenovo has specified.

(511) For notebooks to be sold in [geographical area], Lenovo expected to purchase between [...] units of AMD x86 CPUs in the first reference period[659] following the announcement and altogether [...] units of AMD x86 CPUs in total within the first twelve months of the announcement of the first AMD-based Lenovo notebook.[660] For the market outside [geographical area], Lenovo expected to purchase [...] units of AMD in the first 9 months of the same period,[661] that is, [...] units of AMD in a reference period of one year from the announcement of the first AMD-based Lenovo notebook.

(512) It is to be noted that the agreement between Lenovo and AMD included the text that *"such purchase volumes and announcement dates are good faith estimates only to be used for planning purposes and are not guaranteed by Lenovo".*[662] However, there is evidence that already during the first half of 2006, Lenovo made the necessary preparations for the AMD notebook launch and by April 2006, Lenovo *"incurred Development expenses already on this product"* and *"I believe some*

---

657 Lenovo submission of 27 November 2007, reply to question 4, pp. 10-11. Lenovo claims that it had originally planned the launch of [two models] for October 2006; and [another two models] for May/June 2007.

658 Intel submission of 5 February 2009 related to the SSO, Annex 567, Intel presentation of 30 May 2006 entitled 'Lenovo 2H'06 NB Meet Comp Response', p. 5.

659 Lenovo submission of 27 November 2007, Annex 23, Lenovo presentation of January 2006 entitled *"AMD Update – [...] Alliance"*, slide 3. See also Lenovo submission of 27 November 2007, Annex 22, e-mail [between Lenovo executives] of 31 July 2006 entitled *"Work Item #3 from the Minutes from the AMD – Lenovo NB meeting 7-27-06."* Range as provided by Lenovo.

660 Development and marketing funding Statement of Work #4906L10121 to Goods Agreement #4905L10507, Schedule C. AMD submission of 8 October 2008, Annex 1.

661 Development and marketing funding Statement of Work #4906L10121 to Goods Agreement #4905L10507, Schedule D. AMD submission of 8 October 2008, Annex 1.

662 Lenovo submission of 27 November 2007, Annex 22, e-mail [between Lenovo executives] of 31 July 2006 entitled *"Work Item #3 from the Minutes from the AMD – Lenovo NB meeting 7-27-06."*

commitments with suppliers."[663] This shows that Lenovo was determined to follow through its agreement with AMD.

2.7.5. Plans for [...] alliance with AMD

(513) In view of the expected *"growth of the relationship, including the trend towards AMD supplying* [...][664] *per cent of Lenovo's CPUs"*,[665] Lenovo considered moving from a transactional-type relationship into a [...]alliance with AMD. According to a Lenovo presentation of January 2006, the negotiation of the alliance with AMD was "closed" by January 2006.[666]

(514) Details of this AMD-Lenovo co-operation were set out in a document called Statement of Work (SOW) that was finalised between mid-March and the beginning of April 2006. This timeline and agreement on the SOW are evidenced by contemporaneous e-mails between Lenovo executives: on 14 March 2006, [Lenovo executive] e-mailed [another Lenovo executive] that *"*[w]*e are going to close and sign the agreement this Wednesday with AMD."*[667] In an e-mail of 6 April 2006, [Lenovo executive] told [Lenovo Senior executive]: *"Just so you know last week the AMD contract was also signed* (...)*."*[668]

(515) The notebook deal with AMD was incorporated into this SOW. This is evidenced by an e-mail from [AMD executive] to a Lenovo employee on 1 March 2006: *"The attached is the Letter summarizing the* [geographical area] *Notebook launch deal between AMD and Lenovo. Once this is signed, the details will be incorporate* [sic] *into the Statement of Work (SOW) being finalized in Raleigh. I have attached the*

---

663 Lenovo submission of 27 November 2007, Annex 22, e-mail from [Lenovo executive] to [Lenovo Senior executive] of 7 April 2006 entitled *"AMD Notebook for* [geographical area]*."*

664 Paraphrase of the original text as provided by Lenovo.

665 Lenovo submission of 27 November 2007, answer to question 4, p. 13, referring to Lenovo presentation of January 2006, entitled *"AMD Update* – [...] *Alliances"*, slide 2, in Annex 23 to the Lenovo submission of 27 November 2007.

666 Lenovo submission of 27 November 2007, Annex 23, Lenovo presentation of January 2006 entitled *"AMD Update* – [...] *Alliances"*, slides 2 and 3. *"Closed negotiations with AMD for* [...]*relationship"*; *"Finalized AMD product & country rollout plan."*

667 Lenovo submission of 27 November 2007, Annex 22, e-mail [between Lenovo executives] of 14 March 2006 at 00:07 entitled *"UPDATE: Lenovo* [geographical area] *Notebook Letter of Intent"*. It should be noted that Annex 22 contains a chain of e-mails entitled *"UPDATE: Lenovo* [geographical area] *Notebook Letter of Intent."* Therefore, reference to the exact time of the e-mails with this title intends to identify the individual e-mails within the e-mail chain.

668 Lenovo submission of 27 November 2007, Annex 22, e-mail from [Lenovo executive] to [Lenovo Senior executive] of 6 April 2006 at 09:13 PM entitled *"Fw: AMD notebook."*

SOW and Schedule C for your reference."[669] Another piece of evidence is an e-mail [between Lenovo executives] of 14 March 2006 to which he also attached Schedule C of the agreement with AMD. Schedule C was called *"Lenovo Branded Notebook Products for* [geographical area]" and set out the detailed provisions of the Lenovo-AMD co-operation in this regard.[670] Schedule D contained the relevant provisions for the AMD-based notebooks outside [geographical area].[671]

2.7.6. Intel's reaction

(516) During the negotiations with AMD on the purchase of CPUs for notebooks, Lenovo continuously assessed the potential Intel reaction. In August 2005, a draft Lenovo internal presentation specified: *"Strategy:* (...) *Increased AMD participation; Issues: Adverse* [Intel] *reaction from increased AMD usage"*, and *"Potential for Intel retaliation."*[672] According to [Lenovo executive], *"if we further expand AMD product line, we will have risk in Intel side."*[673] In October 2005, a Lenovo internal presentation suggested to *"*[s]*et up meeting with* [Lenovo Senior executive] *and* [Intel executive] *if inadequate movement by Intel."*[674] In March 2006, a Lenovo executive wrote: *"The next step with AMD in term of product is to roll out an AMD Notebook for* [geographical area] *in june/july.* (...) [A Lenovo executive] *wants to cancel this product, he is concerned that Intel will retaliate on the relationship business."*[675]

2.7.7. The value of [...] remained

(517) Despite the risks of a negative reaction from Intel, the value of [...] for Lenovo remained. This is evidenced by several contemporaneous e-mails between Lenovo

---

669 Lenovo submission of 27 November 2007, Annex 22, e-mail from [AMD executive] to [Lenovo executive] of 1 March 2006 at 03:42 AM entitled *"Lenovo* [geographical area] *Notebook Letter of Intent."*

670 Lenovo submission of 27 November 2007, Annex 22, e-mail [between Lenovo executives] of 1 March 2006 at 03:42 AM entitled *"Lenovo* [geographical area]*Notebook Letter of Intent."* See also e-mail [between Lenovo executives] of 14 March 2006 at 00:07 entitled *"UPDATE: Lenovo* [geographical area] *Notebook Letter of Intent."*

671 Lenovo submission of 27 November 2007, Annex 22, e-mail [between Lenovo executives] of 31 July 2006 entitled *"Work Item #3 from the Minutes from the AMD – Lenovo NB meeting 7-27-06"*.

672 Lenovo submission of 27 November 2007, Annex 23, Draft Lenovo PowerPoint presentation of 12 August 2005 entitled *"*[...] *Alliance Update"*, slides 3-4.

673 Lenovo submission of 27 November 2007, Annex 22, e-mail [between Lenovo executives] of 19 August 2005 at 03:54 AM entitled *"Fw: LC non-Intel* [...]*product status."*

674 Lenovo submission of 27 November 2007, Annex 23, Draft Lenovo PowerPoint presentation of September or October 2005 entitled *"Intel "Meet Comp" Program for Lenovo in 2006 – DRAFT"*, slide 2.

675 Lenovo submission of 27 November 2007, Annex 22, e-mail between two Lenovo executives of 21 March 2006 at 08:01 AM entitled *"Urgent: Intel/AMD."*

executives. In February 2006, a Lenovo executive wrote to another Lenovo executive that *"I want to ensure that both Intel and AMD must compete for our business everyday. This will lead to much more competitive business model in the long term."*[676] In March 2006, [Lenovo executive] wrote to several Lenovo executives that "[w]*e can not stop just because Intel is coming with a lower* [average selling] *price."*[677] Later that month, a Lenovo executive wrote that "[i]*t is key to the success of our* [...] *strategy that we make our AMD relationship work."*[678] According to [Lenovo executive], *"AMD retains a performance/spec advantage with* [product] *over* [product] *and a price/performance advantage for* [certain products]. *The strategic value of having AMD in our portfolio remains."*[679] In another e-mail, he wrote *"[d]espite the pricing change, having AMD in our product line still has strategic value – but only if the program can be made viable and sustainable."*[680]

(518) In March 2006, a Lenovo executive suggested to the highest executives that "[w]*e maintain our course with an AMD notebook, we will make it no matter what, but instruct* [Lenovo executive] *to have Intel bid for it* (...) [Lenovo executive] *has a meeting planned with* [Intel executive] *next week, he takes the opportunity to re explain to Intel Lenovo* [...] *strategy."*[681] In April 2006, a Lenovo executive wrote to another Lenovo executive *"regarding the so-called "AMD Notebook" for* [geographical areas]." He stated that *"I believe getting* [...] *from Intel NOT TO DO AMD is not worth it."*[682] According to [Lenovo executive], *"we cannot stop our AMD Notebook plans in* [geographical area]. *(...) there are still* [a number of] *reasons why we need to do an AMD notebook."*[683]

---

676 Lenovo submission of 27 November 2007, Annex 22, e-mail between two Lenovo executives of 10 February 2006 entitled *"Re: Thanks for the opportunity."*

677 Lenovo submission of 27 November 2007, Annex 22, e-mail from [Lenovo executive]to several Lenovo executives of 15 March 2006 at 06:40 AM entitled *"Re: UPDATE: Lenovo* [geographical area] *Notebook Letter of Intent."*

678 Lenovo submission of 27 November 2007, Annex 22, e-mail between Lenovo executives of 21 March 2006 at 08:01 AM entitled *"Urgent: Intel/AMD."*

679 Lenovo submission of 27 November 2007, Annex 22, e-mail [between Lenovo executives] of 26 May 2006 entitled *"AMD Notebook Programs."*

680 Lenovo submission of 27 November 2007, Annex 22, e-mail from [Lenovo executive] to [Lenovo Senior executive] of 26 May 2006 entitled *"AMD Notebook Program – next steps."*

681 Lenovo submission of 27 November 2007, Annex 22, e-mail between Lenovo executives of 21 March 2006 at 08:01 AM entitled *"URGENT: Intel/AMD."*

682 Lenovo submission of 27 November 2007, Annex 22, e-mail between two Lenovo executives of 30 April 2006 entitled *"Need advice."*

683 Lenovo submission of 27 November 2007, Annex 22, e-mail [Lenovo executive] to several Lenovo executives of 15 March 2006 at 06:40 AM entitled *"Re: UPDATE: Lenovo* [geographical area] *Notebook Letter of Intent."*

2.7.8. Postponement and cancellation of AMD-based notebooks and link to Intel payment

(519) As described in section 2.7.4, the AMD-based Lenovo notebooks were to be launched first in [geographical area] in June 2006[684], followed up by a [geographical area] notebook line in September-October 2006. However, none of these launches were implemented as originally planned. The launch of AMD-based notebooks was postponed twice. In both instances, the postponement was linked to agreements with Intel whereby as a condition of a payment from Intel to Lenovo, Lenovo would postpone the AMD notebooks. The first decision to postpone was taken at the beginning of April 2006, followed by a second postponement decision at the end of June 2006. Initially, the planned [geographical area] launch was delayed to coincide with the [geographical area] launch in September-October 2006. Subsequently, the entire launch was postponed to 2007. These postponements are examined in sub-sections 2.7.8.1. and 2.7.8.2. Section 2.7.8.3. examines the subsequent cancellation of the AMD-based notebook, and Section 2.7.8.4. describes an incident within Lenovo which further demonstrates the link between the Intel payment and the postponement and cancellation of the AMD-based notebook.

2.7.8.1. First postponement

(520) The first decision to postpone was taken at the beginning of April 2006 whereby the [geographical area] launch was delayed from June 2006 to coincide with the [geographical area] launch in September-October 2006. According to an e-mail of 14 March 2006 between Lenovo employees, the so-called Statement of Work with AMD (see section 2.7.5 on Plans for [...] Alliance with AMD) was to be agreed and signed within days.[685] However, Intel reacted negatively to this closer co-operation between Lenovo and AMD. On 17 March 2006, [Intel executive] drafted a note on the thread of communication with [Lenovo Senior executive]: *"As we continue our cooperation in addressing Lenovo's competitiveness and profitability in emerging markets and SMB segments, we've put in place very compelling meet comp responses* (...) *Despite these actions, I've heard that the* [geographical area] *business unit will be introducing notebooks in calendar Q2 based on alternate architecture. Seems like we're out of synch here!"*[686] In other words, already at the

---

684 As noted above, the June 2006 launch date as established by the Commission is very favourable to Intel.

685 Lenovo submission of 27 November 2007, Annex 22, e-mail [between Lenovo executives] of 14 March 2006 at 00:07 entitled *"UPDATE: Lenovo* [geographical area] *Notebook Letter of Intent": "We are going to close and sign the agreement this Wednesday with AMD."*

686 E-mail [between Intel executives] of 17 March 2006 entitled *"RE: Q2 deal details"*. Intel submission of 2 June 2008, Annex 2, Document 29. The fact that this e-mail contains a speaking note for [Lenovo Senior executive] is evidenced by the response to [Intel executive]'s e-mail by

time, Intel wanted to make clear to Lenovo that its favourable offers were directly linked to Lenovo's "non co-operation" with AMD in the notebook segment. This is confirmed by another passage in the same note drafted by [Intel executive]: *"Mobile* [notebook] *consumption goes from* [...]*(QoQ)* [quarter on quarter], *holding 100% MSS* [Market Segment Share]." This passage confirms that Intel closely followed not only Lenovo's volume of purchases from Intel, but also whether Lenovo maintained exclusivity.

(521) Despite [Intel executive]'s reaction of 17 March 2006, for about another two weeks, preparations for the AMD launch proceeded as planned. This is evidenced by the following e-mail quotes. On 21 March 2006, [Lenovo executive] still wrote to the highest Lenovo executives that "[t]*he next step with AMD in term of products is to roll out an AMD Notebook for* [geographical area] *in june/july* [sic]."[687] On 27 March 2006, [Lenovo executive], in an e-mail to the same executives, wrote: *"please find a short summary of the key elements of the Lenovo-AMD relationship* (...) *and you also heard about the recent discussions on the AMD notebook for* [geographical area], *which eventually will happen as planned."*[688] On 4 April 2006, a Lenovo executive wrote: *"we are trying close* [sic] *on the AMD notebook plan, for* [geographical area] *in June and* [geographical area] *in October.* (...) *AMD has told us that* [a Lenovo executive][689] *confirmed that we would launch an AMD notebook in* [geographical area] *in June and* [geographical area] *in Sept/Oct, but I have not heard this confirmed from the Lenovo side on what said* [sic] *during that meeting."*[690]

(522) However, as of the beginning of April 2006, Lenovo started talking about the postponement of the AMD-based notebook launch. In reply to the Lenovo executive's e-mail of 4 April 2006 (referred to in recital (521)), the same day, another Lenovo executive, the addressee of the e-mail, told him that "[i]*n the meeting with AMD,* [a Lenovo executive][691] *mentioned that we will launch AMD*

[Intel executive]. The e-mails starts with *"Quick feedback on the note to* [Lenovo Senior executive]" and continues with comments on the note. E-mail [between Intel executives] of 23 March 2006 entitled *"RE: Q2 deal details"*, Intel submission of 2 June 2008, Annex 2, Document 30.

687 Lenovo submission of 27 November 2007, Annex 22, e-mail from [Lenovo executive] to [Lenovo executive], [Lenovo Senior executive] and [Lenovo Senior executive] of 21 March 2006 entitled *"Urgent: Intel/AMD."*

688 Lenovo submission of 27 November 2007, Annex 22, e-mail from [Lenovo executive] to [Lenovo Executive], [Lenovo Senior Executive] and [Lenovo Senior Executive] of 27 March 2006 entitled *"Your meeting with* [AMD Senior Executive]."

689 Paraphrase of the original text as provided by Lenovo.

690 Lenovo submission of 27 November 2007, Annex 22, e-mail between two Lenovo executives of 3 April 2006 at 04:21 PM entitled *"AMD meeting."*

691 Paraphrase of the original text as provided by Lenovo.

product but not confirm [sic] *date."*[692] Still on the same day, a Lenovo executive e-mailed another Lenovo executive stating *"I continue to hear through the rumour mill that* [a Lenovo executive][693] *has a deal with Intel to not do AMD notebook."*[694]

(523) However, on 6 April 2006, [Lenovo executive] reported that "[Lenovo executive] *meet* [sic] *with Intel last week, specifically* [Intel executive], *and confirmed he would not do AMD for 6 months on notebook and only when* [geographical area] *did it."* He mentioned that the decision had been taken despite the fact that *"last week the AMD contract was also signed."*[695] On 7 April 2006, a Lenovo executive wrote to another Lenovo executive that Lenovo [geographical area][696] *"will not do AMD project, say, for keeping good relationship with Intel.* [Lenovo geographical area][697] *has already decided not to launch within six months.* (...) *the product will launch at the same time both in* [geographical area] *and* [geographical area] *in Sept."*[698] On 11 April 2006, [Lenovo executive] wrote an e-mail to *"document what we agreed tonight so there are no misunderstandings. We agreed to alternative #3."*[699] Alternative #3 meant *"Move* [geographical area] *plan & Add* [geographical area] *to* [another geographical area] *plan => Launch* [geographical area] *NB* [a Lenovo notebook line] *in September and Launch Lenovo* [certain] *NB's* [in geographical area] *and in* [geographical area]."[700]

---

692 Lenovo submission of 27 November 2007, Annex 22, e-mail between two Lenovo executives of 5 April 2006 at 06:34 AM entitled *"AMD meeting."* Note: They are talking about a third Lenovo executive who had a meeting with AMD.

693 Paraphrase of the original text as provided by Lenovo.

694 Lenovo submission of 27 November 2007, Annex 22, e-mail between two Lenovo executives of 4 April 2006 at 06:21 PM entitled *"AMD notebook."*

695 Lenovo submission of 27 November 2007, Annex 22, e-mail from [Lenovo executive] to [Lenovo Senior executive] of 6 April 2006 at 09:13 PM entitled *"Fw: AMD notebook."*

696 Paraphrase as provided by Lenovo. Note that the originally planned June 2006 notebook launch would have been only for [geographical area].

697 Paraphrase of the original text as provided by Lenovo.

698 Lenovo submission of 27 November 2007, Annex 22, e-mail between two Lenovo executives of 7 April 2006 at 06:11 AM entitled *"AMD notebook."*

699 Lenovo submission of 27 November 2007, Annex 22, e-mail from [Lenovo executive] to Lenovo executives of 11 April 2006 entitled *"Re: Charts for Tonight Discussion on AMD."*

700 Lenovo submission of 27 November 2007, Annex 22, e-mail [between Lenovo executives] of 10 April 2006 entitled "[geographical area] *AMD Notebook Options."* This also indicates that the AMD-based notebook to be launched in [geographical area] was to be in [a certain] notebook line, while the AMD-based notebook to be launched [in another geographical area] was [a certain] Lenovo [product].

2.7.8.2. Second postponement

(524) The second decision to postpone was taken in June 2006, whereby the [geographical area] launch of the AMD-based notebooks, including [geographical area], was postponed to January 2007. Again, contemporaneous evidence shows that this postponement was also the result of a deal between Intel and Lenovo which was conditional on the postponement of the AMD-based notebooks. The remainder of this sub-section contains quotes from e-mails between Lenovo executives or between Lenovo and Intel executives. They are in chronological order to demonstrate the sequence of events that led to Lenovo's decision to break its agreement with AMD and award its notebook business for the rest of 2006 to Intel.

(525) On 17 June 2006, [Lenovo Senior executive] wrote an e-mail to [Intel senior executive]. Amongst other issues, he mentioned "[r]*egarding the notebook decision, I expect to be able to give you a decision by the week of June 26th.*"[701] Therefore, this e-mail shows that Lenovo had been in discussions with Intel concerning its notebooks and was considering its options to then take the final decision at the end of June 2006.

(526) The following day, [Intel senior executive] replied to [Lenovo Senior executive]. His reply describes the background to Intel's offer and the events that led to Lenovo's decision. "[...] "[702] This e-mail shows that, at the time, Dell was about to change its x86 CPU-sourcing strategy from Intel-exclusive to include also AMD x86 CPUs in its PCs and [...] As described in this Decision, while Dell had historically been Intel exclusive across all platforms, in 2006, it indeed started sourcing AMD x86 CPUs for all segments (notebook, desktop and servers).[703] It is also important to highlight that another passage in the same e-mail shows that [Intel senior executive] was aware that what he had said about reducing Dell's rebates as a result of it introducing AMD x86 CPUs in some of its computers, if known by outsiders, would have potentially exposed Intel: "[...] "

(527) On 27 June 2006, a Lenovo executive reported to another Lenovo executive that "[two Lenovo executives][704] *had a dinner with* [an Intel executive][705] *tonight* (...).

---

701 E-mail from [Lenovo Senior executive] to [Intel Senior exectuvie] of 17 June 2006, entitled *"Fw: status check..."*. Intel submission of 2 June 2008, Annex 2, Document 2.

702 E-mail from [Intel senior executive] to [Lenovo Senior executive] of 18 June 2006, entitled *"Re: status check..."*. Intel submission of 2 June 2008, Annex 2, Document 2.

703 Gartner, OEM Market Shares 2000-2007, extracted on 27 May 2008, AMD submission of 4 June 2008.

704 Paraphrase of the original text as provided by Lenovo.

705 Paraphrase of the original text as provided by Lenovo.

When we asked Intel what level of support we will get on NB in next quarter, [he][706] *told us* (...) *the deal is base*[d] [sic] *on our assumption to not launch AMD NB platform.* (...) *Intel deal will not allow us to launch AMD."*[707] A day later, a Lenovo executive stated: *"As you know I have been negotiating a special deal with Intel. The net is that Intel has made us a very attractive offer that we will end up taking. Our part of this deal is that we will award all business of shipments for the rest of this calendar year to Intel. In exchange, Intel will give us a special deal for both* [geographical area] *and* [geographical area]. *The deal is worth millions of dollars."* In the same e-mail, the Lenovo executive stated that *"we need to start managing the* (...) *AMD program liability down to as small a number as possible"*, and that *"*[w]*e need to start adjusting our planning for AMD products* (...) *We are resetting it to launch in* [2007]*."*[708] This e-mail demonstrates that a condition of the payment was that Lenovo would put back its plans to launch an AMD-based notebook.[709]

(528) This means that by or on 28 June 2006, the internal Lenovo decision about the postponement was taken, which was most probably confirmed to Intel formally on 29 June 2006, when Lenovo met with Intel. This is evidenced by a Lenovo internal preparatory presentation entitled *"Prep for 6/29 Meeting with* [an Intel executive][710]*"*. Slide 3 of this presentation stated that *"Intel made aggressive proposal for Lenovo's 2006 notebook business that yields* $ (...) *M gross ($* (...) *M* (...)*) funding in 2H'06"; "Plan => Agree to give Intel all of our notebook business in 2006"; "Award* [...] *and Lenovo* [...] *notebook business to Intel for 2006."*[711]

(529) The communication of the decision to AMD was made in two steps. First, on 23 June 2006, instead of communicating a postponement, Lenovo told AMD that it would buy only a small quantity of x86 CPUs[712] from AMD in July and August

---

706 Paraphrase of the original text as provided by Lenovo.

707 Lenovo submission of 27 November 2007, Annex 22, e-mail between two Lenovo executives of 27 June 2006 entitled *"meeting with Intel."*

708 Lenovo submission of 27 November 2007, Annex 22, e-mail between two Lenovo executives and others of 28 June 2006 entitled *"AMD and Intel."*

709 With the practical consequence that during the period in question, no AMD-based notebooks would be launched.

710 Paraphrase as provided by Lenovo.

711 Lenovo submission of 27 November 2007, Annex 23, Lenovo presentation of June 2006 entitled *"Prep for 6/29 Meeting with* [an Intel executive]", slide 3. The figures contained in the original text were left out due to confidentiality claims from Lenovo.

712 Paraphrase as provided by Lenovo.

2006 for the [geographical area] notebook.[713] The postponement decision was finally communicated to AMD on 28 June 2006.[714]

(530) The fact that the deal was concluded with Intel is evidenced by internal Lenovo e-mail exchanges and presentations from the days following the high-level meeting with Intel on 29 June 2006. In this recital and in recital (533), some examples are quoted. Most importantly, on 30 June 2006, a Lenovo executive sent an e-mail to several Lenovo employees setting out the detailed amounts of payments from Intel and their allocation. *"As a result of the deal that we have closed with Intel we have given the following funding to geos and marketing teams".* He calculated that the deal with Intel was worth [...] gross for two quarters.[715]

(531) In its submission of 5 February 2009 related to the SSO, Intel argues that this estimation overstates the value of the Intel offer to Lenovo. According to Intel, the amounts unrelated to the at-risk sales should not be accounted for, and only the incremental discounts should. Professor [...] and Dr. [...] thereby calculated that the funding amount should have been [...] or [...], depending on some varying factors.[716]

(532) In this regard, the argument that only the incremental part of the funding should be taken into account cannot be accepted. This is because the Intel discount was inextricably linked to the condition of not launching the AMD-notebook (and *de facto* awarding the entirety of Lenovo's notebook business for 2006 to Intel). Furthermore, as was described in recital (530), the figure reported by the Commission is the one that was estimated by Lenovo executives. It therefore reflects Lenovo's own interpretation of the gain which the Intel deal provided to it. Finally, in any event, the amount at stake in the transaction is only given as a matter of background for the case. It is not used in any other place in this Decision. Its precise value is therefore not directly relevant to the conclusion that as a result of a payment by Intel, Lenovo postponed the launch of the AMD-based notebook.

(533) The condition for receiving the payments was that Lenovo had to postpone the AMD launch yet again. On 6 July 2006, a Lenovo executive asked: *"When can I*

---

713 See for example Lenovo submission of 27 November 2007, Annex 22, e-mail from [AMD Senior executive] to [Lenovo Senior executive] of 23 June 2006 entitled *"Re: 20 June meeting"*. See also e-mail from [Lenovo Senior executive] to [Lenovo Senior executive]of 23 June 2006 entitled *"Fw: 20 June meeting."*

714 AMD submission of 5 October 2007, Annex 1, e-mail from [Lenovo Senior executive] to [AMD executive] of 28 June 2006 entitled *"Notebook Announce Plans."*

715 Lenovo submission of 27 November 2007, Annex 22, e-mail between Lenovo executives of 30 June 2006 entitled *"Intel funding allocations."*

716 Intel submission of 5 February 2009 related to the 17 July 2008 SSO, paragraphs 294-296.

get more info allowing me to understand how I can leverage the additional Intel money you will get because of our decision to postpone the AMD NN [sic – NB] *launch (...)?"*[717] On 12 July 2006, a Lenovo executive wrote that "[b]*esides* [...] *LCAP for* [a certain product], *Intel* [geographical area] *has also committed additional* [...] *LCAP* [Lump Sum Customer Authorized Price] *to LC* [Lenovo geographical area] *in Calendar Q3-Q4 as a reward of postponing AMD NB planning and more volume commitment for NB processors."*[718] The same day, [Lenovo executive] wrote to him to "[k]*eep in mind that most of these funds will be used to replace AMD funding that we had been counting on and to manage the postponement of the amd* [sic] *programs."*[719]

2.7.8.3. Exclusivity agreement - cancellation of the AMD-based notebooks

(534) This section describes how discussions between Intel and Lenovo led to their entering into an exclusivity agreement in December 2006, covering 2007, and the conditions attached to this deal. As background, it is important to highlight that already in March 2006, Intel wanted to change its relationship with Lenovo . On 23 March 2006, [Intel executive] wrote to [Intel executive]: " [...] "[720] However, Lenovo rejected those offers and continued with the [...] relationship until December 2006, when it finally agreed to enter into a more [...] relationship as encapsulated, *inter alia*, by the exclusivity agreement for notebooks. This section describes the negotiation and terms of that agreement.

(535) Negotiations between Lenovo and Intel continued and became more intense in November 2006. On 28 November 2006, a high-level meeting took place in Santa Clara to finalise discussions about Intel and Lenovo's [...] relationship[721] and it resulted in an agreement. The technical details of this agreement, called the Memorandum of Understanding[722] ("MOU"), were worked out during the month of

---

717 Lenovo submission of 27 November 2007, Annex 22, e-mail between Lenovo executives of 6 July 2006 entitled *"Intel funding."*

718 Lenovo submission of 27 November 2007, Annex 22, e-mail between Lenovo executives of 12 July 2006 at 07:11 AM entitled *"LCAP for 2 Qtr."*

719 Lenovo submission of 27 November 2007, Annex 22, e-mail [between Lenovo executives] of 12 July 2006 at 07:32 AM entitled *"Re: LCAP for 2 Qtr."*

720 E-mail [between Intel executives] of 23 March 2006 entitled *"RE: Q2 deal details"*. Intel submission of 2 June 2008, Annex 2, Document 30.

721 Lenovo submission of 27 November 2007, Annex 22, e-mail from [Intel executive] to [Lenovo executive] of 22 November 2006 entitled *"Re: Next Monday's meeting in Santa Clara to finalize strategic discussion"*. See also e-mail from [Intel executive] to [Lenovo executives] of 21 November 2006 entitled *"Next Monday's meeting in Santa Clara to finalize strategic discussion."*

722 Lenovo submission of 27 November 2007, Annex 1, Memorandum of Understanding.

December 2006, leading to the final signature at the end of December 2006 – beginning of January 2007.[723]

(536) The MOU covered the four quarters of 2007. Most importantly, it provided for increased funding levels and other commercial benefits for Lenovo. As regards the amount of the funding, in the last months of the negotiations, Intel gradually increased its offer. For example, at the end of November 2006, an Intel presentation to Lenovo evaluated that Intel's *"[r]esponse value increased from ~* [...] *to* [...]."[724] *"Incremental support from Intel valued ~* [...]."[725]

(537) On 5 December 2006, an Intel presentation to Lenovo set out: *"Revised Intel Response:* [...]; [...]([...] *growth vs '06);* [...]; ([...] *value in '07)* (...); *Meet comp of* [...] -[...]; *Up to*[...]." The same slide (at the bottom) summarised Intel's new offer: *"Response meet comp value increased by* [...], *to ~*[...] *incremental, with* [...]."[726]

(538) A Lenovo presentation dated 17 December 2006 shows that the amounts were modified with respect to the 5 December 2006 status. According to slide 2 of this presentation, while the amount of [...] was increased by [...] to [...], the [...] was decreased by [...] to [...].[727] Therefore, the total amount of incremental fund offered by Intel stayed at USD [...] million, as indicated by the presentation of 5 December 2006.

(539) Funding under the MOU was incremental to other Intel funds already received by Lenovo and which Intel continued to pay after the MOU. This is evidenced by an e-mail of 5 January 2007 from [Lenovo executive] to [Lenovo executive]. [Lenovo executive] described in detail "[t]*he Lenovo-Intel relationship in 2007 consistent of "business as usual" elements and new terms that are defined in the recently signed*

---

723 Lenovo's signature is dated 30 December 2006 and Intel's signature is dated 15 January 2007 on the Memorandum of Understanding.

724 Lenovo submission of 27 November 2007, Annex 23, Intel PowerPoint presentation of 28 November 2006 entitled *"Lenovo / Intel* [...] *Discussion"*, slide 4.

725 Lenovo submission of 27 November 2007, Annex 23, Intel PowerPoint presentation of 28 November 2006 entitled *"Lenovo / Intel* [...] *Discussion"*, slide 9.

726 Lenovo submission of 27 November 2007, Annex 23, Intel PowerPoint presentation of 5 December 2006 entitled *"Lenovo / Intel 2007* [...] *Discussion December 5th Update"*, slide 3.

727 Lenovo submission of 27 November 2007, Annex 23, Lenovo PowerPoint presentation of 17 December 2007 (or a few days prior to this date at most) entitled *"Prep for* [Lenovo Senior executive] [Intel executive] Intel executive*3x2 on December 17th"*, slide 2.

MOU."[728] Such *"business as usual"* Intel support was, for instance, [...] Intel Inside Program; [...]; Intel support [...]; or the [...].

(540) Contemporaneous evidence from both Intel and Lenovo demonstrates that an unwritten condition of the MOU was that Lenovo would grant exclusivity to Intel in the notebook segment which led in particular to the *de facto* cancellation of the existing AMD notebook projects. This evidence is addressed in the remainder of this sub-section.

(541) [Intel executive] wrote into his Accomplishments Report for 2006: *"Top 5 ACCOMPLISHMENTS in 2006: 1. Achieved 100% Intel NB CPU MSS in '06 in Lenovo's full NP product portfolio, including* [...] *branded notebooks sold worldwide. Received Division Recognition Award at 3Q'06 BUM for creating comprehensive meet comp response that enabled Intel to win two key "at risk" Lenovo notebook refresh designs and maintain 100% Intel NB CPU MSS at Lenovo worldwide.* (...) *2. Reached formal agreement with Lenovo (signed MOU) on '07 deal that awards Intel 100% Lenovo NB CPU business in '07 and grows Intel '07 DT CPU MSS to* [...]%[729]*, enabling Intel to increase YoY CPU volume sales to Lenovo by over* [...]%".[730]

(542) In addition, an Intel presentation of June 2007 on slide 5 entitled *"07 Framework Review"* described the benefits of the MOU: *"Intel Gets:* [...] *CPU in '07, which equates to 100% NB and* [...]*% DT WW; Intel Gives:* [...] *incremental funding on top of* [...] *and existing programs."* On slide 7, the presentation mentions *"Lenovo 100% aligned with Intel in '07 in NB space."*[731]

(543) An internal Lenovo presentation of November 2006 stated that *"*[...]*"; "NB business will be 100% Intel – No AMD NB."*[732] On 11 December 2006, [Lenovo executive] e-mailed that *"Late last week Lenovo cut a lucrative deal with Intel. As*

---

728 Lenovo submission of 27 November 2007, Annex 22, e-mail [between Lenovo executives] of 5 January 2007 entitled *"2007 Lenovo-Intel* [...]*Relationship."*

729 This Decision only covers the exclusivity rebate in the notebook segment. This is without prejudice to whether there is a conditional rebate in the desktop segment and whether this would be potentially in contravention of Article 82 of the Treaty.

730 *"2006 Accomplishments"* of [Intel executive], p. 1. Intel submission of 2 June 2008, Annex 2, Document 32. The meanings of acronyms are as follows: "NB" for notebook, "MSS" for Market Segment Share, "BUM" for Business Unit Meeting, "YoY" for Year on Year, and "DT" for desktop.

731 Intel presentation of June 2007 entitled *"Lenovo Plan 2007"*, slides 5 and 7. Intel submission of 2 June 2008, Annex 2, Document 74.

732 Lenovo submission of 27 November 2007, Annex 23, Lenovo PowerPoint presentation of November 2006 entitled *"Intel* [...] *Relationship"*, slide 1.

a result of this, we will not be introducing AMD based products in 2007 for our Notebook products".[733]

(544) On 7 November 2006, Lenovo calculated that the volume for the AMD-based notebook x86 CPU ramp and requirements in the first quarter of 2007 would be [...] units.[734] On 7 December 2006, the Lenovo sales department still projected the purchase of [...]9 AMD x86 CPUs for notebooks and [...] x86 CPUs for desktops, adding that *"these are only the larger ones and do not include any of the numbers for smaller retailers."*[735] However, the highest management level within Lenovo had taken the internal decision to give the entire notebook business to Intel already in November 2006 – a message to inform AMD of this decision *"to postpone the launch* (...) *indefinitely"*[736] had already been drafted by 30 November 2006. This was communicated to AMD on 7 December 2006.[737]

(545) The fact that within a very short time, only a few weeks at the maximum, Lenovo changed its business strategy from dual to single sourcing and that the Lenovo sales department was still planning for the AMD launch on 7 December 2006, unaware that on that same day, AMD had been told that all AMD-based Lenovo notebooks had been cancelled, is a further indication that cancelling all the planned AMD-based Lenovo notebooks was linked to the MOU with Intel, which was concluded in the same timeframe. Furthermore, market data confirm that Lenovo did not launch AMD-based notebooks in 2007[738] and in November 2007, Lenovo stated that it had *"no current planned AMD notebooks."*[739]

(546) It should be noted that Schedule C (notebooks for [geographical area]) and D (notebooks for outside [geographical area]) to the Lenovo-AMD SOW included the

---

733 Lenovo submission of 27 November 2007, Annex 22, e-mail from [Lenovo executive] to [executive of Lenovo supplier] of 11 December 2006 entitled *"Cease and Desist all Activity on AMD Product."*

734 Lenovo submission of 27 November 2007, Annex 22, e-mail [between Lenovo executives] of 7 November 2006 entitled *"Re: Fw: LI 1Q07Cy AMD Notebook CPU Ramp and 1Q07 Requirements."* Range as provided by Lenovo.

735 AMD submission of 5 October 2007, Annex 4, e-mail from [Lenovo Executive] to [AMD Executive] of 7 December 2006 entitled *"Re: Update on Final Retail Plans for LVO 3K Mobile Offerings?"*

736 Lenovo submission of 27 November 2007, Annex 22, e-mail from [Lenovo executive] to [Lenovo Senior executive] of 30 November 2006 entitled *"Lenovo confidential call with* [AMD Senior executive]."

737 Lenovo submission of 27 November 2007, Annex 22, e-mail from [AMD executive] to [Lenovo executive] of 7 December 2006 entitled *"Notebook."*

738 Gartner, OEM Market Shares 2000-2007, extracted on 27 May 2008, AMD submission of 4 June 2008.

739 Lenovo submission of 27 November 2007, answer to question 4, p. 12.

text that *"such purchase volumes and announcement dates are* (were) *good faith estimates only to be used for planning purposes and are* (were) *not guaranteed by Lenovo".*[740] In this regard, the Commission considers that as regards the naked restriction elements set out in this Decision, it is irrelevant whether Lenovo was or was not in contractual breach with regard to AMD when delaying and abandoning its AMD project. This is because this is independent of Intel paying Lenovo in exchange for delaying and cancelling its planned AMD-based products.

2.7.8.4. Lenovo trying to conceal the reason for the cancellation of the AMD notebooks and the exclusivity agreement

(547) On 7 December 2007, Lenovo executives drafted a *"positioning message for consistent internal communication of the* [AMD/Intel] *decisions."*[741] According to this *"positioning message"*, the *"decision* [to cancel the AMD notebooks] *was driven by the need* (...) *to* [...]*."*[742] However, despite the efforts not to reveal a link between the cancellation of the AMD notebooks and the deal with Intel,[743] in December 2006, a miscommunication occurred at lower levels within Lenovo.

(548) On 11 December 2006, a procurement manager e-mailed [...], a Lenovo supplier, that *"*[l]*ate last week Lenovo cut a lucrative deal with Intel. As a result of this, we will not be introducing AMD products in 2007 for our Notebook products. Naturally, this is a major strategy shift with significant implications as we have incurred expense and parts for these programs. You should expect a shift in our AMD volumes to Intel based systems. What I am asking you to do today is CEASE AND DESIST ALL ACTIVITY ASSOCIATED WITH AMD PRODUCT."*[744] This triggered a very sensitive reaction from Lenovo's executives: *"Procurement guys goofed* (...) *note went to* [Lenovo supplier] *and* [...] [another Lenovo supplier] *(...) they have retracted the email from the ODM's* [Original Design Manufacturers] *and are in damage control mode but if it leaks to AMD then they'll have evidence*

---

740 Lenovo submission of 27 November 2007, Annex 22, e-mail [between Lenovo executives] of 31 July 2006 entitled *"Work Item #3 from the Minutes from the AMD – Lenovo NB meeting 7-27-06."*

741 Lenovo submission of 27 November 2007, Annex 22, e-mail from [Lenovo executive] to [Lenovo Senior executive] of 7 December 2006 entitled *"Internal positioning of the AMD NB decision."*

742 Lenovo submission of 27 November 2007, Annex 22, e-mail from [Lenovo Senior executive] to [Lenovo executives] of 12 December 2006 entitled *"Internal Positioning of the AMD NB Decision."*

743 Lenovo submission of 27 November 2007, Annex 22, e-mail from [Lenovo executive] to [Lenovo Senior executive] of 7 December 2006 entitled *"Internal positioning of the AMD NB decision": "I intentionally excluded mention of* [...] *from the message because I think it would be prudent to communicate that separately."*

744 Lenovo submission of 27 November 2007, Annex 22, e-mail from [Lenovo executive] to [executive of Lenovo supplier] of 11 December 2006 entitled *"Cease and Desist all Activity on AMD Product."*

of a direct link & our execs could be confronted (...) pls don't forward."[745] In other words, the Lenovo executive was specifying that the Lenovo procurement team had revealed to the outside world the "*direct link*" between the Intel payment and the cancellation of the AMD-based notebook, but that the Lenovo strategy was to attempt to conceal this link.

2.7.9. Intel's arguments

2.7.9.1. Conditionality

(549) Intel denies the existence of any exclusivity conditions in the discounts it offered Lenovo. According to Intel, "*Intel did not condition its discounts on any launch delay or exclusivity*".[746]

(550) Intel dedicates 59 pages of the main text of its submission of 5 February 2009 related to the SSO in an attempt to demonstrate its claim that there was no conditionality in its discounts to Lenovo.[747]

(551) In this text, Intel did not address most of the Commission's evidence on conditionality. For instance, Intel did not comment on the following pieces of evidence which have been specified and explained in recitals (520) to (548):

- *"I continue to hear through the rumour mill that* [a Lenovo executive][748] *has a deal with Intel to not do AMD notebook."*[749]
- "[Lenovo Executive] *meet* [sic] *with Intel last week, specifically* [Intel executive], *and confirmed he would not do AMD for 6 months on notebook and only when* [geographical area] *did it."*
- Lenovo [geographical area][750] *"will not* do *AMD project, say, for keeping good relationship with Intel.* [Lenovo geographical area][751] *has already decided not*

---

745 Lenovo submission of 27 November 2007, Annex 22, e-mail between two Lenovo executives of 14 December 2006 entitled *"Cease and Desist all Activity on AMD Product."*

746 Intel submission of 5 February 2009 related to the 17 July 2008 SSO, paragraph 29.

747 Intel submission of 5 February 2009 related to the 17 July 2008 SSO, pp. 117 to 176. In addition, 18 pages.of the annexed Report of Professor [...] and Doctor [...] are dedicated to Lenovo. These counts do not include exhibits and annexes.

748 Paraphrase of the original text as provided by Lenovo.

749 Lenovo submission of 27 November 2007, Annex 22, e-mail between two Lenovo executives of 4 April 2006 at 06:21 PM entitled *"AMD notebook."* See recital (522).

750 Paraphrase as provided by Lenovo. It should be noted that the originally planned June 2006 notebook launch would have been only for [geographical area].

751 Paraphrase of the original text as provided by Lenovo.

to launch within six months. (...) *the product will launch at the same time both in* [geographical area] *and* [geographical area] *in Sept."*[752]

- "[two Lenovo Executives][753] *had a dinner with* [an Intel Executive][754] *tonight* (...). *When we asked Intel what level of support we will get on NB in next quarter,* [he][755] *told us* (...) *the deal is base*[d] [sic] *on our assumption to not launch AMD NB platform.* (...) *Intel deal will not allow us to launch AMD."*[756]

- *"As you know I have been negotiating a special deal with Intel. The net is that Intel has made us a very attractive offer that we will end up taking. Our part of this deal is that we will award all business of shipments for the rest of this calendar year to Intel. In exchange, Intel will give us a special deal for both* [geographical area] *and* [geographical area]. *The deal is worth millions of dollars."*

- *"Intel made aggressive proposal for Lenovo's 2006 notebook business that yields* $ (...) *M gross ($* (...) *M* (...)*) funding in 2H'06"; "Plan => Agree to give Intel all of our notebook business in 2006"; "Award* [...] *and Lenovo* [...] *notebook business to Intel for 2006."*[757]

- *"When can I get more info allowing me to understand how I can leverage the additional Intel money you will get because of our decision to postpone the AMD NN* [sic – NB] *launch* (...)*?"*[758]

- "[k]*eep in mind that most of these funds will be used to replace AMD funding that we had been counting on and to manage the postponement of the amd* [sic] *programs."*[759]

---

752 Lenovo submission of 27 November 2007, Annex 22, e-mail between two Lenovo executives of 7 April 2006 at 06:11 AM entitled *"AMD notebook."* See recital (522).

753 Paraphrase of the original text as provided by Lenovo.

754 Paraphrase of the original text as provided by Lenovo.

755 Paraphrase of the original text as provided by Lenovo.

756 Lenovo submission of 27 November 2007, Annex 22, e-mail between two Lenovo executives of 27 June 2006 entitled *"meeting with Intel."* See also recital (527).

757 Lenovo submission of 27 November 2007, Annex 23, Lenovo presentation of June 2006 entitled *"Prep for 6/29 Meeting with* [an Intel executive]", slide 3. The figures contained in the original text were left out due to confidentiality claims from Lenovo. See also recital (528).

758 Lenovo submission of 27 November 2007, Annex 22, e-mail between Lenovo executives of 6 July 2006 entitled *"Intel funding."* See also recital (533).

759 Lenovo submission of 27 November 2007, Annex 22, e-mail [between Lenovo Executives] of 12 July 2006 at 07:32 AM entitled *"Re: LCAP for 2 Qtr."* See also recital (533).

– *"Top 5 ACCOMPLISHMENTS in 2006: 1. Achieved 100% Intel NB CPU MSS in '06 in Lenovo's full NP product portfolio, including* [...] *branded notebooks sold worldwide. Received Division Recognition Award at 3Q'06 BUM for creating comprehensive meet comp response that enabled Intel to win two key "at risk" Lenovo notebook refresh designs and maintain 100% Intel NB CPU MSS at Lenovo worldwide.* (...) *2. Reached formal agreement with Lenovo (signed MOU) on '07 deal that awards Intel 100% Lenovo NB CPU business in '07 and grows Intel '07 DT CPU MSS to* [...]*%, enabling Intel to increase YoY CPU volume sales to Lenovo by over* [...]*%".*[760]

– *"Intel Gets:* [...] *CPU in '07, which equates to 100% NB and* [...]*% DT WW; Intel Gives:* [...] *incremental funding on top of* [...] *and existing programs"*[761]

– *"*[...]*"; "NB business will be 100% Intel – No AMD NB."*[762]

(552) In a submission of 8 May 2009, sent by e-mail from [...] to Mr. [...] at 12:58 p.m., Intel provided the Commission with excerpts from the transcript of a deposition of [...] of [Lenovo executive] (the author of the email quoted in the fifth indent of recital (551)) in the course of the litigation between AMD and Intel in the state of Delaware and with certain exhibits mentioned in those excerpts or related to that deposition. That submission was received after the Advisory Committee on Restrictive Practices and Dominant Positions had given its opinion on the draft Decision in a meeting held earlier on the same day. In accordance with settled case-law, the consultation of the Advisory Committee represents the final stage of the procedure before the adoption of the decision.[763] In addition, it follows from Article 11(1) of Regulation No 773/2004 that the undertaking concerned should in principle exercise its right to be heard before the Advisory Committee is consulted. Nevertheless, taking into account Intel's argument that it provided the Commission with the deposition at the earliest possible date, the Commission has carefully examined Intel's submission, the excerpts from [Lenovo executive]'s deposition and the exhibits and considers that they cannot modify its assessment of the relevant facts. In this regard, it should first be noted that the extracts have been provided in

---

760 *"2006 Accomplishments"* of [Intel executive], p. 1. Intel submission of 2 June 2008, Annex 2, Document 32. The meanings of acronyms are as follows: "NB" for notebook, "MSS" for Market Segment Share, "BUM" for Business Unit Meeting, "YoY" for Year on Year, and "DT" for desktop. See also recital (541).

761 Intel presentation of June 2007 entitled *"Lenovo Plan 2007"*, slides 5 and 7. Intel submission of 2 June 2008, Annex 2, Document 74. See also recital (542).

762 Lenovo submission of 27 November 2007, Annex 23, Lenovo PowerPoint presentation of November 2006 entitled *"Intel* [...] *Relationship"*, slide 1. See also recital (543).

763 Joined Cases 100 to 103/80 *Musique Diffusion française and others v Commission* [1983] ECR 1825, paragraph 35; Joined Cases T-213/01 and T-214/01 *Österreichische Postsparkasse and Bank für Arbeit und Wirtschaft v Commission* [2006] ECR II-1601, paragraph 149.

a fragmentary and selective manner and that most of them do not address the issue of the conditionality of the Intel payments and rebates. The only extract which directly relates to this issue reads as follows: "*Q. Was it understood that this offer was to win the* [...] *business and that Lenovo would not launch AMD in those product lines? A. I think it was understood that the offer was to win the business for* [...] , *and the likely consequence was that if I was using Intel, I wasn't using somebody else. But it wasn't they you know – I don't – I don't believe that the word "exclusive" or, you know, "drop AMD" or anything like that was – were part of Intel's requirements. Q. Okay. And – and your view was that if you had not awarded Intel the* [...] *business, that Intel's offer would have been* [...] *less? A. They offered me money to make their products competitive if I used them. If I decided not to use them, that – that offer was – I wouldn't have fulfilled my part of the offer. The offer wouldn't have – wouldn't have been valid.*"[764] The wording of this deposition reflects the conclusion that a condition of the Intel payments was that the AMD projects would not proceed. The careful avoidance of the word "exclusivity" by Intel does not alter the fact that the offer was understood to result in the AMD project being dropped, as is also confirmed by the email mentioned in the fourth indent of recital (551)("*the deal is base*[d] *[sic] on our assumption no not launch AMD NB platform*(...) *Intel deal will not allow us to launch AMD.")*[765]

(553) The sole Commission evidence on conditionality from the 17 July 2008 SSO that Intel addresses is the evidence mentioned in recital (548): ("[l]*ate last week Lenovo cut a lucrative deal with Intel. As a result of this, we will not be introducing AMD products in 2007 for our Notebook products. Naturally, this is a major strategy shift with significant implications as we have incurred expense and parts for these programs. You should expect a shift in our AMD volumes to Intel based systems. What I am asking you to do today is CEASE AND DESIST ALL ACTIVITY ASSOCIATED WITH AMD PRODUCT.*")[766] Intel argues that the Commission failed to take into account a later statement by [Lenovo executive] which Intel argues rebuts the quote above and states that "[t]*he reason* [Lenovo] *stop*[ped] *AMD NB is because of* [a] *need to* [...] *at this time, it has nothing to do with Intel!*".[767] Intel also claims that the evidence does not support the 17 July 2008

---

764 Intel submission of 8 May 2009, p. 6.

765 Lenovo submission of 27 November 2007, Annex 22, e-mail between two Lenovo executives of 27 June 2006 entitled *"meeting with Intel."* See also recital (527).

766 Lenovo submission of 27 November 2007, Annex 22, e-mail from [Lenovo executive] to [executive of Lenovo supplier] of 11 December 2006 entitled *"Cease and Desist all Activity on AMD Product."*

767 Intel submission of 5 February 2009 related to the 17 July 2008 SSO, paragraph 460.

SSO's assertion that Lenovo cancelled the 2007 AMD-based notebook launch because the MOU required an exclusive agreement.[768]

(554) Intel's portrayal of the evidence mentioned in recital (548) is unconvincing. Indeed, Intel fails to put the evidence in the context of the chain of emails in which it appears. As the Commission pointed out in the 17 July 2008 SSO, the email in question triggered a very sensitive reaction from Lenovo's executives. A later email reacted in these terms: *"Procurement guys goofed* (...) *note went to* [Lenovo supplier] *and* [...] [another Lenovo supplier] (...) *they have retracted the email from the ODM's and are in damage control mode but if it leaks to AMD then they'll have evidence of a direct link & our execs could be confronted* (...) *pls don't forward."*[769] This later email demonstrates that the substance of the email from the '*procurement guys*' was not inaccurate. Indeed, as the Lenovo executives wrote, a leak of the email to AMD would give AMD "*evidence of a direct link*", which would lead to Lenovo's executives potentially being "*confronted*". It also shows that, contrary to Intel's portrayal, the information which Lenovo was trying to hide was that of the "*direct link*" between the "*lucrative deal*" with Intel (which cannot reasonably be anything else than the MOU given the date of the email and its context) and the cancellation of the AMD-based notebooks by Lenovo. Finally, it puts the reaction from the Lenovo executive mentioned in recital (548) in its proper context, namely, the "*retraction*" of the email in "*damage control mode*". It is also noteworthy that [Lenovo executive]'s email repeats nearly word for word the *"positioning message for consistent internal communication of the* [AMD/Intel] *decisions"* which Lenovo had been preparing for this purpose (see recital (547)).

(555) Instead of attempting to address the remainder of the Commission's evidence on conditionality, Intel has put together an account presenting Lenovo's decisions to twice postpone the AMD-based notebook programmes and eventually to cancel them all and adhere to Intel exclusivity for the whole of 2007 as unilateral Lenovo business decisions based on the competitiveness of Intel's offers and AMD shortfalls.[770]

(556) This representation by Intel of events misses the point. It is quite possible that Intel's package offer was at the relevant points in time overall better than AMD's. In this regard, the Commission does not dispute that Lenovo made its decisions only on the basis of pure business considerations. Lenovo's decisions are also very likely to have been the result of a global analysis which certainly took account in

---

768 Idem.

769 Lenovo submission of 27 November 2007, Annex 22, e-mail between two Lenovo executives of 14 December 2006 entitled *"Cease and Desist all Activity on AMD Product."*

770 Intel submission of 5 February 2009 related to the 17 July 2008 SSO, paragraph 247.

particular of the absolute level of Intel and AMD's offered prices but also of the different pros and cons of each supplier's offer.

(557) However, none of these considerations are incompatible with the findings that the offers by Intel, regardless of their business value, were conditional on exclusivity and on postponement/cancellation of AMD-based notebooks, nor with the evidence mentioned above which support these findings. They are not therefore able to invalidate the Commission's conclusion based on the evidence mentioned in recitals (520) to (548), which Intel has not been able to rebut.

(558) Intel has also attempted to portray a situation where the Lenovo decisions to postpone and/or abandon the AMD-based notebooks was a second step in the Lenovo decision process, separate and distinct form the awarding of unconditional discounts by Intel: "*Having attained its objectives without launching additional AMD-based PCs, Lenovo concluded that it no longer needed these systems to market to gain the desired concessions from Intel, and that the business prospects for the AMD-based notebooks were not attractive on their own to justify release of these notebooks*";[771] "*after it* [Lenovo] *had achieved its primary objective of negotiating better pricing and supply terms from Intel in 2006 and 2007, Lenovo chose not to move forward with AMD-based notebook launches because of four critical factors*".[772]

(559) However, Intel has been unable to adduce any objective evidence that the Lenovo decisions to postpone or abandon the AMD-based products were taken separately, after Lenovo had agreed with Intel on unconditional discounts. As a matter of fact, the evidence from the file clearly shows the opposite: the two matters were always connected, and the decision to postpone/abandon the AMD-based products was always an immediate and direct consequence of the deals with Intel and not a separate business decision based on the examination of the need for AMD-based products after unconditional deals with Intel were concluded.

(560) This appears for instance in the following quote, which describes the launch of AMD-based products as an impossibility due to the Intel deal rather than a separate independent business decision: "[two Lenovo Executives][773] *had a dinner with* [an Intel Executive][774] *tonight* (...). *When we asked Intel what level of support we will get on NB in next quarter,* [he][775] *told us* (...) *the deal is base*[d] [sic] *on our*

771 Intel submission of 5 February 2009 related to the 17 July 2008 SSO, paragraph 244.

772 Intel submission of 5 February 2009 related to the 17 July 2008 SSO, paragraph 247.

773 Paraphrase of the original text as provided by Lenovo.

774 Paraphrase of the original text as provided by Lenovo.

775 Paraphrase of the original text as provided by Lenovo.

assumption to not launch AMD NB platform. (...) *Intel deal will not allow us to launch AMD."*[776] The following evidence also shows that the postponement of AMD-based products is what Intel obtained in exchange for the rebates it granted to Lenovo: *"As you know I have been negotiating a special deal with Intel. The net is that Intel has made us a very attractive offer that we will end up taking. Our part of this deal is that we will award all business of shipments for the rest of this calendar year to Intel. In exchange, Intel will give us a special deal for both* [geographical area] *and* [geographical area]."[777]

(561) In the case of the MOU, the *quid pro quo* is even more clear as the MOU itself includes as a condition a target volume for Intel-based notebook products at Lenovo which was well-known by both Lenovo and Intel to be equivalent to 100% Intel exclusivity: *"Intel Gets:* [...] *CPU in '07, which equates to 100% NB and* [...]*% DT WW; Intel Gives:* [...] *incremental funding on top of* [...] *and existing programs"; "Top 5 ACCOMPLISHMENTS in 2006:* (...) *2. Reached formal agreement with Lenovo (signed MOU) on '07 deal that awards Intel 100% Lenovo NB CPU business in '07 and grows Intel '07 DT CPU MSS to* [...]*%, enabling Intel to increase YoY CPU volume sales to Lenovo by over* [...]*%".*[778]

(562) It is therefore clear from the quotes provided in recitals (549) to (561) that Intel's representation of the Lenovo decisions about AMD-based products as independent business decisions not linked to conditions in Intel discounts is unconvincing.

(563) Furthermore, without prejudice to the considerations put forth above, the evidence and reasoning which Intel has adduced to support its arguments about the motivations of Lenovo's decision are also in themselves unconvincing, and based on a misplaced reading of evidence.

(564) Indeed, Intel essentially contends that the Commission has not demonstrated that Lenovo believed that there was any sufficient demand for AMD-based notebooks.[779] However, in support of its claim, Intel has not provided evidence to demonstrate that Lenovo believed that there was not sufficient demand for AMD-

---

776 Lenovo submission of 27 November 2007, Annex 22, e-mail between two Lenovo executives of 27 June 2006 entitled *"meeting with Intel."*

777 Lenovo submission of 27 November 2007, Annex 22, e-mail between two Lenovo executives and others of 28 June 2006 entitled *"AMD and Intel."*

778 *"2006 Accomplishments"* of [Intel executive], p. 1. Intel submission of 2 June 2008, Annex 2, Document 32. The meanings of acronyms are as follows: "NB" for notebook, "MSS" for Market Segment Share, "BUM" for Business Unit Meeting, "YoY" for Year on Year, and "DT" for desktop.

779 See for instance paragraphs 258 to 266 of Intel submission of 5 February 2009 related to the 17 July 2008 SSO, which are dedicated to this claim. However the same notion is also addressed in many other sections.

based notebooks. Instead, Intel has sought to undermine the documents on which the Commission relied, arguing that these documents were negotiation documents in which Lenovo was purportedly exaggerating the competitiveness of AMD-based notebooks as a negotiation leverage vis-à-vis Intel.[780] In order to seek to demonstrate this point, Intel concentrates on only one of the documents quoted by the Commission, and gives a distorted presentation of this document.

(565) The document on which Intel bases its claim is a Lenovo internal document which assesses an Intel offer for discounts in 2006 and suggests a way forward for future negotiations with Intel on this topic.[781] Intel claims that this document shows that Lenovo's actual assessment of the AMD competitive threat was different from what Lenovo represented to Intel in negotiations. In support of this claim, Intel seeks to show a contrast between the parts of the document where Lenovo was making an assessment of the market (the top of the slides) and the parts where Lenovo was defining a negotiation position vis-à-vis Intel (the bottom of the slides, entitled 'Actions'). Intel gives a concrete example taken from slide 5 of the presentation:

> *"In the category of "Traditional Biz," Lenovo notes that Intel's proposed "2006 funding level seems to assume 'same' competitive environment with AMD, whereas this attempts to contrast this seems to be increasing in actuality." At the bottom of that same slide, under the heading "Actions," however, the negotiating posture of this statement becomes apparent, as Lenovo notes that it must work to "*[d]*evelop case for competitive environment getting worse." In other words, Lenovo was not presenting its own market assessment; rather, Lenovo recognized in this presentation that it would need to develop evidence for the allegedly increasing AMD competitive threat to support its negotiating position."*[782]

(566) In its example, Intel therefore portrays Lenovo's market assessment that the competitive environment with AMD "*seems to be increasing*" as contradictory with Lenovo's decision to develop a case for the competitive environment "*getting worse*". In other terms, Intel interprets Lenovo's assessment that the '*competitive environment with AMD is increasing*' as meaning that AMD was less and less competitive. This is an unreasonable interpretation of Lenovo's words. In reality, both in its assessment and its decided actions, Lenovo meant that AMD was more and more competitive. The 'increasing of the competitive environment' means that there is more competition on the market. The fact that the "*competitive*

---

780 Intel submission of 5 February 2009 related to the 17 July 2008 SSO, paragraph 259.

781 Lenovo presentation of 29 August 2005 entitled '*Intel Meet Comp Proposal for 2006*'. Intel submission of 5 February 2009 related to the 17 July 2008 SSO, annex 570.

782 Intel submission of 5 February 2009 related to the 17 July 2008 SSO, paragraph 262.

environment is getting worse" means that it is getting worse for Intel, hence justifying more discounts to Lenovo. This interpretation of Lenovo's presentation is supported by several other parts of the presentation. For instance, in slide 6, Lenovo calls for "*Increase funding due to increasingly competitive environment*"; In slide 8, Lenovo outlines "*AMD increasing strength in mobile* [notebook]".

(567) Of all the documents on which the Commission has based its findings that Lenovo considered that there was market demand for AMD-based notebooks, the document specified in recital (565) is the only document which Intel addressed concretely.

(568) Therefore, Intel's arguments are unconvincing and undermine Intel's general contention that Lenovo's representations in negotiations with Intel about the existence of a demand for AMD-based notebooks were mere negotiation arguments which Lenovo did not believe in.

(569) In addition to not providing any convincing rebuttal of the documents quoted by the Commission on the subject matter, Intel has not provided any further evidence in support of its argument. Indeed, the only documents to which Intel refers[783] merely outline that Lenovo found it necessary to launch an AMD-based notebook in circumstances where there was market demand. This is little more than an evident business assertion that it is valuable for a company to try to serve market demand. Therefore, it does not support Intel's claim that, according to Lenovo, there was not sufficient market demand for AMD-based notebooks.

(570) Finally, Intel puts important emphasis on Lenovo's submission of 21 December 2007, in which Lenovo submitted that it had chosen not to move forward with the launch of AMD-based products because of [...], because of the erosion of AMD's price advantage over Intel, because of its concerns about [...] and because of the fact that AMD-based computers were not forecast to be successful. Intel also underlines Lenovo's submission that the 2007 Intel-Lenovo MOU is "*in no way conditional on* [Lenovo] *pursuing an Intel-only strategy.*"[784]

(571) Already in the 17 July 2008 SSO, the Commission had taken note of Lenovo's submission of 21 December 2007 and of Lenovo's statement outlined in recital (510). The Commission had taken the preliminary view that this statement was not

---

783 See Intel submission of 5 February 2009 related to the 17 July 2008 SSO, paragraphs 264 to 266. Intel makes only vague allusions to documents or very selective quotes of a few words. It is therefore difficult to elicit exactly what part of which document Intel is referring to in support of its arguments.

784 Intel submission of 5 February 2009 related to the 17 July 2008 SSO, paragraph 247.

consistent with the broad range of contemporaneous evidence contained in the file.[785]

(572) Intel has provided no argument and/or document which would alter the basis for this Commission finding. In particular, as has been described, Intel has not sought to address the majority of the relevant contemporaneous evidence, and, in the only case where it has sought to address it, as has been highlighted, its arguments are unconvincing.

(573) The Commission therefore maintains that Lenovo's submission of 21 December 2007 on Lenovo's reasons for purchasing only Intel-based x86 CPUs for its notebook computers in 2007 is incomplete and, at least to a certain extent, inaccurate. This interpretation is consistent with the pattern of attempts by Lenovo to conceal the complete nature of its agreements with Intel as described in section 2.7.8.4. The Commission considers that this has to be viewed in particular in the context of the position of OEMs in the market as described in section VII.3, and in particular their important reliance on Intel as an unavoidable trading partner as well as the thin profit margin on which they operate.

2.7.9.2. Intel's argument that Lenovo and AMD did not have a binding agreement

(574) Intel argues that the SOW cannot be regarded as a binding agreement between Lenovo and AMD, and the fact that Lenovo executed the SOW and made *"preliminary technical work on AMD-based notebook designs, is* [not] *inconsistent with Lenovo's ultimate decision to award those platforms to Intel for the remainder of 2006."*[786] According to Intel, it was AMD and not Lenovo that ultimately decommitted from the SOW.[787] Intel also argues that the Commission has failed to recognise that it is a normal part of the competitive process for firms to consider alternative strategies without necessarily implementing them.[788] It is noted that these arguments are in themselves not related to the basic issues of conditionality and of Intel seeking to ensure that Lenovo postpone or cancel its AMD plans. Nevertheless, the Commission addresses each of the issues in turn.

(575) According to Intel, *"The SSO incorrectly argues that AMD and Lenovo formally agreed in the SOW to produce and to market AMD-based notebooks in 2006 and 2007"* since *"the SOW contained no such commitment"* and because the SOW

---

785 17 July 2008 SSO, footnote 110.

786 Intel submission of 5 February 2009 related to the 17 July 2008 SSO, paragraphs 288-289.

787 Intel submission of 5 February 2009 related to the 17 July 2008 SSO, paragraphs 290.

788 See in particular paragraph 268 of Intel submission of 5 February 2009 related to the SSO.

specified itself that *"volumes and announcement dates [for AMD-based notebooks] are good faith estimates only to be used for planning purposes and are not guaranteed by Lenovo."*[789] In the first instance, paragraph 19 of the 17 July 2008 SSO explicitly mentioned with respect to volumes in the SOW that *"It is to be noted that these purchase volumes were good faith estimates for planning purposes."*[790]

(576) In any case, as explained in paragraph 19 of the 17 July 2008 SSO and recital (512) of this Decision, there is evidence that already during the first half of 2006, Lenovo made the necessary preparations for the AMD-based notebook launch and that by April 2006, Lenovo *"incurred development expenses already on this product"* and *"I believe some commitments with suppliers."*[791] Moreover, an Intel presentation of 30 May 2006 entitled *'Lenovo 2H'06 NB Meet Comp Response'* specifies: "[Lenovo] *Considering launch of AMD based* [...] *offering in July for* [geographical area] *SMB notebook market; Already have machines/components in inventory."*[792] These pieces of evidence demonstrate that Lenovo intended to follow through with its agreement with AMD and did not regard the SOW as a mere declaration of intent. As described in section 2.7.5, Lenovo and AMD agreed to form a long-term [...]alliance for which the basis document was the SOW. Moreover, the evidence referred to in this recital demonstrates that Intel's argument that there would have been only *"preliminary technical works on AMD-based notebook designs"*[793] is incorrect - by May 2006, preparations for the AMD launch went much further than only preliminary design work. In fact, by that time, Lenovo had already started purchasing parts to be assembled into the planned AMD notebook.

(577) Intel also argues that it is common in the industry for OEMs to develop a PC before making a final decision on whether to launch it or not, and therefore any technical development Lenovo had undertaken did not constitute an irrevocable contractual commitment.[794] However, there is a difference between the development of test prototypes and the commencement of purchasing of significant volumes of parts from suppliers to be built in a planned product, which was what Lenovo had started

---

789 Intel submission of 5 February 2009 related to the 17 July 2008 SSO, paragraph 289.

790 Lenovo submission of 27 November 2007, Annex 22, e-mail [between Lenovo Executives] of 31 July 2006 entitled *"Work Item #3 from the Minutes from the AMD – Lenovo NB meeting 7-27-06."*

791 Lenovo submission of 27 November 2007, Annex 22, e-mail from [Lenovo Executive] to [Lenovo Senior Executive]of 7 April 2006 entitled *"AMD Notebook for* [geographical area]."

792 Intel submission of 5 February 2009 related to the 17 July 2008 SSO, Annex 567, Intel presentation of 30 May 2006 called 'Lenovo 2H'06 NB Meet Comp Response', p. 5.

793 Intel submission of 5 February 2009 related to the 17 July 2008 SSO, paragraph 288.

794 Intel submission of 5 February 2009 related to the 17 July 2008 SSO, paragraph 291.

doing in the present instance. The Commission does not claim that there was a binding contractual commitment and considers that this issue is irrelevant.

(578) As regards Intel's argument that it was AMD which decommitted from the SOW, the only piece of evidence on which Intel relies is an e-mail from Lenovo to AMD of 3 October 2006. As has already been described, this e-mail should be viewed in the context of the fact that it is after the time when Lenovo had already twice announced that it would delay the AMD-based notebook launch and shortly before the definitive announcement to AMD of the cancellation on 7 December 2006. As stated in section 2.7.8.4, the Commission considers that Lenovo did not wish to inform AMD that the cancellation was a condition of the deal with Intel, but instead, decided to provide other reasons for the decision.

2.7.10. Conclusion on facts

(579) As is demonstrated by the evidence described in recitals (505) to (548), Lenovo entered into an agreement with AMD to launch an AMD-based notebook in 2006. At least two models were planned for 2006, [...]. The plan was to introduce them in two waves, first in [geographical area] in June 2006, followed by a [geographical area] launch in September-October 2006. However, in the context of the negotiation of increased funding with Intel, the [geographical area] launch was first delayed to coincide with the [geographical area] launch in September-October 2006. Then, as a result of an agreement with Intel reached in June 2006, in exchange for increased Intel funding, the entire launch was postponed from September-October 2006 to the first quarter of 2007, then to the second quarter of 2007. In December 2006, Intel and Lenovo concluded a Memorandum of Understanding that provided for, amongst other terms, [...] incremental funding from Intel to Lenovo in 2007. This deal was conditioned on Lenovo granting Intel exclusivity for its notebook segment. This implied in particular the cancellation of the existing AMD-based notebook projects that had been postponed. Since then, Lenovo has not introduced AMD-based notebooks. On the basis of the relevant evidence therefore, the Commission concludes that the Intel funding was (at least in part) conditional on Lenovo first postponing the launch of the AMD-based notebook which it had already agreed and planned for, and then cancelling the launch and sourcing all of its supply in the notebook segment in 2007 from Intel.[795]

---

795 As has been outlined, the Commission notes that Lenovo's view is that *"Intel payments to Lenovo were not conditional on limited sourcing/ postponement/ cancellation of AMD."* Lenovo submission of 27 November 2007, answer to Question 6, p. 23. However, this is not consistent with the analysis of the broad range of contemporaneous evidence that has been outlined.

2.8 MSH

2.8.1. Introduction

(580) Media-Saturn Holding GmbH ("MSH")[796] is a German-based consumer electronics retailer, which operates under the store names "Media Markt", "Media World" (Italy) and "Saturn" in approximately 14 European countries.[797] In terms of overall sales value of desktop and mobile PCs at retail level in 2007, MSH's market share has amounted to [...]% and [...]% respectively in Germany and Austria, its main countries of focus.[798] MSH is the largest PC retailer in Europe.

(581) MSH does not source any products directly from Intel but purchases assembled desktop and mobile PCs from OEMs to sell them on to end customers. Despite the resulting lack of a direct supplier-customer relationship between both companies, Intel has been providing MSH with considerable amounts of money under continuous funding agreements which were conditional upon MSH selling exclusively Intel-based PCs since 1997.

(582) In addition to these direct payments from Intel, MSH has also received indirect marketing contributions for advertising campaigns under the "Intel Inside Programme" ("IIP"). Given that the IIP is exclusively designed for OEMs, MSH has not received these payments directly from Intel but via the different OEMs [...]. The amount of these funds is usually calculated as a percentage of [certain of

---

796 In the following, no distinction is made between the company's numerous subsidiaries such as for example Media-Saturn International GmbH ("MSI") and Media-Saturn Trade GmbH ("MST") due to the complexity of MSH's company structure. Thus, for the key actors and their functions mentioned in the following, reference is made exclusively to MSH.

797 Figure as of 31 December 2008, see homep. of MSH's parent company Metro Group: http://www.metrogroup.pl/servlet/PB/menu/1001975_l10/index.html#a2, downloaded and printed on 24 March 2009.

798 See market share overview provided in [MSH submission], which is based on data from *Gesellschaft für Konsum-, Markt- und Absatzforschung* ("GfK"). In view of the fact that GfK's data [...], and that with respect to some outlets calculations are based on estimates or extrapolations of sales data, MSH's market shares may to a certain extent overstate MSH's real sales share (see [MSH submission]).

According to the GfK overview, MSH's value based market shares in the PC retail market were as follows (as of 2000 or as far as reliable data are available for the individual countries):
Austria: [...];
Belgium: [...];
France: [...];
Germany: [...];
Greece: [...];
Italy: [...];
Spain: [...];
Netherlands: [...];
Poland: [...];
Portugal: [...];
Sweden: [...].

MSH's costs].[799] The payments MSH has received under the IIP are not covered by the Decision, although they must of course be taken into account in order to assess the overall relationship between Intel and MSH.

(583) This section is structured as follows: Section 2.8.2. analyses the written funding agreements between Intel and MSH specifying both parties' commitments and major structural changes over time. Section 2.8.3. explains in detail the nature and the calculation of Intel's payments to MSH under these agreements. Section 2.8.4 sheds light on the actual conditionality upon exclusivity of Intel's payments to MSH. This underlies the entire contractual relationship between both companies). Section 2.8.5. addresses some of Intel's arguments made in its submission of 5 February 2009 related to the SSO of 17 July 2008. Section 2.8.6 concludes on the facts.

2.8.2. The funding agreements between Intel and MSH

(584) Intel has been directly providing MSH with substantial financial support since 1997 under continuous funding agreements. These have been structurally changed over time.

(585) In terms of geographical scope, the first agreement between Intel and MSH from [...] only covered MSH's operations in [...], while further European countries were included subsequently: [...].[800]

(586) The agreements were regularly negotiated by top level representatives of both companies.[801] As regards MSH, these agreements were not only binding for its headquarters but also for all MSH country subsidiaries and local shops covered – [...].[802]

(587) Intel's commitments under these agreements were of a predominantly financial nature, but also covered a number of marketing support measures until the end of March 2003.[803] At the beginning of their contractual relationship, Intel provided MSH with previously agreed [description of how amount of payment was

---

799 [MSH submission]. In 2006 and 2007, MSH received for example a total amount of approx. [...] from OEMs under the IIP, see [MSH submission].

800 [MSH submission].

801 The [the fist two agreements] (see [MSH submission]) were, for example, negotiated by [Intel executive], and [MSH Executive] from the company's headquarters in Ingolstadt (Germany). See [MSH submission].

802 [MSH submission]

803 Apart from clauses or a section on "[...]", the funding agreements until [...] contained separate clauses or even an entire section on [...].

determined].[804] Throughout the entire contractual relationship, the amount of Intel funding previously agreed by the parties for the relevant contract duration was based on [...].[805]

(588) MSH's commitments under the funding agreements cover a number of mostly general promotional activities, [description of promotional activities].[806] Although some of the agreements provided for a written confirmation that the listed activities had been duly carried out by MSH,[807] a proper monitoring process for MSH's compliance with these obligations has never been established nor operated in practice. In fact, MSH has never been required to specifically prove the fulfilment of these activities and Intel has never shown any particular interest in MSH's compliance with these obligations.[808] The reason for this is MSH's exclusivity commitment towards Intel, which was the real purpose of Intel's payments under the funding agreements as explained in section 2.8.4.

(589) As regards their structure, the different funding agreements can be grouped as follows: the [early agreements] (section 2.8.2.1.), the "Contribution Agreements" [...] (section 2.8.2.2) and the "Framework Agreements" [...] (section 2.8.2.3.).

2.8.2.1. The [early agreements]

(590) With effect from [...], MSH became party to the [...] ("[First] Agreement") previously negotiated by [one of MSH's sister companies].[809] The agreement was based on the expectation that [MSH and one of its sister companies] would

---

804 [MSH submission].

805 [MSH submission].

806 [MSH submission].

807 While [Second agreement] established a clear link between the payments and the activities to be carried out by MSH, specifying that *"[t]he funding will be paid upon written justification of such agreed promotion and advertising activities* (...) *incured* [sic] *by MSH"*, the Contribution Agreements from [...] onwards merely reserved Intel the right to audit MSH's compliance with the agreement [...] and provided that *"MSI will, on Intel's request, provide proof of performance of MSI's obligations under the agreement."* The Contribution Agreements as from [...] onwards contained an additional clause [...], according to which *"MSI will provide Intel with a written confirmation that all the agreed promotional activities outlined in this Agreement have been carried out by MSI during the Period."* (see [MSH submission]).

808 [MSH submission]: *"Moreover, and at least since* [...], *Intel had not shown a particular interest in MSH's compliance with such "obligations". While Intel did receive information on MSH marketing activities in the context of the "Intel Inside"-program (and may have had other sources), MSH did not provide Intel with information specifically on the measures described in the contribution agreements after 2002. In earlier years, MSH routinely sent Intel copies of all advertising flyers, but not sorted or specifically designed to show compliance with the contribution agreement."* Footnote 5 linked to the last sentence: *"As explained above, the advertising material in question was partly financed by contributions that MSH received from computer OEMs in the context of the "Intel Inside"-program."*

809 [MSH submission].

"purchase [...] *Intel CPUs per year for integration in PC's to be assembled by or for"* both companies [...].[810] In contrast to the subsequent agreements, Intel's financial contribution was earmarked [...].

(591) After [...], the [First] Agreement was replaced before its expiry date by a new agreement concluded between Intel and MSH only, which most likely took effect from [...][811] [...] ("[Second] Agreement").[812] The common [parameter to calculate the payment amounts] underlying the agreement was set at [...] units for the period from [...].

(592) For [...], Intel and MSH entered into a new agreement ("[Third]Agreement"), which was subsequently renewed [...].[813] While the two previous agreements provided for [...], the [Third] Agreement introduced the concept of [type of payment and description of payment mechanism]. As a consequence of this switch [...], the agreement also established certain audit guidelines to precisely monitor MSH's actual sales volume during the contract duration [...]. Another new element of the [Third] Agreement, which was dropped in the subsequent agreements, was the introduction of a separate [...] *"extra contribution* [...] *to the marketing activities as laid down"* in the agreement .

(593) A common feature of all the funding agreements for the period [...] (which was dropped in the subsequent agreements) was the establishment of an additional *"Market Development Fund"* for the *"funding of the promotional activities"* to be carried out by MSH as provided for in the agreements.[814] This fund covered additional payments to MSH, the conditions of which were laid down in [certain clauses]. The functioning of this additional fund is explained in more detail in section 2.8.3.1.c).

---

810 Contrary to what the wording of the clause might suggest, MSH has never purchased CPUs directly from Intel, although it operated an own PC brand ("Network") from 1997 until the end of 2001. The "Network" computers were assembled by third-party computer manufacturers, which were regularly instructed by MSH to incorporate exclusively Intel CPUs into these PCs in view of MSH's exclusivity arrangement with Intel as from October 1997. Beside the "Network" brand, MSH has also sold other computer brands from 1997 onwards, even though they represented only a minor percentage of MSH's total retail sales in the first years of its activity. The [parameter to calculate the Intel payments] contained in [...] thus covered both sales of MSH's "Network" brand as well as sales of other computer brands. See [MSH submission].

811 This date is indicated in [MSH submission]. However, [...], MSH points out that *"[i]t is unclear when precisely that subsequent agreement entered into force* [...]."

812 [MSH submission].

813 [MSH submission].

814 See [First] Agreement, [Second] Agreement and [Third] Agreement.

(594) A second common feature, which was [...] abolished as of 2002, was the provision of a "best efforts clause" according to which MSH undertook to *"use best efforts to request from its supplier that they purchase Intel leading edge motherboards, peripheral products (e.g. graphics) system and server products for the PC's MSH is selling through its stores."*[815] As explained in section 2.8.4., this clause was understood by the parties to require that MSH would exclusively sell Intel-based PCs.

2.8.2.2. The "Contribution Agreements" ([...])

(595) From [...] onwards, Intel's and MSH's previously [...]agreements were replaced by [...] agreements with differing names, [...],[816] [...],[817] and [...].[818] This was despite the fact that the agreements had an identical overall structure and wording (these agreements will be collectively referred to hereafter as "Contribution Agreements").

(596) The Contribution Agreements continued the concept of [...]contributions introduced by the [Third] Agreement, which were subject to [...].[819] [...].[820]

(597) Another common feature of the Contribution Agreements was that the previous "best efforts clause" was replaced by a "non-exclusivity clause", which stated that the *"Agreement is non-exclusive; each Party is free to carry out similar activities with third parties."*[821] As explained in section 2.8.4., the new wording of this clause left the exclusive relationship between the parties unchanged.

---

815 See [First] Agreement (with a slightly simplified wording), [Second] Agreement and [Third] Agreement. The [First] Agreement contained an additional Clause [...], according to which [MSH and one of its sister companies] undertook to *"continue to favor the use of Intel microprocessors in the PC systems sold through* [the sister company's] *stores in Europe, and through its Media Markt and Saturn retail stores in* [geographical area]". See also [MSH submission].

816 [MSH submission].

817 [MSH submission].

818 [MSH submission].

819 [MSH submission].

820 [MSH submission].

821 See [...] Contribution Agreements.

2.8.2.3. The "Framework Agreements" and "Contribution Agreements" ([...])

(598) Since [...], Intel and MSH have entered into [...]*"Framework Contribution Agreements"* ("Framework Agreements"). These are in addition to the conclusion of the [...] Contribution Agreements described in section 2.8.2.2.[822]

(599) The Framework Agreements serve the purpose of laying down *"a contractual framework for the* [...] *Contribution Agreements"* [...]. All further details [...] are, as before, negotiated in the framework of the [...] Contribution Agreements.[823]

(600) A novelty of the " [...] Framework Agreement" is MSH's obligation [...] to "[...]." The marketing activities listed under section [...] of the Contribution Agreement for [...] are almost identical to the list of marketing activities MSH committed to carrying out under the previous Contribution Agreements.[824] In these Contribution Agreements, however, it was implied that Intel's financial contribution was made in return for such activities.[825]

2.8.3. Intel's payments to MSH under the funding agreements

(601) Intel's main commitment under the funding agreements with MSH was of financial nature. As far as the structure of Intel's payment arrangements with MSH and the calculation of such payments is concerned, the following two periods have to be distinguished: payments under [the early agreements] (section 2.8.3.1.) and payments under the "Contribution Agreements" [...] (section 2.8.3.2.). Section 2.8.3.3. summarises the payments MSH received from Intel under these funding agreements from 1997 to 2007.

2.8.3.1. Payments under the [early agreements] ([...])

(602) At the beginning of the contractual relationship between Intel and MSH, the structure of the payment arrangements between both companies changed at frequent intervals. The [First] Agreement started with [...] followed by [...] in the [Second] Agreement (section a)), while the [Third] Agreement introduced for the first time [...] (section b)). All three agreements provided for the establishment of an additional *"Marketing Development Fund"* (section c)).

---

822 [MSH submission].

823 See [...] Framework Agreement.

824 See list of activities [...] of the previous Contribution Agreements.

825 [MSH submission] . [...], the Contribution Agreement for [...] even contained an explicit statement in this regard: *"Using Intel's contribution to its expenses, MSI will undertake the following activities:* (...)".

a) [...] payments under the [First] Agreement and the [Second] Agreement

(603) Both the [First] Agreement and the [Second] Agreement provided for [...] for *"Intel's participation to the agreed promotion and advertising activities of Intel based system sold by MSH"*[826] during the respective contract period, which amounted to [...] in the [First] Agreement (for both [MSH and one of its sister companies])[827] and to [...] during the entire contract duration of the [Second] Agreement.[828] Under the terms of the agreements, [...].[829] It cannot be excluded, as Intel claims in its submission of 9 February 2009,[830] that MSH (and [one of its sister companies] with regard to the [First] Agreement) actually received smaller amounts under both funding agreements. However, this is immaterial since this Decision solely relies on the payment amounts contained in section 2.8.3.3., which are based on consistent Intel and MSH data and were not contested by Intel.

(604) A particularity of the [First] Agreement was [...], whereas the [Second] Agreement merely provided for [...]. However, neither the [First] nor the [Second] agreements contained any particular monitoring mechanism that would have enabled Intel to verify MSH's compliance with its promotion and advertising commitments under the agreements.[831]

(605) Both agreements were based on common [parameter to calculate the Intel payments] for the contract duration, which amounted to in the [First] Agreement (for both [MSH and one of its sister companies])[832] and under the [Second] Agreement.[833] Neither of the agreements provided for a particular audit process in this regard.[834]

---

826 See [Second] Agreement and [First] Agreement (with a simplified wording).

827 See [First] Agreement.

828 See [First] Agreement [...].

829 [MSH submission] .

830 Intel submission of 5 February 2009 related to the 17 July 2008 SSO, paragraph 127.

831 [The First] Agreement merely states that *"Intel will make contributions or reimbursements on* [...], *provided that* [MSH and one of its sister companies] *has performed the required activities"*. [The Second] Agreement establishes a clear link between the payments and the activities to be carried out by MSH, specifying that *"[t]he funding will be paid upon written justification of such agreed promotion and advertising activities"*. However, apart from the fact that such written justification was never provided by MSH to Intel, no proper monitoring process was agreed on between the parties. See [MSH submission].

832 See [First] Agreement.

833 See [Second] Agreement.

834 Under [Second] Agreement, Intel merely reserved its right to audit MSH's compliance with the agreement.

b) [...] contributions under the [Third] Agreement

(606) The [Third] Agreement introduced the concept of [...] *"rebates"* [...]. Based on MSH's sales estimates for the following year, both parties agreed on [...] with a total cap of [...] for the entire contract duration. In addition, Intel committed to paying an extra contribution [...] *"for MSI's* [type of costs] *related to the marketing activities as laid down in this Agreement".*[835]

(607) The [Third] Agreement was the first agreement to provide for a detailed audit process. However, this only covered MSH's sales data during the contract period, such as [...][836] [...]. No monitoring process was established for MSH's compliance with its marketing commitments under the agreement.[837]

c) Payments under the "Marketing Development Fund"

(608) In addition, all agreements during this period provided for the establishment of a *"Market Development Fund"* ("MDF") for the funding of promotional activities as foreseen by the agreements.[838] The MDF essentially covered the following two types of payments.

(609) First, [...].[839] [...].[840]

(610) Second, [...].[841]

2.8.3.2. Payments under the "Contribution Agreements" ([...])

(611) The Contribution Agreements as from [...] continued the previously introduced concept of [...].

(612) Intel's funding was subject to [...].[842] [...].[843]

---

835 See [Third] Agreement.

836 [...].

837 [MSH submission].

838 See [First] Agreement, [Second] Agreement and [Third] Agreement.

839 [Second] Agreement and [Third] Agreement.

840 [MSH submission].

841 [MSH submission].

842 See [...] Contribution Agreements.

843 See for example the following documents:

[...].

(613) [...].[844] MSH's sales volume was monitored with the help of [description of periodical monitoring procedure].[845] [...] MSH was also requested to provide the x86 CPU vendor [...]. This means that not only Intel-based sales but also sales with x86 CPUs of its competitors had to be reported to Intel, which thus allowed Intel to monitor MSH's overall supplier strategy.

2.8.3.3. Summary of Intel's payments under the funding agreements (1997-2007)

(614) The following table summarises the payments MSH received from Intel under the funding agreements between 1997 and 2007.

[Inspection document from MSH's premises]: *"Please find also enclosed a proposal, with which we would reach* [...]. *This is the final proposal – I have no more margin of discretion."* ([...], original in [...]).

[Inspection document from MSH's premises]: *"Unfortunately,* [Intel executive]*has disavowed our perceptions in his draft agreement. After consulting with* [Intel executive]*, he justifies this with the fact that with the $/CPU contributions proposed by us we would by far exceed the* [...] *provision."* ([...], original in [...]).

Document FK21 contains an internal Intel briefing for a meeting with MSH on 19 January 2005: *"Contra Revenue Agreement status: (...) We stated that we have to consider Intel revenue more. Communicated that* [...]*% of Intel revenue is fair".* (p. 2, see also table on p. 6).

[Inspection document from MSH's premises]: *"Based on our estimates, the payout should exceed clearly the* [...]*-obstacle of the total purchase volume! According to Intel's proposal, we would be close to the* [...]*... However, the figures are unrealistic as regards the notebook segment because they are clearly below our planning! Thus, this time we should clearly exceed the* [...]*!"* ([...], original in [...]).

Document IP19 is an internal e-mail communication at Intel of 3-4 March 2005: *"To hit* [...]*% of Intel revenue – what Intel gave as a ballpark in the meeting when we changed the CRA to the new format – is almost impossible. Only if they would have not more than* [...]*% ICP* [Intel Celeron processors] *in DT and NB and extremely high ASP* [average sales prices] *P4Ps* [Pentium 4 processors] *and CMTs* [another type of Intel processors] *they would hit* [...]*% of Intel revenue. And then they and Intel would probably not be competitive anymore especially in DT. Note: MSH was always leading in terms of mix, but in the last three years they never had* [...]*% ICP! please bear in mind that they do not have competition to fill the value segment like other retailers have!* (...) *If you look back into 2004 history they have never hit* [...]*% of Intel revenue (they know that, too.): Q1'04* [...]*%; Q2'04* [...]*%; Q3'04* [...]*%; Q4'04* [...]*%* (...) *General comment the* [...]*%: I am not saying that we need to stick with this* [...]*% - but if we do – we then have to communicate clearly to MSH since this was a statement from an Intel representative in the past."* (pp. 4-5).

844 See [...] Contribution Agreements.

845 See [...] Contribution Agreements.

Table 11 - Summary of payments – […]

[…]	[…]	[…][846]	[…]
[…][847]	[…]	[…]	[…]
[…]	[…]	[…]	[…]
[…]	[…]	[…]	[…]
[…]	[…]	[…]	[…]
[…]	[…]	[…]	[…]
[…]	[…]	[…]	[…]
[…]	[…]	[…]	[…]
[…]	[…]	[…]	[…]
[…]	[…]	[…]	[…]
[…]	[…]	[…]	[…]

Sources:
For years […]: Document IP7, p. 2, and [MSH submission];
For years […]: FK18, p. 4;
For years […]: […];
For year […]: [MSH submission].

(615) In contrast to what was stated in the funding agreements, Intel's payments to MSH were in practice not made in return for the agreed promotional activities.

(616) This conclusion can be drawn from the following statements made by MSH: *"While the agreements state that the contributions were paid as compensation for such* [promotional] *measures, there was no specific allocation of payments to particular measures, and the amounts were freely negotiated between MSH and Intel* […]. (…) *MSH considered the amounts paid under the agreements were at least in part a reflection of the special and exclusive relationship it had with Intel* (…) *and a means to reduce its purchasing cost for the computers containing Intel CPUs. Consequently, MSH treated the contributions received from Intel for accounting purposes as* […] *contributions that were not intended as a cost reimbursement for specifically defined promotional activities, and that did not have to be specifically accounted for vis-à-vis Intel."*[848] At country level, the *"computer purchasing and marketing budget was also not directly affected by any such payments from Intel, as the Intel funds were only distributed to the different Media*

---

846 The figures cover all payments made to MSH under the funding agreements […].

847 […].

848 [MSH submission].

Saturn country organizations, but not specifically to the computer businesses in each country."[849]

(617) These statements show that MSH was free to spend the marketing funds on whatever it deemed suitable without any limitation on the part of Intel. This conclusion is further confirmed by the fact that no proper monitoring process existed in this regard and that Intel has never shown any particular interest in MSH's compliance with its promotional obligations under the funding agreements as described in recital (588). Thus, Intel's payments under the funding agreements were not in practice conditioned on the performance by MSH of any specific promotional activities, but on MSH's compliance with its exclusivity commitment as explained in section 2.8.4. below.

2.8.4. Intel payments under the funding agreements conditional on MSH being Intel-exclusive

2.8.4.1. Introduction

(618) In contrast to what was stipulated in writing in the funding agreements between Intel and MSH since [...], Intel's financial contribution to MSH under these agreements was in fact in practice at least in part conditional upon MSH exclusively selling Intel-based PCs.[850]

(619) This is addressed in this section, which is structured as follows: Section 2.8.4.2. describes the nature of the unwritten exclusivity arrangement between Intel and MSH. Section 2.8.4.3. illustrates the secrecy requirement of the exclusivity arrangement. Section 2.8.4.4. describes MSH's fear of a substantial financial loss in case it switched even minor parts of its demand to AMD. The risk of reaction by Intel and its unwillingness to consider any exception to MSH's exclusivity commitment is then highlighted by a number of specific examples which relate to: a payment holdback in 1998/1999 (section 2.8.4.5.), the [flagship brand of a major OEM (in the following OEM Z)] issue in 2002 (section 2.8.4.6.), the negotiation of MSH [in one of the bigger EU member states (in the following country Y)]'s accession to the funding agreements in 2003/2004 (section 2.8.4.7.) and Intel's continuous and close monitoring of MSH's sales (section 2.8.4.8.).

---

849 [MSH submission].

850 Whenever reference is made to the conditionality of Intel's payments to MSH in the following sections, this is understood to be interpreted in line with this statement, that is to say that Intel's financial contribution was at least in part conditional upon MSH selling exclusively Intel-based PCs.

2.8.4.2. Nature of the unwritten exclusivity arrangement between Intel and MSH

a) Introduction

(620) Neither the early agreements from [...] nor the subsequent Contribution Agreements contained a written exclusivity clause.[851] However, MSH makes clear that from the beginning, *"MSH management members involved in the negotiation and implementation of the Intel relationship knew that the partnership with Intel was based on the implicit requirement that MSH would sell exclusively, or at least essentially exclusively, computers equipped with Intel CPUs."*[852] The notion of *"at least essentially exclusively"* refers to the fact that *"small errors"*, that is to say small sales of non-Intel based PCs by mistake or in very specific circumstances (for example non-x86-based [OEM] computers sold by MSH around 2002)[853] *"should not be harmful"* to the exclusivity arrangement as such.[854]

(621) The unwritten exclusivity requirement was considered an integral part of the written funding agreements throughout the parties' entire contractual relationship. Again, MSH is very clear in this regard: *"In fact, it had been clear during the negotiations of the first agreement concluded in* [...] *between Intel and* [MSH and one of its sister companies] *that, despite the fact that the agreement only provided for an obligation of* [MSH and one of its sister companies] *to use their "best efforts" to purchase Intel-equipped computers, Intel expected that* [one of MSH's sister companies] and MSH *would exclusively, or at least essentially exclusively, deal in Intel-equipped computers. This had been openly discussed during the negotiations between Intel and* [MSH and one of its sister companies] *in* [...]. *Intel's understanding that the relationship was meant to be essentially exclusive did not change in 2002, when the best efforts clause contained in the initial agreements was deleted and an express no-exclusivity clause was included in the agreements. It was clear to MSH that despite the non-exclusivity clause the exclusive nature of the relationship remained, for Intel, an essential element of the relationship between Intel and MSH. In fact,* [MSH executive] *recalls that Intel representatives*

---

851 See "best efforts" Clauses [...] of the [First] Agreement, [Second] Agreement and [Third] Agreement, as well as the "non-exclusivity" Clause [...] of the Contribution Agreements.

852 [MSH submission]. With regard to its previous submissions, MSH stated that *"[t]his response supplements and, if and to the extent considered relevant, supersedes prior statements made on behalf of MSH, including in responses to prior Article 18 information requests."* See [MSH submission].

853 According to Document IP38, an internal Intel briefing for a meeting with MSH on 22-23 July 2002 found at Intel's premises [...], [OEM]'s share of MSH's total sales represented only [...]% at that time, while the remaining [...]% belonged entirely to Intel (p. 1).

854 [MSH submission]: *"However, small mistakes and deviations, i.e. a certain "background noise", should not be harmful."* (original in [...]).

made it clear to him that the changes in the wording of the agreement had been requested by Intel's legal department, but that in reality the relationship was to continue as before, including the requirement that MSH sell essentially only Intel-based computers."[855]

(622) This statement shows that the exclusivity arrangement was agreed on and later renewed at the same time as the funding agreements, and by the same executives at Intel's and MSH's management level who participated in the negotiations of these agreements.[856] As with the funding agreements, the exclusivity arrangement was binding on all countries covered by the respective agreements at the relevant point in time. This is confirmed by the following statement from MSH: *"As soon as a given country, however, was included in the geographic scope of the contribution agreements, the requirement to essentially only sell Intel-equipped computers applied to the country in question."*[857] Further evidence can be found in Document FK55, an internal Intel e-mail communication of 9 December 2003, in which information received from [an OEM] about MSH [country] was reported: "[Executive of MSH country] *was complaining to* [OEM]*about the relationship to Intel.* [...]*:* (...) *Last but not least he said that he is bound by a* [sic] *Ingolstadt to go to Intel – but he is pushing to get out of this HQ directions."*[858]

(623) No significant exception to the exclusivity agreement was ever permitted by Intel. This is demonstrated by MSH's statement in relation to the [...]meetings in which the level of contributions [...] was negotiated: *"It was clear to all involved, in the framework of such discussions, that MSH did not have the option to buy AMD processors to target a sub-segment in which it was weak, but that some price concession on the part of Intel was requested to address such weakness."*[859]

(624) The Commission disposes of an extensive range of documentary evidence provided by MSH in its submission [...][860] and found during the surprise inspections of February 2008 at MSH's premises in [...] (section b)) as well as at Intel's premises in [...] (section c)) that further demonstrate the nature of the exclusivity arrangement between Intel and MSH as described in recitals (620) to (623).

b) Evidence submitted by MSH and found at MSH's premises

---

855 [MSH submission].

856 See recital (586) above.

857 [MSH submission].

858 [...].

859 [MSH submission].

860 [MSH submission].

(625) A broad range of documents submitted by MSH and found at MSH's premises clearly confirm the nature of the exclusivity agreement between Intel and MSH.[861]

(626) [MSH submission] contains an internal MSH e-mail at management level of [summer] 1999 with the following statement: *"Is there any feedback on your Intel discussion - special support for the hard-fought regions* (...) *- our exclusive agreement (in the future without* [one of MSH's sister companies]*)??"*[862]

(627) [Inspection document from MSH's premises] is an internal MSH e-mail of [summer] 1999 sent from MSH's headquarters in Ingolstadt (Germany) to [MSH management staff] of the MSH countries covered by the [Second] Agreement. The attached document contains a *"secrecy and non-disclosure commitment"* to be signed by the addressees of the e-mail: *"As you are aware and as you know from excerpts, the conclusion of a new framework agreement with Intel Corporation, represented by Intel Germany, is close to being finished. This agreement contains a number of significant terms for the Media Markt-Saturn-Group, which however are linked to the condition that all PCs sold by us are based on Intel CPUs, i.e. that during the contract duration no CPUs of other producers may be sold."*[863]

(628) [Inspection document from MSH's premises] is an internal presentation for the MSH [country management meeting], which took place [in the summer of] 2002 in [...]. Under the heading *"Intel vs. AMD"*, the advantages and disadvantages of MSH's agreement with Intel are outlined. The slide headed *"Next steps"* contains the following statement: *"Decision how to go on with the exclusiv* [sic] *partnership. (At least the "big" countries will be involved)".*[864]

(629) [Inspection document from MSH's premises about] MSH's management meeting [of autumn] 2002. [...], entitled *"AMD/Intel"*, the following was recorded: "[An MSH executive] *asks to verify whether as a test a partial exit in only one Intel-exclusive* [region][865] *would be possible. Also the so far unsuccessful attempts to negotiate an exception with Intel regarding the sales of specific brand products equipped with AMD processors (e.g.* [OEM Z]*) will be continued. A general termination of the Intel agreement is rejected for profit reasons."*[866]

---

861 Documents are listed in chronological order.

862 Original in [...].

863 Original in [...].

864 [...].

865 Paraphrase of the original text as provided by MSH.

866 [...], original in [...].

(630) [Inspection document from MSH's premises] is an e-mail of [autumn] 2002 from MSH's [local] subsidiary ("MSH [country]") to [OEM] relating to certain AMD-based products that [this OEM] wanted to sell through MSH. In the e-mail, MSH informed [the OEM] of the following: *"Please don't send any offers concerning AMD!!! (as you know we sell exclusively Intel processors)".*[867]

(631) [MSH submission] consists of an e-mail of [summer] 2003 from MSH's [local] subsidiary ("MSH [country]") to MSH's management at MSH headquarters in Germany with the following comment: *"Last Monday we had a meeting with Intel* [country] *where they told us that the prices are going down the end of October. The problem is that we have exclusivity with them as you know, and AMD is becoming more and more aggressive to get market share".*[868]

(632) [MSH submission] contains an e-mail dated [spring] 2004 from MSH's [local] subsidiary ("MSH [country Y]") to MSH's headquarters in Germany, confirming the accession of MSH [country Y] to the Contribution Agreements and thus also the underlying exclusivity arrangement as from [date in second quarter of] 2004: *"[A]s You know since* [date in second quarter] *we're 100% Intel. This means that all rebates will be managed not locally but directly by MSI."*

(633) [MSH submission] is an e-mail dated [winter] 2006 from a local MSH shop in [country] to MSH's headquarters in Germany with the following query: *"One question: Does the Intel exclusivity agreement also apply to purchases of separate CPUs?"*[869]

(634) [MSH submission] consists of an e-mail dated [spring] 2006 from MSH's [local] subsidiary ("MSH [country]") to MSH's headquarters in Germany with the following questions: *"Is it still a* [sic] *international decision to work exclusively with Intel?"*[870]

(635) [MSH submission] is an e-mail dated [winter] 2007 from MSH [country] to MSH's headquarters with the following statement: *"Where are we as regards the topic Intel/AMD? What is the line of approach for 2007? If we offer again exclusively Intel, I would like to know how much this will bring us (i.e. MM* [country]*) precisely in terms of additional money from Intel."*[871]

---

867 [...], original in [...].

868 [...].

869 [...], original in [...].

870 [...].

871 [...], original in [...].

(636) [Inspection document from MSH's premises] contains an internal e-mail communication of [spring] 2007 at MSH [country], including the following question relating to an Intel-based PC offer received from a business partner. *"Can we trade processors?"* The answer was: *"Yes, we can. But only Intel CPUs ☺".*[872]

(637) Other documents demonstrate that the knowledge of the high-level background and the details of the exclusivity agreement has been limited to MSH's top management, while the fact that MSH could only sell Intel-based x86 CPUs – either as a result of an internal headquarters decision the reasons for which were unknown, or as a consequence of a contract with Intel the details of which were unknown – was well known in the IT Purchasing Departments of the company and the local shops.

(638) In this regard, [MSH submission][873] contains an e-mail communication of [spring] 1999 between a local Media Markt shop in [...] (Germany) and MSH's management at the headquarters in Germany. The local shop addressed the following query to MSH headquarters: *"[W]e repeatedly receive ads from* [city] *in which they massively advertise AMD (sometimes several sets). Therewith they can cover price ranges which we normally don't have. I thought that there is an agreement with Intel that we are not allowed to do this. Should such an agreement not exist, I would also like to advertise AMD processors to cover the different price ranges."* The management answered as follows: *"I don't know anything about ads with AMD. Therefore I cannot say much about this issue. I will certainly inform myself since a massive campaign with AMD could indeed jeopardize our entire strategy. (...) I ask you to stay loyal to our approach. You will certainly not regret it, on the contrary. As always I cannot say more about it. I think that you understand by now."*[874]

(639) [MSH submission] consists of an e-mail dated [autumn] 2000 from MSH's then [responsible for procurement] to Intel, in which MSH complained about Intel's lack of competitiveness with regard to AMD's latest price reduction for certain strategically important x86 CPUs: *"Against these prices we as the Media Markt and Saturn Group are not competitive with comparable Intel products. In the sense of our agreement I ask you for fastest information which actions Intel takes to offer the 100% partner Media Markt and Saturn the respective requirements for competitiveness."*[875]

---

872 [...], original in [...].

873 [...].

874 Original in [...].

875 [...], original in [...].

(640) [MSH submission] contains an e-mail dated [autumn] 2000 from MSH's then [responsible for procurement] to Intel, in which MSH again complained about Intel's lack of competitiveness with regard to AMD: *"I refer to the telephone conversation we had today during which I described for the umpteenth time the situation with regard to AMD 1 Gigahertz.* (...) *Merely the Media Markt and Saturn Group does not offer these products since we would otherwise violate the spirit of our agreement.* (...) *It cannot be in the sense of our partnership that the company Media Markt and Saturn as the only remaining 100% Intel compliant partner suffers in terms of image and competitiveness and has to beg for the mercy of a positive reaction from Intel."*[876]

(641) [Inspection document from MSH's premises] is an internal e-mail communication of [winter] 2001 at MSH [country] about certain purchasing issues, which includes the following statement: *"*(...) *[F]irst of all MediaMarkt policy implies that we will not sell PCs with AMD processors."*[877]

(642) [MSH submission] consists of an internal e-mail communication of [winter] 2001 regarding problems experienced during the transition period at its [local] subsidiary ("MSH [country]") and at MSH [country], which had both joined the funding agreements and thus also the exclusivity agreement between Intel and MSH as from Q1/2001. MSH's management wrote: *"[P]lease keep at it regarding the PC topic* [country]. (...) *We should agree on the next steps on short notice. Is it possible that* [country]*is now starting with AMD? Please verify this; I could still exclude them from the contract with Intel."* The executive, who was apparently in charge of the monitoring of the proper implementation of Intel exclusivity in both countries, answered as follows: *"The department managers in* [country]*have decided in favour of the box – that was in October. This will have been the last action though. What we should do is a similar announcement like in* [country]. *I don't have the feeling that the MD's* [Managing Directors] *there know what this is all about! Couldn't you lay down the law; otherwise the situation won't change a lot?! As regard* [country]*– be assured that I will keep at it –* (...) *I think it might be necessary to be at least once a month for a week in* [country]*– at least until it is clear that our concept is successful."*[878]

(643) [Inspection document from MSH's premises about] MSH's management meeting held in [the summer of] 2001. The following was recorded under the heading *"Intel": "Problematic in the new media sector is dependence on Intel. Even in case of temporary competitive advantages of AMD Intel will remain our partner in the*

---

876 [...], original in [...].

877 Original in [...].

878 [...], original in [...].

future. Future negotiations should take into account that we can buy AMD processors for selected actions if a certain AMD processor is clearly and verifiably more competitive and cheaper."[879]

(644) [MSH submission], an internal MSH e-mail of [summer] 2001, in which an MSH executive challenges MSH's Intel strategy, contains the following statement: *"I would like to unfurl a topic that in my understanding is a very delicate one. We have concluded an* [...] [similar to exclusivity agreement] *with Intel... good/bad?!? We have received a big sum of money in return – good!"*[880]

(645) [Inspection document from MSH's premises], which apparently dates from before 2002, contains an overview of Intel payments under the heading *"INTEL Exclusive Agreement"*.[881]

(646) [MSH submission] consists of an e-mail communication of [winter] 2002 at MSH management level. One of the managing directors followed up on an e-mail to [MSH's country management staff], to which a presentation was attached that apparently contained more details about MSH's relationship with Intel than were normally divulged: *"...do you always disclose details of the Intel agreement to the countries???"* The author of the e-mail to [MSH's country management staff] answered as follows: *"...not up to now. It was first too complex and too confidential. However, all countries have quite a lot of difficulties not knowing whether they will receive the money they are entitled to. (see Saturn in the past). The new agreement is from my point of view not as hot as the old one, we urgently need more transparency and moreover we shouldn't have any secrets vis-à-vis the country* [management staff]."[882]

(647) [Inspection document from MSH's premises about] MSH's management meeting held in [the summer of] 2002. Under [...], the following was recorded: *"Amongst others, the consequences of a change in the processor policy shall be outlined: AMD has meanwhile 40% market share in Germany, which we cannot ignore. The termination of our liaison with Intel means a risk, but at the same time a new start with AMD a chance."*[883]

(648) [Inspection document from MSH's premises] contains an internal e-mail of [autumn] 2004 from MSH's management at the headquarters in Germany. MSH

---

879 [...], original in [...].

880 [...], original in [...].

881 [...], original in [...].

882 [...], original in [...].

883 [...], original in [...].

management had been informed by the IT Purchasing Department that [OEM] planned to launch an AMD-based "Germany-PC" and inquired: *"...through which "channels" will* [OEM] *market this???????...about how many units are we talking????...and which offer does* [OEM]*make us..."they" cannot sell AMD through us!!!!!! This really seems a bit "strange"."* The IT Purchasing Department answered as follows: *"You are definitely right that some things are a bit "strange" here but I have not been completely idle. We will certainly receive during the course of this week an additional offer from* [OEM]. *The then offered configuration will, except for the CPU (!), be 100% identical to the Germany-PC* [OEM]'s AMD-based offer]. *Like this we also have the possibility to offer the same (Intel-based) configuration at the same price."*[884]

(649) [Inspection document from MSH's premises] consists of an e-mail dated [winter] 2004 from MSH [country] to MSH's headquarters in Germany with the following statement: *"Apart from* [OEM], *we are the only PC-supplier that only uses Intel CPUs. In view of AMD's attractive 64-bit-processors* [OEM] *now offers the possibility to also source chips from the production of the Intel competitor AMD in the future. How do we see this? We have the impression that we cannot achieve important price points because we only market Intel. Has there already been a decision in this regard for 2005?"*[885]

(650) [Inspection document from MSH's premises] consists of an e-mail of [winter] 2005 from MSH's management to Intel, in which MSH complained about Intel's supply shortages: *"[U]nfortunately I have to come back to my last email about CPU availability, because nothing has changed. As you know we are 100% dependent on you. So please help us. We already suffered a lot in January. This is not acceptable."*

(651) [Inspection document from MSH's premises] [886] contains an e-mail dated [winter] 2005 from MSH's management to Intel, in which MSH again complained about Intel's supply shortages at that time, while Aldi, a German food retailer which periodically also offers PCs, was not obviously experiencing such supply shortages: *"If we don't have anything to sell because Intel does not stick to its commitments, this is very unfortunate. Certainly it does not make sense to threaten with AMD all the time.* (...) *He* [Intel executive] *has clearly assured us that we would be the last ones to have a shortage. If a huge number of CPUs appears in the store of a known food retailer I ask myself whether someone has a very short*

---

884 [...], original in [...].

885 Original in [...].

886 [...].

memory. In particular, if the usual supplier of this food retailer is not a 100% loyal Intel client and constantly trying to convince us that we are on the wrong track."[887]

(652) [Inspection document from MSH's premises] consists of an e-mail communication of [summer] 2005 between MSH [country[and MSH's headquarters in Germany, in which MSH [country] inquired about the following: *"Are we allowed to sell AMD processoers* [sic] *as PC component?"* The headquarters answered: *"[S]orry, no!"*

(653) [Inspection document from MSH's premises] contains an e-mail dated [summer] 2005 from a weekly online IT magazine, which had addressed MSH [country] with the following query: *"I would like to know whether Media Markt offers AMD-based PCs?"* The internal follow-up in this regard contained the following answer: *"We do not sell products with AMD chips. We sell PCs with Intel CPUs exclusively."*[888]

(654) [Inspection document from MSH's premises] is an internal e-mail dated [spring] 2005 from the manager of a local shop in [...](Germany) to MSH's headquarters in Germany, in which he complains about the lack of competitiveness of Intel-based PCs in certain price ranges: *"I don't want my mail to be understood as an accusation but rather as a cry for help in the sense that we are currently not able to satisfy this market. I know very well about the importance of the Intel agreement. But it really hurts me when our competitors advertise exactly the products and price ranges, for which our hands are tied due to* [...] *obligations."*[889]

(655) [Inspection document from MSH's premises] contains an e-mail dated [winter] 2006 from MSH's headquarters in Germany to a business partner who had asked whether it was true that MSH did not purchase any products with an AMD processor. MSH answered as follows: *"1. Yes, it is correct that we don't purchase any products with an AMD processor. 2. because we have an* [...]*with Intel."*[890]

(656) [MSH submission] is an e-mail communication of [summer] 2006 at management level, which refers to a press article published on 2 July 2006 in the Financial Times Germany about AMD being foreclosed from MSH because of an alleged exclusivity agreement with Intel. The first e-mail contains the following statement: *"[T]he topic does not really calm down and the snare in our houses...demand for AMD processors...is so easy to set. I think that also one or the other managing director will ask in the coming days how he and his staff should behave in case*

---

887 [...] , original in [...].

888 Original in [...].

889 Original in [...].

890 [...], original in [...].

AMD is demanded. Wouldn't it be a possibility to use AMD in one of our next dispositions or even flyer products?" MSH's management answered: *"I had asked to renounce emails on this subject and use direct communication as usual at media-saturn."*[891]

(657) [MSH submission] consists of an e-mail communication of [spring] 2007 between MSH's headquarters and a business partner, which was interested in starting an AMD-based PC promotion with MSH [country]and therefore sent the following query to MSH: *"Our* [country] *team is trying to set up a cross-promotion with A[M]D on our notebook products. They have heard than* [sic] *A[M]D is "banned" momentarily from selling to Mediamarkt in* [country]. *Are you aware of anything like that and if not, can you please investigate or go back to me?"* MSH's headquarters answered this query as follows: *"Not available is a better word. There are many reasons and local economic decisions behind it."*

(658) [Inspection document from MSH's premises] consists of an internal e-mail communication of [winter] 2008 at MSH [country] with regard to an offer for an AMD-based [OEM] notebook. It contains the following statement: *"Notebook has AMD ☹, so cannot be supplied."*[892]

c) Evidence found at Intel's premises

(659) In addition, numerous documents found at Intel's premises in [...] provide strong evidence on the nature of the exclusivity agreement between Intel and MSH.[893]

(660) Document IP23 contains draft minutes of an *"Intel-MSH Audit Process Meeting"* held on 7 September 2000. One of the *"Main Points"* recorded in the minutes is the following: [...]. Document IP12 is an internal e-mail follow-up at Intel of 22 September 2000 on the draft with the following comment: [...][894] [...]

(661) Several documents found at Intel's premises contain the acronym "[...]" in connection with MSH, which stands for "[...]". [...][895]

---

891 Original in [...].

892 Original in [...].

893 Documents are listed in chronological order.

894 P. 1 of the document.

895 See for example Document KS56 of 28 October 2002, p. 1 (*"INTEL OBJECTIVES: Uplevel the relationship Intel-MSH to make sure Intel will continue have VOC status."*); Document FK35 of 21 July 2003, p. 1 (*"Intel has VOC status at MSH"*); Document IP34 of 22 December 2003, p. 1 (*"MediaSaturn is the only one where we are VOC"*); Document FK72 of 17- 24 March 2004, p. 3 (*"MSH* [country Y]*was the only country where Intel has not VOC status at MSH"*); Document IP32 of 12 October 2004, p. 1 and 2 *("Intel has VOC status in all countries."; "Prove to MSH that they can win with IA* [Intel Architecture] *and stay with Intel as VOC.")*; Document FK21 of 19 January

(662) This conclusion results, on the one hand, from Document IP47, which is Intel's internal [...] drawn up by [...]in January 2004. Under point 10 headed [...], the term [...]is suggested to [...][896]

(663) In addition, the meaning of the term is demonstrated by the context of further documentary evidence described in recitals (664) to (668).

(664) The most meaningful documents in this regard which establish a clear link between the acronym *"VOC"* and Intel exclusivity refer to MSH [country Y] , which joined the funding agreements and thus also the exclusivity arrangement with Intel only in 2004. The negotiations of MSH [country Y]'s accession started in 2003, during which its share of Intel x86 CPUs continuously increased from [...]% in Q1/2003 to [...]% in Q4/2003,[897] before switching to Intel exclusivity as from [date in second quarter of] 2004 onwards.

(665) Document FK56 consists of an internal e-mail of 13 January 2003 from [Intel executive] to [Intel senior executive]with an attached briefing for a dinner with MSH on the same day. Under the heading *"Intel objectives"*, the following is noted: *"1. Understand what is needed to include* [country Y] *in the European agreement. Background: Currently* [country Y] *is the only European MSH country that is not included in the collaboration agreement, so they do offer AMD based PCs. Historically all MSH countries have "grown up" in the Intel agreement so they are used to it – Media Markt* [country Y] *is the only country branch that has been bought by MSH and so historically* [country Y] *feels more independent from the HQ."* Under *"INTEL ISSUES: 1. Media Markt* [country Y] *selling AMD based PCs"* it goes on: *"Discovery to understand what is needed to become VOC at Media Markt* [country Y]." Under *"Key figures"* at the end of the document is noted: *"Intel MSS* [Market Segment Share] *100% Intel (excl.* [country Y]*)".*[898]

2005, p. 4 *("Intel has VOC status @ MSH – product availability is a MUST")*; Document IP19 of 4 March 2005, p. 3 *("The emotions are high at MSH these days and I see a realistic chance of loosing* [sic] *VOC status.")*; Document FK18 of 10 October 2005, p. 2 *("Intel has VOC status in all countries.")*; Document FK16 of 5 October 2006, p. 1 *("Media Saturn was reviewing the (VOC) supplier situation with us in Dec'05 and Jan'06, as they did not grow as fast as the (GfK) market in Germany.")* and Document IP35 of 10 October 2007, p. 1 *("Intel is a vendor of choice for them* [MSH] *for many years.")*.

896 P. 2 of the document.

897 See Document FK52 of 22 July 2003, p. 2 *("[T]hanks to the joint effort, what we put together in place, Q2 in Media Market* [country Y] *ended up with a* [...]*% MSS,* +[...]*% recovery VS Q1 and* +[...]*% over what agreed on the promotional plan. The agreement has also been signed for Q3 with a target of* [...]*% MSS by* [MSH executive]*.")*, and Document FK50 of 21 August 2003, p. 4 (slide headed *"CDC Plans": "Goals for next Qtr (Q4) – MS* [...]*%")*.

898 Pp. 2, 3 and 5 of the document.

(666) Document FK33 is an internal Intel briefing of 25 July 2003 prepared for an executive meeting with MSH. Under the heading *"Account Background"*, the following is noted: *"Intel Has VOC status in 9 of the 10 countries. A contra revenue agreement is in place. Only in* [country Y] *Intel is not VOC, but we have been able to close a contra revenue agreement there also with the goal to become VOC by Q1 2004."* In the *"ADDENDUM"* under *"MSH Facts & Figures"*, it is stated : *"Intel MSS VOC (all countries but* [country Y]*)".*[899]

(667) Document FK73 is an internal briefing from [Intel executive] in [country Y], which dates from 17 March 2004 and thus [...] before the switch to Intel exclusivity. Under the heading *"Noticeable activity on covered Accounts: MSH* [country Y]", he wrote: *"Job#1 accomplished!!! They will be VOC by* [date in second quarter]. *It took a year to switch them from ~* [...]*%Mss* [market segment share] *to VOC".*[900]

(668) Document JABR19 contains the key points of an internal briefing for, Intel's then [Intel senior executive]for a dinner with MSH scheduled for 15 September 2004: *"A) The key actions for* [Intel senior executive] *should be: 1. Appreciation for close cooperation* (...) *Intel has VOC status now also at Media Markt in* [country Y]. *So Intel is VOC in all 11 countries now where MSH has stores!"*[901]

(669) Other documents confirming the use of the acronym VOC for Intel exclusivity are listed in recitals (670) to (676).[902]

(670) Document JABR17 is an internal *"Customer Meeting Briefing Document"* for Intel's Retail Executive Conference held on 27-28 May 2002 in Berlin. The *"Executive summary"* indicates MSH's interest in negotiating an exception for certain AMD-based products from the exclusive Contribution Agreements with Intel: *"Meeting focus will be on discussing the strong competitive threat especially in the notebook arena, driven by key OEMs like* [OEM Z]. *Discussion will be if we should have an "AMD window" in the collaboration agreement for* [...]." Against this background, Intel clarifies that its top objective is to *"Hold VOC status at MSH"*, further specifying that a *"strong competitive threat (see issues) especially in Notebook arena is endangering Intel-MSH relationship"*, and that the *"Goal is to a) Avoid to have AMD based NBs in MSHs Q3 lineup, b) If a) not possible minimize volume and visibility".*[903]

---

899 Pp. 2 and 4 of the document.

900 P. 1 of the document.

901 P. 1 of the document.

902 Documents are listed in chronological order.

903 [Inspection document from MSH's premises] explains the issue from MSH's point of view (See recital (629) above): *"Also the so far unsuccessful attempts to negotiate an exception with Intel*

(671) Document IP38, an internal briefing for a meeting with MSH in Santa Clara on 22-23 July 2002, follows up on the growing competitive threat that risked jeopardising Intel's VOC status at MSH: *"*[MSH] *is a major retailer in Germany and Europe. (...) Current Intel MSS is* [...]*% [...]% is* [OEM]*. (...) Risk for Intel is that AMD is approaching them directly and we now even have major design wins from AMD at A-Brand OEMs like* [OEM Z]. *MSH feels forced to offer also these SKUs* [stock-keeping units]." Under *"CUSTOMER ISSUES AND OBJECTIVES: 1. Continue Intel-MSH collaboration agreement"*, it is stated that *"MSH wants to continue the close cooperation with Intel, but is challenged by growing competition and AMD design wins at major OEMs like* [OEM Z], *HP/Compaq. MSH is expecting Intel to solve this issue by winning back the designs. If this is not possible in a reasonable time, MSH feels forced to offer AMD based SKUs."* Against this background, *"INTEL ISSUES AND OBJECTIVES"* are phrased as follows: *"1. Uplevel the relationship to hold VOC status at MSH: Of course competition is very actively approaching MSH. So far we have been able to keep VOC status, but for 2H 02 we have seen major design wins of AMD in the NB segment of key A-Brand OEMs."*[904]

(672) Document PEB7 consists of an internal briefing for the same meeting at Santa Clara, but is specifically written for [Intel Executive]. In this briefing, the section *"INTEL ISSUES: 1. Competitive threat"* contains the following statement: *"AMD is aggressively approaching MSH. Since AMD has high MSS in consumer MSH thinks they do miss a portion of the market by not offering AMD".*[905]

(673) Document IP17 is an internal briefing for a meeting with MSH on 28 October 2002 in Germany. Under the heading *"Tone of the Meeting"*, the following is noted: *"Tone will basically be friendly since Intel has VOC status: So MSH is committed, but also sees issues: Channel conflict: Food chains (ALDI) offering very aggressive Intel SKUs; A-Brand OEMs: Some OEMs like Sony or HP/Compaq have high AMD share in their value NB lineup – MSH is committed to offer only Intel, but it is difficult for them to not offer a complete segment of key OEMs".*[906]

(674) Document FK59 consists of an internal e-mail dated 24 October 2003, which contains the minutes of a meeting with MSH on 21 October 2002 in Santa Clara. Under *"Key issues with Intel that MSH highlighted"*, the *"Executive summary"* states: *"1. Availability issues. Selling only Intel based PCs and NBs this is not acceptable for MSH."* Under *"Session 2 – MSH Pitch"*, the following is noted:

---

regarding the sales of specific brand products equipped with AMD processors (for example [OEM Z]*) will be continued."*

904 Pp. 1, 2 and 3 of the document.

905 P. 5 of the document.

906 P. 1 of the document.

"Needs and Claims: 1. More flexibility needed from Intel/faster decisions; Intel supply Issues in the recent past have put MSH under pressure → not acceptable since Intel has VOC status".[907]

(675) Document PEB14 is an internal presentation about MSH [country], which most likely dates back to the end of 2004. Under the slide entitled *"MSH Q&As"*, the following is noted: *"Can you give me more details about the CRA* [Contra Revenue Agreement, which is Intel's reference to the Contribution Agreements] *(do you have volume target or only mix target?): mix, we removed volume due to VOC status; details on the phone."*[908]

(676) Document JABR11 consists of an internal e-mail communication of 19-20 January 2005. The follow-up e-mail to [Intel senior executive] about an e-mail with minutes of the *"QBR* [Quarterly Business Review]" meeting with MSH held on the same day in Munich (Germany), contains the following statement: *"And last but not least, we'll continue being VOC (vendor of choice, and we have all their skus on IA* [Intel Architecture]*)".*[909]

(677) A number of documents such as internal briefings for meetings with MSH from the first years of Intel's funding relationship with MSH also contain references to an *"Intel MSS"* [Market Segment Share] at MSH of 100%.[910] After MSH [country Y]had been finally aligned with MSH's exclusivity commitment in [date in second quarter of] 2004, this reference was supplemented by the statement that *"Intel has VOC status in all countries"*[911] or that *"Intel is a vendor of choice for them* [MSH] *for many years."*[912]

d) Conclusions

---

907 Pp. 1 and 2 of the document.

908 P. 4 of the document.

909 P. 1 of the document.

910 See for example Document FK75 of 7 September 2001, pp. 22-23 of the document and 21/22 of the presentation (*"MediaMarkt Group:* (...) *100% Intel"* and *"Saturn Group:* (...) *100% Intel"*); Document KS44 of 14 November 2001, p. 1 *("Intel MSS at MediaSaturn is 100%.")*; Document IP38 of 22-23 July 2002, p. 1 *("Current Intel MSS is* [...]*% ([...]% is* [OEM]*)")*; Document KS56 of 28 October 2002, p. 3 *("Intel MSS* [...]*% ([...]%* [OEM]*)")*; Document FK42 of 20 December 2002 *("Customer Background:* (...) *100% Intel")*; Document KS58 prepared for a meeting on 30 July 2003, p. 2 (*"Intel MSS* [...]*% ([...]%* [OEM]*)")* and Document PEB12 of 27 July 2004, p. 6 *("MSS 2003 100%")*.

911 See for example Document FK20, an internal briefing for a meeting with MSH on 1 August 2005, p. 7.

912 See for example Document IP35, an internal briefing for a meeting with MSH on 10 October 2007, p. 1.

(678) In the light of MSH's submission [...] referred to in section a) above, and the contemporaneous evidence described in sections b) and c) above, the Commission concludes that MSH has been bound by an exclusivity agreement with Intel since October 1997 until at least 12 February 2008. This was an integral part of the written funding agreements entered into between both parties since that time.

2.8.4.3. Secrecy of the exclusivity agreement between Intel and MSH

(679) From the beginning of their contractual relationship, it was understood by MSH and Intel that the exclusivity arrangement was to be kept secret. This understanding is reflected in the very wording of the funding agreements as such, which either circumscribed the exclusivity requirement in an understated way ("best efforts" clause of the early agreements), or even stated the contrary ("non-exclusivity" clause of the Contribution Agreements) at the request of Intel's legal department.[913]

(680) It was first of all Intel which expressly insisted on the concealment of the exclusivity requirement. This is explained by MSH [country Y]'s [executive] with regard to the negotiation of MSH [country Y]'s accession to the funding agreements: *"During the meetings*, [Intel executive] *and other the* [sic] *Intel representatives indicated above made it clear that the discussions on the exclusivity requirement would have to remain secret.*[Intel executive]*pointed to the fact that the contribution agreement itself would not contain an exclusivity provision because the inclusion of an express provision to that effect would not be permissible. The Intel representatives thus asked me that all discussions on this topic would need to remain secret, should not be recorded in writing, and generally that they "should not leave the room where they were held".*"[914] The secret treatment of the exclusivity arrangement with Intel is also confirmed by MSH [country Y]'s executive responsible for the centralized purchasing of "new media": *"It was clear to everyone in MS* [country Y] *that the existence of the agreement with Intel, including the understanding that MS* [country Y] *was to sell essentially only Intel-based computers, was to be kept confidential."*[915]

(681) [...]This can be seen from [...], Intel's [...] created by [...], and mentioned in recital (662). [...]This is substituted by [...]as described in recitals (663) to (677).

(682) MSH also sought to avoid expressly referring to its exclusivity agreement with Intel in its internal correspondence and to use more ambiguous language instead, as can be seen from the documents described in recitals (638) to (658). There is a

---

913 [MSH submission].

914 [MSH submission].

915 [MSH submission].

wide range of documentary evidence at the Commission's disposal, which confirms the secrecy accorded to the exclusivity arrangement by MSH. These documents show that the knowledge of the exclusivity agreement with Intel at MSH had been limited to the greatest extent possible according to a "need to know" principle, and that communication about this topic was predominantly carried out orally. The relevant documents are listed in the following recitals in chronological order.

(683) [MSH submission] is an internal MSH e-mail of [summer] 1999, which includes the following request: *"[P]lease get me a copy of our "secret agreement" with Intel for Wednesday. (...) In addition, there is a secrecy commitment."*[916]

(684) [Inspection document from MSH's premises] contains an internal e-mail of [summer] 1999 sent from MSH headquarters to [MSH management staff] of the MSH countries covered by the [Second] Agreement, and an attached *"secrecy and non-disclosure commitment"* to be signed by the addressees of the e-mail: *"In addition, we urge you to keep the agreement with INTEL, and in particular its content, absolutely secret and to oblige your staff to do the same."*[917]

(685) As mentioned in recital (646), [MSH submission] consists of an e-mail communication of [winter] 2002 at MSH management level. One of the managing directors followed up on an e-mail to [MSH's country management staff] , to which a presentation was attached that apparently contained more details about MSH's relationship with Intel than normally divulged: *"...do you always disclose details of the Intel agreement to the countries???"* The author of the e-mail to [MSH's country management staff] answered as follows: *"...not up to now. It was first too complex and too confidential. However, all countries have quite a lot of difficulties not knowing whether they will receive the money they are entitled to. (see Saturn in the past). The new agreement is from my point of view not as hot as the old one, we urgently need more transparency and moreover we shouldn't have any secrets vis-à-vis the country* [management staff]."[918]

(686) As mentioned in recital (656), [MSH submission] is an e-mail communication dated [summer] 2006 at MSH management level, which refers to a press article published on 2 July 2006 in the Financial Times Germany about AMD being foreclosed from MSH because of an alleged exclusivity agreement with Intel. The first e-mail contains the following statement: *"[T]he topic does not really calm down and the snare in our houses...demand for AMD processors...is so easy to set. I think that also one or the other managing director will ask in the coming days*

---

916 Original in [...].

917 [...], original in [...]. As for the context of the document, See recital (627).

918 [...], original in [...].

how he and his staff should behave in case AMD is demanded. Wouldn't it be a possibility to use AMD in one of our next dispositions or even flyer products?" MSH's management answered: *"I had asked to renounce emails on this subject and use direct communication as usual at media-saturn."*[919]

(687) [MSH submission] contains an e-mail communication dated [summer] 2007 between MSH's headquarters in Germany and MSH [country] with regard to the following query: *"At this moment we see some challenges in the ultra portable pc's. Especially when they are coming in a nice price-range. We can have some opportunities with fi* [sic!] *the* [OEM]. *But, this is not an intel cpu. Are these products allowed or are they outside our guidelines?"* Instead of giving a direct answer to this short and precise question, MSH's management simply answered: *"I will call you later."*[920] Bearing in mind the management's statement referred to in recital (686), this answer again confirms that MSH management tried to avoid written discussions about the company's exclusivity agreement with Intel.

(688) [Inspection document from MSH's premises] contains an internal e-mail communication at MSH of [summer] 2005 with regard to the following customer request about MSH's purchasing strategy: *"I received the following information and would like to know whether this is true or not. "AMD is entirely excluded from the supply of Mediamarkt". When having a look at your PC segment, I realised indeed that you don't offer any computer system with AMD products."* The internal follow-up contained the following statement: *"[D]o we answer such requests at all? If yes, how do we express ourselves? In principle, we cannot communicate* [the consequences of the arrangement with Intel] *in any case to the outside world..".*[921]

2.8.4.4. MSH's fear of a substantial financial loss in case of a switch to AMD

(689) It was understood by Intel and MSH that non-compliance with MSH's exclusivity commitment would lead at least to a substantial and disproportionate reduction of Intel's payments under the funding agreements. However, there was some uncertainty as regards the amount of payments that would be lost since Intel never expressly spoke out on the financial consequences of non-compliance and MSH avoided testing the issue with Intel in practice.[922]

---

919 Original in [...].

920 [...], parts of the original in [...].

921 [...], original in [...].

922 [MSH submission].

(690) In view of MSH's perception that *"the Media Markt and Saturn Group* [was] *not competitive with comparable Intel products"*[923] for certain price ranges during certain periods of time, the company repeatedly engaged in negotiations with Intel's main competitor, AMD, with regard to a potential switch of parts of its demand.[924]

---

923 [MSH submission], which contains an internal e-mail communication of [autumn] 2000, [...](original in [...]).

See also the following documents (in chronological order):

Document [...] of [autumn] 2000: *"It cannot be in the sense of our partnership that the company Media Markt and Saturn as the only remaining 100% Intel compliant partner suffers in terms of image and competitiveness and has to beg for the mercy of a positive reaction from Intel."* ([...], original in [...]).

Document [...] of [summer] 2001: *"We have concluded an* [...] [similar to exclusivity agreement] *with Intel....good/bad?!? We have received a big sum of money in return – good! We have no variety in our product line (That's normally our philosophy?!?) – bad! We have offered all our competitors "a stone" to throw – bad!"* ([...], original in [...]).

Document [...] of [summer] 2002: *"[A]s already discussed in* [country], *we have the following needs in* [country], *which were confirmed during my round trip through our houses. 1) we currently don't cover price entry classes without negative range since our competition covers them at a reduced rate with AMD-based PCs. 2) we cannot always serve customers demanding branded PCs since these brands are partly with AMD. [H]owever, we should not send away any client saying: we don't have that and we cannot get it."* ([...], original in [...]).

Document [from inspection at MSH's premises] of [spring] 2005: *"I don't want my mail to be understood as an accusation but rather as a cry for help in the sense that we are currently not able to satisfy this market. I know very well about the importance of the Intel agreement. But it really hurts me when our competitors advertise exactly the products and price ranges, for which our hands are tied due to* [...]*obligations."* (original in [...]).

Document [...] of [autumn] 2005: *"2.1) We still have a problem of availability at the price entry CPUs. Given that this segment is extremely crucial for us and a high volume is moved therein, this is an unacceptable factor. From our point of view, it would be a viable solution to have a regular forecast discussion with MSH. Therewith we could guarantee that the processor volumes we need are treated by Intel with priority."* (original in [...]).

924 Document [...] of [autumn] 2002: *"[D]uring the last days I was repeatedly asked by the Managing Directors from inland and abroad about the outstanding fundamental decision with regard to AMD vs. Intel, or AMD and Intel. [A]s far as I am informed, this decision should have been prepared after your trip to* [country]*and the discussions with the mentioned CPU manufacturers."* (original in [...]).

Document [from inspection at MSH's premises] of [autumn] 2002: *"*[...]*AMD/Intel:* [An MSH executive favours using AMD-based processors as this might fit with MSH's marketing strategy.] *Also big brands such as Sony are switching to AMD.* (...) [An MSH executive] *asks to verify whether as a test a partial exit in only one Intel-exclusive* [region] *would be possible."* ([...], original in [...]and paraphrases of the original text as provided by MSH).

Document [from inspection at MSH's premises] of [autumn] 2002: *"...I have talked to* [an MSH executive]. *He is in view of the situation (pro/contra) of the opinion that the decision to stay with Intel is the right one. However, he sees the "problem" at the entry price ranges (*[OEM]*etc.) with AMD CPUs as we do.* (...) *Then we have to clarify on Monday, how we will explain this to AMD...they are waiting for a feedback!!!!"* (original in [...])

Document [...] of [autumn] 2004: *"[T]he Intel /AMD question is currently (actually as every year) being reconsidered."* ([...], original in [...]).

Document [...] of [winter] 2004: *"[A]s for the rest we are in intensive negotiations with Intel. I believe that we are currently in good hands with Intel...however, we are in contact with AMD".* ([...], original in [...])

MSH has stated in this regard: *"As MSH did not feel legally bound to an exclusive relationship with Intel, MSH repeatedly reviewed its purchasing strategy and several times also entered into talks with AMD to explore whether, under terms potentially offered by AMD, terminating the exclusive sales of Intel equipped computers would be commercially sensible for MSH."*[925]

(691) However, MSH and AMD never reached an agreement, in particular in the light of the likely substantial and disproportionate loss of Intel payments in case of a switch from exclusivity to a mix of suppliers. MSH described the situation as follows: *"In particular,* [AMD's offers in the past were not sufficient to be accepted by MSH and to][926] *terminate the relationship with Intel. It was clear to MSH in this regard 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 under the contribution agreements (and thus in a reduction of the total payments received from Intel, even if the total volume of Intel-CPUs sold by MSH would have remained the same as in previous periods), although MSH never actually tested the issue with Intel. Against the background of MSH's existing arrangements with Intel and the likely impact that dealings with AMD would have had thereon, MSH has to date always considered that the commercial offers made by AMD would not have been attractive enough to MSH from a commercial point of view."*[927]

(692) The Commission is in the possession of a wide range of contemporaneous documentary evidence that confirms MSH's fear of a considerable and disproportionate financial loss. This contributed to the maintenance of its exclusivity commitment with Intel despite a certain dissatisfaction with its relationship with Intel[928] and its concerns about its own competitiveness during

---

925 [MSH submission].

As regards the frequency of MSH's contacts with AMD, the following is stated in the same paragraph: *"An initial review of relevant calendar entries of MSH management staff suggests that between 1998 and 2007 there were at least 20 meetings scheduled with representatives of AMD. In addition, MSH had e-mail exchanges with AMD, usually in connection with such meetings. The last two meetings with AMD took place in 2007. No meetings with AMD took place in 2005 and 2006, but in 2004, MSH representatives met with AMD representatives at least six times."*

926 Paraphrase of the original text as provided by MSH.

927 [MSH submission].

928 Dissatisfaction was apparently caused by certain supply issues [see for example [inspection documents from MSH's premises]], payment disputes (see for example [inspection document from MSH's premises]), [...] (see for example [inspection documents from MSH's premises]) and the inflexibility of the Intel-Inside-Programme (see for example [inspection document from MSH's premises]). MSH's dissatisfaction with certain issues is also mirrored in a number of internal Intel briefings for meetings with MSH, see for example Document IP7 of 19 January 1999, Document IP38 of 22-23 July 2002, Document PEB7 of 23 July 2002, Document IP19 of 4 March 2005 and Document FK78 of 10 March 2005.

certain periods in time.[929] In fact, Intel has never been willing to consider any (not even minor) exception to the exclusivity arrangement although MSH has repeatedly tried to negotiate the possibility of a mix of suppliers,[930] or at least an *"AMD window"* for certain price ranges and under certain conditions.[931] Thus, only the risk of loss of payments from Intel caused MSH to stay Intel-exclusive and refrain from introducing even a minor percentage of AMD-based PCs to improve its competitiveness. This is demonstrated by the evidence in the following recitals.[932]

(693) [MSH submission] contains an internal e-mail of [autumn] 2002 at MSH management level, in which the severe financial disadvantages of a partial switch to AMD are highlighted: *"[O]n the basis of the present offers from AMD we prepared two scenarios. These show that we have a risk of approx.* (...) *to* (...) *million US$. In addition we have an additional risk resulting from the INTEL Inside agreement, which I estimate approx.* (...) *million US$. Thus, the risk could be* (...) *to* (...) *million US$. I have great difficulties taking a clear position. The topic is very complex. If we could generate more margins with AMD in our operative business, we would have the possibility to minimize part of the above-mentioned risk. However, I don't believe in this...since the price advantage of an AMD CPU directly impacts (according to the offers of our competitors) the sales price. The only argument in favour of AMD and INTEL is in my opinion the currently lacking brand variety at MSH."*[933] This statement therefore outlines that not only did MSH assume that it would lose its direct Intel payments under the

---

929 See footnote 923 above.

930 Document [...] of [autumn] 2000: *"[A] short info about the points discussed with* [Intel executive] *with regard to a potential extension of the contract: No longer a 100% Intel arrangement but something similar to a quota arrangement. for example 90/10; 80/20. In this regard, even a renouncement of AMD advertisements would be possible in the extreme case."* (original in [...]).

931 Document [from inspection at MSH's premises] of [summer] 2001: *"Problematic in the new media sector is dependence on Intel. Even in case of temporary competitive advantages of AMD Intel will remain our partner in the future. Future negotiations should take into account that we can buy AMD processors for selected actions if a certain AMD processor is clearly and verifiably more competitive and cheaper."* ([...], original in [...]).

Document JABR17 of 27-28 May 2002: *"Executive summary: Meeting focus will be on discussing the strong competitive threat especially in the notebook arena, driven by key OEMs like* [OEM Z]. *Discussion will be if we should have an "AMD window" in the collaboration agreement for* [...]." (p. 1).

Document [from inspection at MSH's premises] of [autumn] 2002: *"Also the so far unsuccessful attempts to negotiate an exception with Intel regarding the sales of specific brand products equipped with AMD processors (for example* [OEM Z]*) will be continued."* ([...], original in [...]).

932 Documents listed in chronological order.

933 [...], original in [...]. The figures contained in the original text were left out due to confidentiality claims from MSH.

funding agreements, but also part of the payments received under the Intel-Inside-Programme.[934]

(694) As discussed in recital (629), [inspection document from MSH's premises about] MSH's management meeting [of autumn] 2002 in which the following statement is contained under the heading *"AMD/Intel"*: "[An MSH executive favours using AMD-processors as this might fit with MSH's marketing strategy.][935] *Also big brands such as Sony are switching to AMD.* (...) [An MSH executive] *asks to verify whether as a test a partial exit in only one Intel-exclusive* [region][936] *would be possible.* (...) *A general termination of the Intel agreement is rejected for profit reasons."*[937]

(695) [Inspection document from MSH's premises] is an e-mail dated [autumn] 2003 at MSH management level, in which the company's supplier strategy is touched on: *"As for Intel, there is in principle nothing new to say with regard to last year. Apparently we are right with our strategy since we gain market share although we don't market AMD CPUs. The economic risk in case of a strategy change is like in the previous year approx. $* (...) *Mio."*[938]

(696) [MSH submission] consists of an e-mail communication dated [winter] 2004 at MSH management level, which reports about a new offer from AMD in case MSH would be willing to switch part of its purchases to AMD: "[An MSH executive] *has met* [executive] *of AMD – responsible for the international business – at a tradeshow in* [...]. *He communicates the message of the AMD guy of* (...) *$ per quarter if AMD could start business with Media-Saturn."* The reaction of one of the managing directors was the following: *"...these are in total* (...) *€ more than we achieved with Intel in 2003...excl. Intel Inside. This fits into the picture we currently have of Intel...for more efforts we receive increasingly less money."*[939]

(697) [MSH submission] consists of an e-mail communication of [autumn] 2004 between MSH's headquarters in Germany and its [country] subsidiary ("MSH [country]"), and which inquired about the following: *"[W]e recently received updated GfK*

---

934 The IIP is not part of the Commission proceedings. However, this is without prejudice to whether (part of) the Intel IIP payments are in practice conditional on a market share requirement for a particular customer, and hence potentially in contravention of Article 82 of the Treaty.

935 Paraphrase of the original text as provided by MSH.

936 Paraphrase of the original text as provided by MSH.

937 [...], original in [...].

938 Original in [...]. The figure contained in the original text was left out due to confidentiality claims from MSH.

939 Original in [...]. The figures contained in the original text were left out due to confidentiality claims from MSH.

figures regarding the share Intel <> AMD – I attached those for you. Therein you can see how strong AMD is at PC/Desktop. This finding raises the question of our Intel-strategy. My question: how about the rest of Europe and are there considerations to reconsider the strategy as regards the Intel-contract respectively?" The headquarters answered this query as follows: *"[T]he Intel /AMD question is currently (actually as every year) being reconsidered. (...) For the moment, the tendency seems to me to go towards a continuation of the agreement. Reasons: 1. Despite our only Intel strategy we are gaining market share. 2. We would potentially lose a lot of money."*[940]

(698) [MSH submission] contains an e-mail dated [spring] 2006 from MSH's headquarters in Germany to MSH [country], replying to the question of whether it was *"still an international decision to work exclusively with Intel": "I discussed the AMD issue with* [an MSH executive] *and I told him, that, if* [country]*is not willing/able to work exclusively with Intel any more, I can exclude* [country]*from the contract. I asked him, if he thinks, that we would sell significantly more, and he denied. Definitely you would lose the money, and AMD is not able to compensate even part of it. Especially in the current situation (with 100% Intel you are winning a lot of market share!) it seems not very intelligent to stop this partnership now."*[941]

(699) [Inspection document from MSH's premises] is an internal e-mail communication at MSH [country] of [spring] 2006 concerning the promotion of a specific AMD-based PC. It contains the following statement: *"Do not advertise* [AMD-based PC] *at all, breaching the contract would cost a lot..."*.[942]

2.8.4.5. Payment holdback in 1998/1999

(700) The fact that the risk of reaction on the part of Intel for MSH's non-compliance with its exclusivity commitment was not only theoretical is further demonstrated by the following incident. After it found MSH advertising an AMD-based PC in one of its flyers at the end of 1998, Intel decided to withhold a substantial part of the agreed funding in order to give a warning to MSH for the future. The issue was finally settled when Intel paid out the amount in question a couple of weeks later.

(701) This incident is recorded in Document IP11, which consists of an internal e-mail communication at Intel between 21 September 1998 and 17 February 1999. The first relevant e-mail dates from 18 December 1998 and is addressed to [Intel executive] and [Intel executive]. It contains the following statement: *"I have just*

---

940 [...], original in [...].

941 [...].

942 [...], original in [...].

stopped a payment due to be made today [...] *to Media Markt as we have just found them advertising a Fujitsu AMD K6-2 processor based PC. I want to give you an opportunity to raise this with (both of) them should you wish. I will not OK the payment until either of you tell me to do so. OK?"* [Intel executive's] answer to this issue was the following: *"*[Intel executive], *although it's a shame to see MM advertising AMD K6-2 – as far as I'm aware we only have an agreement with them not to promote their own "network" PCs with imitators.*[943] *But as a kind of "warning" it should be a signal for them that we stopped our payments. Even if we will have to pay anyway... My suggestion is to delay the payment at least until yearend (except there is a (Intel-) financial reason."*[944]

(702) As suggested by [Intel executive], the payment was indeed withheld during the following weeks. On 30 December 1998, he reported the following after having been contacted by MSH: *"I got a call from the office of MM HQ asking why they didn't receive the payment* [...] *yet. I told them that I'm waiting for a final approval. That means that we are not paying this year* – [Intel executive], *do you agree to pay them during January? And how open can we be in telling them WHY Intel delayed the payment?"* [Intel executive] answered as follows: *"[I] assume we can tell them why we are doing this. Check with legal for final approval of what we say. [L]eave things this way and use it to drive a mtg with* [MSH executive][945] *and me."*[946]

(703) [Intel executive] of Intel Germany, followed up on this issue on 2 January 1999: "[Intel executive], [MSH executive] *did call me right before the year end.* (...) *He knew the reason for the payment stop without telling. He explained that the special promotion action was restricted to* [...] *only, with a limited s/o* [probably sold out] *number (*[MSH executive] *sed* [sic] *that sales went excellent and they made more profit than with Intel based configs?). Since all have been* [OEM] *brand which are not part of the agreement he requested immidiate* [sic] *payment release.* [Intel executives] *and myself had some fruitfull* [sic] *meetings with them in 2H/Dec. Also our new roadmap is seen very positive and competitive. Both Media Markt and Saturn* [...] *are back 100% with Intel, supporting the roadmap.* (...) *Given the current course and strategy of MSH I would recommand* [sic] *to release the payment and have the meeting with* [MSH executive] *ASAP to close the other*

---

943 This assertion and the following statements that imply a limitation of MSH's exclusivity commitment to certain PC brands are erroneous since the exclusivity agreement between Intel and MSH in fact covered not only MSH's own "Network" brand but all PC brands sold by MSH from October 1997 onwards. See [MSH submission].

944 P. 18 of the document.

945 [...].

946 P. 17 of the document.

issues." [Intel executive] replied on the same day: *"[I] would like to see* [MSH executive] *on my return before [I] release payment."*[947]

(704) That the payment holdback was at least maintained until the middle of January 1999 is shown by Document IP7, which contains the briefing for the meeting with MSH referred to in recitals (702) and (703), which was eventually scheduled for 19 January 1999. Under *"CUSTOMER OBJECTIVES"*, the following is noted: *"Intel to release the* [...] *payment hold. Reason: The* [OEM] *brand is not part of the agreement. Comment: Saturn* [...] *promoted a Network NBI 300 Notebook on Jan.7 (full page local add* [sic] *in SZ* [most likely Süddeutsche Zeitung]*). This is a clear violation of the II agreement.* [MSH executive] *stated that the promoted NB is a* [OEM] *brand and was a mistake by a local SH store."*[948]

(705) This early incident shows that Intel wanted to make very clear that it would not accept any deviation from the exclusivity requirement MSH had committed to. Given that this message was well understood by MSH from the beginning, the company has never been subsequently ready to actually test the issue with Intel[949] and to decide unilaterally on a deviation from its exclusivity commitment even for a minor part of its demand.

2.8.4.6. The [flagship brand of major OEM] Issue in 2002

(706) Another incident that highlights Intel's determinedness to ensure that there would be no deviation from the exclusivity requirement occurred in 2002. In that year, MSH tried to negotiate an exception from the exclusivity agreement with Intel with regard to certain lower priced AMD-based [flagship brand] PCs offered by [OEM Z], for which Intel was not able to offer a competitive alternative. These efforts turned out to be unsuccessful in view of Intel's insistence on full compliance with Intel exclusivity. The alternative for MSH was a substantial financial loss.

(707) MSH describes the negotiations as follows: *"Sometime in 2001 or 2002 (*[MSH Executive] *does not recall the exact time period), there were negotiations between MSH* and *Intel concerning a request by MSH to be able to sell, at least for a certain period,* [OEM Z's flagship brand] *computers that were equipped with AMD processors.* [OEM Z] *had first produced* [flagship brand] *notebooks only with Intel CPUs. However, at some later point in time,* [OEM Z] *introduced lower priced* [flagship brand] *models which were equipped with AMD CPUs. Both Intel and*

---

947 P. 16 of the document.

948 P. 1 of the document.

949 [MSH submission]. MSH stated in this regard that the sale of AMD-equipped PCs would have resulted at least in a disproportionate reduction of Intel payments, even if the volume of Intel-based computers sold by MSH remained the same (See recital (691)).

MSH tried to persuade [OEM Z] *to offer these cheaper models alternatively also with Intel CPUs. It was known to MSH, however, that it would take several months until* [OEM Z]*could make such Intel equipped* [flagship brand] *notebooks available, and MSH wanted to deal immediately with these lower range* [flagship brand] *notebooks. For this reason MSH turned to Intel requesting whether it could exceptionally sell AMD equipped* [flagship brand] *notebooks until the cheaper range* [flagship brand] *notebooks would become available with Intel CPUs. Intel responded that if MSH would do so, Intel would no longer pay any contributions for any* [flagship brand of OEM Z] *notebooks, i.e., also not for those* [flagship brand] *notebooks sold by MSH that were actually equipped with Intel CPUs. As this would have meant a substantial financial loss for MSH, it decided not to deal in AMD equipped* [flagship brand PCs] *at all."*[950]

(708) This unsuccessful attempt to negotiate an exception to the exclusivity arrangement was also mentioned in several documents in the possession of the Commission described in recitals (709) to (711).

(709) In Document JABR17, which is an internal *"Customer Meeting Briefing Document"* for Intel's Retail Executive Conference held on 27-28 May 2002 in Berlin, the *"Executive summary"* indicates MSH's interest in negotiating an exception with Intel for certain AMD-based products from the exclusive Contribution Agreements: *"Meeting focus will be on discussing the strong competitive threat especially in the notebook arena, driven by key OEMs like* [OEM Z] . *Discussion will be if we should have an "AMD window" in the collaboration agreement for* [...]. *"*[951]

(710) In addition, Document IP38, an internal briefing for a meeting with MSH in Santa Clara on 22-23 July 2002, already mentioned in recital (671), confirms the growing competitive threat from AMD with regard to [OEM Z] that risked jeopardizing Intel's "vendor of choice" (that is to say exclusive) status at MSH: *"Risk for Intel is that AMD is approaching them* [MSH] *directly and we now even have major design wins from AMD at A-Brand OEMs like* [OEM Z]. *MSH feels forced to offer also these SKUs."* Under *"CUSTOMER ISSUES AND OBJECTIVES: 1. Continue Intel-MSH collaboration agreement"*, it is noted that *"MSH wants to continue the close cooperation with Intel, but is challenged by growing competition and AMD design wins at major OEMs like* [OEM Z], *HP/Compaq. MSH is expecting Intel to*

---

950 [MSH submission] . According to MSH, *"[t]he issue became moot some months later when – it is no longer known by MSH when exactly –* [OEM Z] *offered also the lower-range* [flagship brand] *models with Intel CPUs."*

951 [...].

solve this issue by winning back the designs. If this is not possible in a reasonable time, MSH feels forced to offer AMD based SKUs." [952]

(711) In [inspection document from MSH's premises about]MSH's management meeting [of autumn] 2002 and was already quoted in recitals (629) and (694), the following was recorded: "[...]*AMD/Intel: "(...) Also the so far unsuccessful attempts to negotiate an exception with Intel regarding the sales of specific brand products equipped with AMD processors (e.g.* [OEM Z]*) will be continued. A general termination of the Intel agreement is rejected for profit reasons."* [953]

2.8.4.7. The negotiation of MSH [country Y]'s accession to the funding agreements in 2003/2004

(712) The negotiation process of MSH [country Y]'s accession to the funding agreements in 2003/2004 confirms the conditionality of Intel's payments upon exclusivity.

(713) As explained in recital (664), in [the second quarter of] 2004, MSH [country Y] joined the funding agreements and thus also the exclusivity arrangement with Intel after extensive negotiations throughout the year 2003. The conditionality of Intel's funding in return for MSH [country Y]'s exclusivity commitment is demonstrated in particular by two aspects of the negotiation process: first, Intel's refusal to let MSH [country Y] benefit from its funding under the already existing agreements even if it were to only sell off its existing stock of AMD-based PCs; and second, the substantial increase in funding MSH [country Y] experienced after its final accession to the funding agreements.

(714) MSH has described the negotiation process and Intel's determinedness to admit no exception to the exclusivity arrangement as follows: *"MM* [country Y] *generally sold a relatively significant proportion of AMD equipped computers (e.g. in 2003, the proportion was roughly* [...]*%). After MM* [country Y] *'s integration into the MSH group, MSH suggested to MM* [country Y]*'s management to join the contribution agreement with Intel.*[954] *The negotiations concerning the accession of MM* [country Y] *to the central contribution agreements concluded by MSH were held throughout the year 2003.*[955] *There were several meetings between MM* [country Y]*'s management and Intel representatives* (...). *As it was clear that MM* [country Y] *could only come under the coverage of the central contribution*

---

952 [...].

953 [...], original in [...].

954 [MSH submission]: *"Starting from 2002 both MSH and Intel representatives strongly suggested that MS* [country Y] *become part of the agreement."*

955 In these negotiations, Intel was represented *"by* [Intel executive], [Intel executive]*l for* [country Y], *and* [Intel executive] *from Intel* [country Y]*."* See [MSH submission].

agreement if MSH sold (essentially) exclusively Intel equipped computers,[956] *the extension of the agreement to* [country Y] *was negotiated in light of MM* [country Y]*'s existing AMD business. More specifically, MM* [country Y]*'s management tried to obtain an exception from the exclusivity requirement under which it would be permitted, at least for a transition period, to continue selling a certain maximum percentage of AMD equipped computers. MM* [country Y] *first asked to be able to sell up to* [...]*% AMD equipped computers, and subsequently would have been willing to reduce that percentage to* [...]*%. However, Intel rejected this request and insisted that MM* [country Y] *could only come under the central agreement if it were to switch entirely to Intel equipped computers.*[957] *In the negotiations, Intel's main representative,* [Intel executive], *even refused MM* [country Y] *the possibility to sell down its existing stocks of AMD equipped computers and insisted that the central contribution agreement agreed with MSH could only become applicable to MM* [country Y] *once only Intel equipped computers were sold.*[958] *Given the importance of the matter to MSH, and the difficulties encountered in the negotiations, there had also been discussions between* [MSH Executive] *and* [another MSH Executive] *and Intel's* [Executive] *on the subject."*[959]

---

956 [MSH submission] stated in this regard: *"In the discussions, it was clear that it was a prerequisite to becoming part of the agreement for MS* [country Y] *to purchase essentially only Intel-based computers."* [...].

[MSH submission] specified [...] that "[Executive] *of Intel made it clear to* [MSH executive] *and* [another MSH executive] *that MS* [country Y] *would only be admitted to the benefits of the contribution agreements, if MS* [country Y] *would agree to sell (essentially) only Intel-based computers."* [...].

The table provided in [MSH submission] shows that the number of Intel-based PCs sold by MSH [country Y] more than [...] in 2003 and [...] in 2004 compared to the relatively stable sales amount of Intel-based PCs during the years 2000 to 2002. In view of the fact that MSH [country Y]'s proportion of AMD-based PCs was roughly [...]% in 2003 (See recital (714) above), these figures indicate that already during the year 2003, in which MSH [country Y]'s potential accession to the funding agreements was being negotiated with Intel, the company continuously switched a growing part of this demand to Intel in order to achieve full exclusivity as from [date in second quarter of] 2004.

957 [MSH submission] stated in this regard: *"However, Intel rejected these suggestions.* [Intel executive] *insisted that MS* [country Y] *purchase exclusively Intel CPUs if we wished to be included in the central contribution agreement with MSH and receive the payments provided for thereunder."* [...].

958 [MSH submission] stated in this regard: "[MSH Executive recalls] *that in these negotiations* [MSH Executive] *tried to obtain the possibility to at least sell-off the existing stocks of AMD-based computers.* [Intel executive], *however, refused to agree to this possibility, explaining that if MS* [country Y] *sold AMD-equipped computers, MS* [country Y] *would not get any contributions for the sale of Intel-based computers.* [Intel executive] *made clear to* [MSH Executive] *and* [another MSH Executive] *that the agreement with Intel was an "all or nothing" agreement. By this* [MSH Executive understands] *that he meant, with respect to MS* [country Y]*'s participation in the agreement, "either you are in or you are out.""* [...].

959 [MSH submission].

(715) A solution to MSH's AMD stock problem was only found with Intel [country Y]'s local management. MSH stated in this regard that: *"It was only with Intel* [country Y]*'s local management that MM* [country Y] *was able to find a "gentlemen's agreement" under which it was permitted to sell down its remaining stocks of AMD equipped computers also after MM* [country Y]*'s accession to the agreement between MSH and Intel."*[960]

(716) After its accession to the central Intel/MSH funding agreements, MSH [country Y] experienced a disproportionate increase in marketing funds from Intel. The reason was to reward MSH [country Y] for its exclusivity commitment. [MSH executive in country Y] described the company's financial situation before and after its accession to the funding agreements as follows: *"MS* [country Y] *did not have a formal cooperation agreement with either Intel or AMD, but received marketing contributions from both AMD and Intel. I believe that, before MS* [country Y] *joined the system of contribution agreements negotiated between Intel and MSH, the level of financial contributions received from AMD and Intel was roughly equivalent. The contributions received from Intel before MS* [country Y] *acceded in 2004 to the system of contribution agreements concluded by MSH with Intel was, however, much smaller than the amounts received from Intel thereafter when MS* [country Y] *had effectively become an exclusive Intel customer."*[961]

(717) [MSH Executive] also gives a quantitative estimate of the increase in Intel support to MSH [country Y] between 2003 and 2004: "*Intel paid €* [...] *(for 2003). In contrast, MS* [country Y] *received €* [...] *for 2004 for Intel activities. These funds came both from suppliers (for Intel based activities i.e. Intel Inside) and from Intel after* [MSH country Y] *had acceded to the agreement concluded between MSH and Intel."*[962]

---

960 [MSH submission].

[MSH submission] stated in this regard: *"In the months following the negotiations with Intel, in which it was eventually agreed that MS* [country Y] *would join the contribution agreements from* [date in second quarter of] *2004 onwards,* [MSH Executive] *finally managed to reach a "gentlemen's agreement" with the local* [country Y] *management, i.e.,* [Intel executive] *and* [Intel executive]. [Intel executive] *and* [Intel executive] *agreed that MS* [country Y] *should be able to at least sell off the existing stocks of AMD-equipped computers during* [...] *2004 (and some remaining computers thereafter)."* [...].

MSH stated in this regard that it is not aware that the negotiation of the gentleman's agreement *"involved anyone but MM* [country Y] *and Intel's local* [country Y] *management"* and that *"[i]n particular,* (...) [Intel country's main representative in the negotiation of MSH country Y's accession to the funding agreements] *or* [Intel country Executive] *did not participate in the negotiations".* See [MSH submissioin].

961 [MSH submission].

962 [MSH submission].

(718) Intel disputes the accuracy of the comparison made by [MSH Executive]. In this regard, Intel notes that the 2004 amounts include payments under the Intel Inside programme which are not covered by the Commission enquiry.[963] These payments, according to Intel, were made by OEMs from their Intel Inside funds, [...]. In this context, Intel argues that it is necessary to subtract [...] from the total [...]mentioned by [MSH executive].[964] Intel also considers that a non-Intel inside payment of [...] should have been accounted for in 2003 as opposed to 2004 because, despite the fact that it was paid in the first quarter of 2004, it relates to sales from late 2003.[965]

(719) The Commission takes good note of Intel's remarks. It is indeed correct that the accounting documentation on which [MSH Executive] based his computation seems to include Intel Inside payments in 2004, but not in 2003. This could indeed lead to an overestimation of the quantitative increase of total payments made by Intel in the case where MSH [country Y] would have received similar Intel Inside payments in 2003 which would for an unknown reason not be accounted for in [MSH Executive]'s accounting documentation.

(720) However, it is noteworthy that, to the extent that it believed that the accounting documentation used by [MSH Executive] is inaccurate, Intel was free to supply its own survey of the total payments it made to MSH [country Y] in 2003 and 2004. Intel chose not to do so, and to instead argue on the basis of tailored corrections to the documents of [MSH Executive], which are all in Intel's favour. In this respect, it is noted that a contemporaneous MSH [country Y] document, whilst confirming the fact that the [...] used by [MSH Executive] contains some Intel Inside payments, also shows that the Intel recalculations based on tailored corrections of [MSH Executive]'s accounting documents underestimate the amount of non-Intel Inside payments for 2004. Indeed, according to this internal MSH [country Y] presentation, Intel paid [...] in non Intel Inside x86 CPU payments in 2004.[966] This is above the result of the subtraction of [...] from [...] (that is, [...]), and even more above the figure resulting from Intel's further deduction of [...] (that is, [...]).[967] The Commission therefore considers that Intel's recalculation method, which is biased in Intel's favour, does not provide a proper basis for the invalidation of the qualitative conclusion drawn by [MSH Executive] that the payments which MSH [country Y] received in 2003 were *"much smaller than the*

---

963 Intel submission of 5 February 2009 related to the 17 July 2008 SSO, paragraph 202.

964 Idem.

965 Intel submission of 5 February 2009 related to the 17 July 2008 SSO, paragraph 203.

966 [Inspection document from MSH's premises].

967 Intel submission of 5 February 2009 related to the 17 July 2008 SSO, paragraph 204.

amounts received from Intel thereafter when MS [country Y] *had effectively become an exclusive Intel customer."*[968]

(721) In any event, it remains undisputed that in 2003, the year before acceding to the system of contribution agreements concluded by MSH with Intel, MSH [country Y] received [...] payments for Intel activities.[969]

(722) This figure increased considerably to [...] in 2004, the year that the central contribution agreement came into force in [country Y]. Even excluding the Intel Inside payments and considering, as Intel does, that only [...] are attributable to direct Intel payments in 2004, given that MSH [country Y] sold [...] with Intel x86 CPUs in 2003 and [...] with Intel x86 CPUs in 2004,[970] the Intel-related payments per x86 CPU increased from [...] to [...] bringing [country Y] closer to the MSH central average contribution of [...] [971] in 2004.[972]

(723) This is by all measures a disproportionate increase. It must be noted that, as underlined in recital (720), the [...] value calculated by Intel is underestimated and is therefore in Intel's favour. Furthermore, as described in recital (713), MSH [country Y] acceded to the central funding agreement with Intel in the second quarter of 2004 only. It is therefore normal that the full effect of this accession was not yet represented in the average 2004 figures.

(724) Finally, other estimates provided by Intel in its 5 February 2009 submission give a strong confirmation of the disproportionality of the increase of the Intel payments to MSH [country Y] in relation to the increase in purchases after the introduction of exclusivity which resulted from the accession of MSH [country Y] to the central funding agreement. The following chart compares the rate of the funding granted by Intel to MSH [country Y] in 2003 under a separate agreement with the average global rate of the funding granted by Intel to MSH under the global agreement in 2003 and in 2004.

---

968 See recital (716).

969 As explained above, Intel claims that a payment made in the first quarter of 2004 in consideration of sales made in late 2003 should be added to this amount. However, if this were to be done, then similar payments made at the beginning of 2005 in consideration of sales effected in late 2004 would also have to be taken into account in the computation of the amount for 2004 in order to compare like for like. Since Intel did not provide data that allows this computation to be made, the Commission maintains the consistent calendar framework adopted by MSH.

970 [MSH submission].

971 See paragraph 88 of the 17 July 2008 SSO.

972 The conversions are based on an average exchange rate of 1,19 USD/EUR with regard to the exchange rates published by Eurostat for the relevant years on its website (1,13 USD/EUR for 2003 and 1,24 USD/EUR for 2004).

Table 12 - Comparison of Intel funding rates to MSH [country Y] with the average for MSH

Rate of Intel funding to MSH [country Y] in 2003	[...]%
Average global rate of Intel funding to MSH in 2003	[...]%[973]
Average global rate of Intel funding to MSH in 2004	[...]%

Source: Intel[974]

(725) As is clear from the table in recital (724), the rate of Intel funding which MSH [country Y] received when it was not covered by the central contribution agreement between MSH and Intel was [...] the rate of funding which the rest of MSH received from Intel on average. This comparison is particularly valuable because it allows an assessment of disproportionate increases: as the funding is expressed in rates, a proportionate increase due only to an increase of Intel sales would not appear in these figures.

2.8.4.8. Intel's continuous and close monitoring of MSH's sales

(726) A further element that kept MSH closely aligned to Intel and made the company refrain from any unilateral deviations from its exclusivity commitment was its awareness that Intel was continuously and closely monitoring the market, in particular by means of the sales-related information that MSH was required to provide under the funding agreements (see recitals (607) and (613)).

(727) Apart from annual *"top-level discussions"* at Intel's headquarters in the United States with [Intel's top management],[975] Intel and MSH met *"for a "Jahresgespräch" (annual discussion) at least once a year (but sometimes a bit more often) at the European level"* in which *"Intel would be represented by its* [European and German management as well as its responsible executive for MSH]. (...) *These meetings focused on general business development, on the development of MSH sales and that of the contributions paid under the contribution agreements. The analysis of MSH's business development was very detailed. Intel has (as a result of the information provided under the contribution agreements) very good insight into MSH's sales structure as regards computers.* (...) *Intel reviewed information on MSH's plans and expectations, based on MSH's own sales*

---

973 Intel does not specify whether this rate also averages the payments made to MSH [country Y] or not. For the purpose of this comparison this question can be left open, since the global average rate would be even higher for the payments made under the central contribution agreement if MSH [country Y]'s separate payments in 2003 would have to be excluded from the calculation. Such a higher rate would be to Intel's disadvantage for the purpose of this comparison.

974 Intel submission of 5 February 2009 related to the 17 July 2008 SSO. Report of Professor [...] and Doctor [...]. Exhibit 27 for the first line. Exhibit 20 for the second and third lines.

975 [MSH submission].

forecasts and forecasts obtained from market research companies such as GfK, as regards MSH's computer business in the year to come. At these annual meetings, Intel was also given access to [...]. *By comparing these* [...] *sales volumes with the information on MSH's sales of computers with Intel CPUs that MSH was to provide under the contribution agreements, Intel could see whether and to what extent MSH sold computers that were not equipped with an Intel CPU."*[976]

(728) In addition to these annual meetings, MSH met *"at least* [...] *times a year"* with [Intel executive] *"for additional, detailed discussions"*, which *"would usually be preceded by an Intel proposal as regards the contribution levels for the next* [...], *on which MSH would run (again prior to the meeting) simulations of the resulting overall contribution based on MSH's detailed sales expectations (on a per processor level).* (...) *In the* [...] *meetings MSH would discuss with Intel its detailed* [forecast] *for processors, which would be contrasted with Intel's own market expectation,* (...). (...) *Also at these meetings, Intel was given access to MSH's* [projections], *which would have revealed if MSH had plans to sell computers with processors other than Intel processors."*[977]

(729) Apart from the possibility for Intel to discover any breach of MSH's exclusivity commitment through the generalised monitoring process under the funding agreements described in recital (727) and (728), MSH was well aware that any non-Intel based promotion would be immediately detected and queried by Intel. This is demonstrated by the following examples.

(730) The first incident is the payment holdback reported in Document IP11, an internal e-mail communication at Intel between 21 September 1998 and 17 February 1999, described in recitals (700) to (704). The reason for the substantial payment holdback was that Intel had *"just found them* [MSH] *advertising a* [OEM] *AMD K6-2 processor based PC."*[978]

(731) The second incident dates from [autumn] 2007, when MSH [country] had promoted a non-Intel based PC in one of its flyers, about which Intel had immediately complained to MSH. However, since MSH had already itself detected the mistake, the product delivery to the local shops had already been stopped so that in practice, not a single one of these PCs was sold.

(732) [Inspection documents from MSH's premises] are e-mail communications of [autumn] 2007 between MSH [country] and MSH's headquarters relating to this

---

976 [MSH submission].

977 [MSH submission].

978 [...].

issue. The headquarters inquired: *"[W]hy we are doing this in* [country] *with* [OEM]*? Can you explain me, because you know we have a strong relationship with Intel!!"* MSH [country] answered: *"Honestly I have no clue. It was my former colleague* (...) *who was responsible for placing this product in our flyer. Until further research for his decision, I have no proper explaination* [sic]*."* The headquarters answered: *"[T]hanks for your feedback for this issue because it was coming from Intel to us "what we are doing right now in* [country]*?" Please make sure that we will have in the future Intel in the Promotoin* [sic] *because of our partnership with them."*[979] MSH [country] followed up: *"[W]e have never done any promotions with non-Intel systems, because we know the importance of our relationship with Intel. That's why I don't understand this decision of my former colleague* (...). *Also I don't understand why nobody in our organisation detected this before the flyer was printed, like our marketing department."*[980] Some hours later, after having further investigated the issue, MSH [country] updated the headquarters as follows: *"I have found out that unfortunately the mistake was discovered too late to change the flyer, it was already printed. But, together with* [OEM]*, we have been able to stop the delivery of this product. So the product has never reached our shops, towhere* [sic] *we have not sold 1 single piece."*[981]

(733) Given that MSH was well aware of the financial risk in case of its non-compliance with Intel's exclusivity requirement as described in recitals (689) to (699), it was thus in the first place the company itself that sought to avoid any breach of its exclusivity commitment and not to have to actually test the issue with Intel.[982] This is confirmed by the promotion of a non-Intel based PC by MSH [country] in 2007 referred to in recital (732), the delivery of which was stopped by MSH itself when Intel drew its attention to it. In addition, [MSH submission] contains an e-mail of [winter] 2001 from MSH's headquarters in Germany to MSH [country Y], reveals the same attitude: *"[Y]our newsletter offers an* [sic] *PC with AMD processor. Be aware that this could risk and/or damage our Intel-agreement, considering that* [country Y] *has joined from 2001 onwards this cooperation."*[983]

(734) In view of MSH's strong efforts to comply with its exclusivity commitment, mistakes in terms of non-Intel based PC promotions and/or sales only happened

---

979 [Inspection document from MSH's premises].

980 [Inspection document from MSH's premises].

981 [Inspection document from MSH's premises].

982 [MSH submission]. MSH stated that the sale of AMD-equipped PCs would result at least in a disproportionate reduction of Intel payments (See recital (691) above).

983 [...]. It has to be noted that MSH [country Y] joined the funding agreements as from [date in second quarter of] 2004, so that the statement as such was apparently a mistake since MSH [country Y] was not bound by MSH's exclusivity commitment at the time when the e-mail was written.

rarely as MSH itself confirmed: *"In rare instances,* [Intel executive] *(or another Intel representative) might have mentioned to* [MSH Executive] *if Intel had noticed that AMD based computers had been offered by a MediaMarkt or Saturn market. In such (rare) cases,* [MSH Executive]*would be asked if such sales represented a change of strategy on the part of MSH, which* [MSH Executive] *denied.* [MSH Executive] *then took corrective action by requesting the MediaMarkt in question to no longer sell such equipment."*[984]

2.8.5. Intel's arguments

(735) Only a limited amount of the arguments made by Intel in its 5 February 2009 submission related to the 17 July 2008 SSO relate directly to the evidence stemming from MSH and Intel on the issue of unwritten conditionality based on exclusivity and referred to in section 2.8.4. These arguments will be rebutted in subsections 2.8.5.1. and 2.8.5.2.

(736) At the same time, Intel to a greater extent argues on a more general basis that the Commission and MSH would have mis-assessed the context of the retail computer market of which such payments for marketing and not for exclusivity would be a normal feature, and that therefore the payments to MSH by implication would not be conditional.[985] The latter arguments presuppose that even if MSH, as emerges from the documentary evidence presented in section 2.8.4.2, would have understood, based on communications from Intel executives, that the payments were conditional upon exclusivity, this understanding should have been corrected by a general perception of a market environment in which such payments are common without an exclusivity condition. However, such an explanation of why the payments would not have been subject to an exclusivity condition is implausible since, unlike other market participants, MSH had an exclusive Intel-based offering. Intel fails to put forward any convincing reason why MSH would unilaterally have chosen a different sales strategy than its competitors such as, for instance DSGI, which Intel claims received the same payments. Additional elements which Intel uses to support its market characterisation such as AMD's disinterest in dealing with MSH[986] and the assumption that MSH's growth would be triggered by MSH's brand promotion together with Intel[987] do not make Intel's market description more plausible and are not capable of refuting the clear

---

984 [MSH submission].

985 Intel submission of 5 February 2009 related to the 17 July 2008 SSO, paragraphs 77, 85-86, 95-99, 133, 153-159. In the last section addressing this argument (paragraphs 153 to 159) Intel refers to statements made by DSGI (a retailer that is comparably large as MSH).

986 Intel submission of 5 February 2009 related to the 17 July 2008 SSO, paragraph 84.

987 Intel submission of 5 February 2009 related to the 17 July 2008 SSO, paragraph 86.

evidence on conditionality described in section 2.8.4. Nevertheless, Intel's description of the functioning of the market is also incorrect as is explained in recitals (737) and (738).

(737) Intel's claim that AMD showed no interest in dealing with MSH is unfounded.[988] In that context, Intel ignores MSH's [submission] that reports of 20 meetings with AMD in which *"[a]gainst the background of MSH's existing arrangements with Intel and the likely impact that dealings with AMD would have had thereon, MSH has to date always considered that the commercial offers made by AMD would not have been attractive enough to MSH from a commercial point of view."*[989]

(738) Similarly, Intel fails to provide any further explanation of how its co-branding with MSH actually worked in practice, why it would have had an effect on MSH's growth and of what it would have consisted on top of the Intel Inside programme that was a marketing vehicle channelled via the OEMs and, as specified in recital (582), is not discussed in this Decision. Without such substantiation of an argument, Intel's description of the market mechanics remains unfounded since it cannot be verified on the basis of substantive evidence.

(739) Moreover, arguments related to the fact that *"AMD is responsible for its own ability to gain business at MSH"*[990] do not need to be further addressed here since, as is clarified in recital (922), the performance of competitors is not relevant for the application of Article 82 of the Treaty according to the relevant case-law. Similarly, the as efficient competitor analysis which has been conducted in the present case considers the capability of foreclosure of a hypothetical as efficient competitor (that is to say, again, without reference to actual performance in the market).

(740) Intel's arguments on the specific evidence relied on by the Commission as regards conditionality are now examined in subsection 2.8.5.1.

2.8.5.1. Intel arguments on the lack of conditionality of Intel payments to MSH

(741) Intel claims that the payments it offered to MSH are in no way conditional on exclusivity.[991] Intel has put forward several categories of arguments to substantiate this allegation, including in particular elements aimed at disproving the evidence

---

988 Intel submission of 5 February 2009 related to the 17 July 2008 SSO, paragraph 84.

989 [MSH submission].

990 Intel submission of 5 February 2009 related to the 17 July 2008 SSO, section II.A.6.

991 Intel submission of 5 February 2009 related to the 17 July 2008 SSO, paragraph 22.

on conditionality described in section 2.8.4.2. All categories of arguments will be addressed hereunder.

(742) However, before addressing these categories of arguments, the Commission wishes to underline certain important general remarks concerning Intel's allegations.

(743) Firstly, it is noteworthy that Intel did not address one of the significant elements supporting the Commission case, that is, the MSH [submission]. In MSH's own words, *"[i]t was clear to MSH in this regard 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 under the contribution agreements (and thus in a reduction of the total payments received from Intel, even if the total volume of Intel-CPUs sold by MSH would have remained the same as in previous periods), although MSH never actually tested the issue with Intel."*[992]

(744) As a matter of fact, rather than addressing this statement from MSH, Intel in several instances tried to portray the statement and the conclusions directly drawn from it in the 17 July 2008 SSO as mere allegations about what MSH understood,[993] or mere belief of individual, badly informed MSH employees.[994] In this respect, Intel has also ignored that the MSH company statement was supported [...] by highly placed MSH executives who were in reality very well informed of the nature of the relationship between MSH and Intel. Intel's continued reliance on alleged memory issues with [MSH Executive], one of the most important witnesses in his capacity of senior executive,[995] is also surprising.[996]

---

992 [MSH submission].

993 See for example Intel submission of 5 February 2009 related to the 17 July 2008 SSO, paragraph 181 (*"The SSO alleges that MSH understood that it would experience a "substantial and disproportionate reduction" in payments from Intel in the event of "non-compliance with MSH's exclusivity commitment."*).

994 See for example Intel submission of 5 February 2009 related to the 17 July 2008 SSO, paragraph 161 (*"It may well be the case that individual MSH employees believed that the internal direction arose from an agreement with Intel, but these assumptions by personnel not directly involved in negotiations between MSH and Intel cannot be deemed to supersede the actual, contemporaneous evidence showing that exclusivity was not a condition of the contribution agreements."*).

995 According to [MSH submission], [MSH Executive] was employed with MSH since [...]. Between [...] and [...], he occupied [management] position (including computer purchasing and marketing), and between [...]and [...], he was [in a management position at] MSI (the signatory of most contribution agreements) that was later merged with MSH. [MSH Executive] occupies inter alia [management] position [in] Purchasing of MSH.

996 See for example Intel submission of 5 February 2009 related to the 17 July 2008 SSO, paragraph 125 (*"This plain error, which is certainly understandable in the context of* [MSH Executive]*'s attempt to recall negotiations more than a decade ago in which he was a peripheral participant, simply provides no support for the SSO's conclusions."*), or paragraph 139 (*"Notwithstanding* [MSH Executive]*'s lapsed memory, it is indisputable that the terms of the contribution agreements govern the legally binding rights and responsibilities possessed by the parties to the agreement."*).

(745) Intel also misrepresents an important aspect of the Commission case. The first sentence of the section of the Intel submission of 5 February 2009 related to the SSO which is dedicated to the conditionality of Intel payments to MSH portrays the Commission's case in these terms: *"The core allegation in the SSO is that Intel's financial contributions to MSH were entirely conditioned on exclusivity, to the extent that MSH would have allegedly lost 100% of its financial contributions from Intel if it had chosen to switch even a fraction of its demand to systems featuring AMD microprocessors."*[997]

(746) This depiction is misleading. The Commission did not claim in the 17 July 2008 SSO, nor does it claim in this Decision, that 100% of Intel's payments to MSH would be lost even if MSH were to switch only a fraction of its demand to AMD-based PCs. The conclusion of the 17 July 2008 SSO in this respect clearly specified that the Commission considered, based on the MSH statement in particular, that a partial MSH switch to AMD-based PCs would trigger a disproportionate loss of Intel payments.[998] A disproportionate loss does not necessarily mean a 100% loss, in particular where this is a response to a switch of only a fraction of MSH's demand.

(747) The 17 July 2008 SSO did consider the hypothesis of a 100% loss of the payments in the context of the as efficient competitor analysis. As is explained in detail in section VII.4.2.3.3.b) concerning the as efficient competitor analysis for HP (see in particular recitals (1320) to (1323)), the principle of the application of the as efficient competitor analysis is to weigh the impact of a switch of the entirety (100%) of a customer's contestable share to the dominant company's competitor. In this specific context, therefore, the Commission is not examining the impact of the switch of 'even a fraction' of the customer's demand, but of the largest possible switch in the customer's demand.

(748) The remainder of this section will address in turn Intel's argument that there is no conditionality in the terms of the agreements (subsection a)); Intel's own contemporaneous evidence which it presented to seek to disprove conditionality (subsection b)); Intel's arguments on the lack of conditionality in other retail contribution agreements (subsection c)); Intel's discussion of the Commission's conditionality evidence from the 17 July 2008 SSO (subsection d)); Intel's arguments on MSH's fear of a substantial loss in payments in the event of a switch to AMD (subsection e)); Intel's arguments on the payment holdback in 1998/1999 (subsection f)); and Intel's arguments on the monitoring of MSH sales by Intel (subsection g)).

---

997 Intel submission of 5 February 2009 related to the 17 July 2008 SSO, paragraph 128.

998 17 July 2008 SSO, paragraph 202.

(749) Intel also put forward more specific arguments concerning the [flagship brand of OEM Z] issue described in section 2.8.4.6. and the accession of MSH [country Y] to the central arrangement between Intel and MSH in 2004. Intel's arguments concerning the accession of MSH [country Y] to the central arrangement between Intel and MSH in 2004 have already been discussed in the relevant factual section (see section 2.8.4.7.). Intel's arguments concerning the [flagship brand of OEM Z] issue are directly linked to the application of the as efficient competitor analysis. They are discussed in section VII.4.2.3.6.c).

a) Intel's argument that there is no conditionality in the terms of the agreements

(750) According to Intel, *"[t]he analysis of Intel's contribution agreements with MSH must properly begin with the terms of those agreements."*[999] Intel then underlines that, *"[b]eginning in 2002, Intel's contribution agreements with MSH incorporated an express non-exclusivity clause"*.[1000]

(751) Intel's argument on the existence of an express non-exclusivity clause is misplaced. As described in section 2.8.4.2.a), MSH submitted to the Commission that it was clear to MSH that despite the non-exclusivity clause, the agreements with Intel were in reality exclusive.[1001]

(752) Intel imputes the statement referred to in recital (621) to *"[t]he imprecision of* [MSH Executive]*'s recollection"*,[1002] and refers to [MSH submission], which reads: *"[t]he non-exclusivity clause, which had been inserted into the agreement on Intel's initiative, allowed us to inform Intel at any time that we would also sell computers with AMD processors in the future,"* and *"[t]hat is why I assumed that a binding exclusivity arrangement for the future did not exist."*[1003] Intel concludes from the above that *"MSH was in fact free to sell AMD-based systems at any time."*[1004]

(753) Intel's argumentation is unconvincing. Setting aside Intel's recurrent argument about the precision of [MSH Executive]'s memory,[1005] it must be underlined that, in any event, the submission relied on in section 2.8.4.2.a) is a submission by MSH as

---

999 Intel submission of 5 February 2009 related to the 17 July 2008 SSO, paragraph 135.

1000 Intel submission of 5 February 2009 related to the 17 July 2008 SSO, paragraph 138.

1001 See recital (621).

1002 Intel submission of 5 February 2009 related to the 17 July 2008 SSO, paragraph 138.

1003 Intel submission of 5 February 2009 related to the 17 July 2008 SSO, paragraph 139.

1004 Idem.

1005 See also recital (744).

a company. The submission reads: *"It was clear to MSH that despite the non-exclusivity clause the exclusive nature of the relationship remained, for Intel, an essential element of the relationship between Intel and MSH."*[1006]. This statement therefore qualifies the understanding of MSH as a whole, and not only that of [MSH Executive]. The statement then further relies on [MSH Executive]'s testimony, which the Commission considers as very plausible in view of the fact that [MSH Executive] was one of the senior executives dealing with MSH's relationship with Intel and could therefore not ignore the nature of this relationship.[1007] Furthermore, the testimony of [MSH Executive] about the fact that *"Intel representatives made it clear to him that the changes in the wording of the agreement had been requested by Intel's legal department, but that in reality the relationship was to continue as before, including the requirement that MSH sell essentially only Intel-based computers"*[1008] is corroborated by the testimony given by [MSH Executive] in the context of the discussion of the accession of MSH [country Y] to the central agreements with Intel, which reads: *"During the meetings,* [Intel executive] *and other the* [sic] *Intel representatives indicated above made it clear that the discussions on the exclusivity requirement would have to remain secret.* [Intel executive] *pointed to the fact that the contribution agreement itself would not contain an exclusivity provision because the inclusion of an express provision to that effect would not be permissible. The Intel representatives thus asked* [MSH Executive] *that all discussions on this topic would need to remain secret, should not be recorded in writing, and generally that they "should not leave the room where they were held". "*[1009]

(754) Finally, the extract of [MSH submission] quoted by Intel does not disprove the Commission's conclusion. Indeed, the Commission does not claim that MSH's arrangements with Intel banned MSH from selling any non Intel-based PCs for an unlimited period of time. The Commission's conclusion is only that the non-written exclusivity clause conditioned the allocation of a disproportionate part of Intel's payments to MSH selling only Intel-based PCs. In other terms, MSH was free to start selling AMD-based PCs at any time, but this would have led to a loss of a disproportionate fraction of Intel payments. In this regard, the situation is very similar to the nature of Intel's conduct with regard to Dell.

1006 [MSH submission].

1007 [MSH Executive]'s responsibility for the business relationship with Intel over the entire period in question is illustrated by the contemporaneous evidence quoted in section VI.2.8.4 including [MSH submission].

1008 [MSH submission].

1009 [MSH submission].

b) Intel's own contemporaneous evidence which it presented to rebut conditionality

(755) Intel presents the results of its own investigation into *"the email files of the Intel employees most directly involved in negotiations with MSH over the period of time encompassed by the* [17 July 2008] *SSO."*[1010] After the review of the few documents which Intel claims to have been able to locate due to the time elapsed, Intel claims that "*MSH was never legally or practically bound to sell exclusively Intel-based PCs*".[1011] This statement is, however, not supported by the quoted evidence.

(756) The only contemporaneous evidence that Intel provides to support the contention described in recital (755) consists of a letter of the Intel executive of 13 November 1997, and then a number of internal e-mail exchanges between Intel executives surrounding the conclusion of the [Second] and [Third] contribution agreement with MSH.[1012]

(757) The letter from [Intel Executive] merely contains a statement related to the negotiation of the [First] contribution agreement that reads: *"[A]s discussed with you personally on 11 November [1997], your management went beyond the objective of the arrangement in its interpretation of the agreement, in particular by reference to the 'spirit of the agreement.*"[1013] This statement does not contain any evidence related to the unwritten conditionality of the payments. Intel fails to put forward any contemporaneous evidence further explaining this document and instead makes a reference to the recollection of [Intel executive], [...].[1014] Even assuming that Intel's interpretation of this vague document were correct, [Intel Executive's] letter could in a much more plausible way be also understood as an allusion to the unwritten and secret nature of MSH's exclusivity commitment described in section 2.8.4.3. Such an explanation would also seem much more plausible in the context in which the letter has been written, namely that [Intel Executive] had been informed by [...] that an [...] and, instead of passing this message clearly to MSH in writing, only makes a vague reference to an oral

---

1010 Intel submission of 5 February 2009 related to the 17 July 2008 SSO, paragraph 141.

1011 Intel submission of 5 February 2009 related to the 17 July 2008 SSO, paragraph 141.

1012 In this context, Intel also makes reference to the inspection document [...] in paragraphs 144 to 145 of its submission of 5 February 2009 related to the 17 July 2008 SSO. However, given the highly inculpatory nature of this document, Intel portrays it as a document reflecting *"evident sarcasm"* (paragraph 145) and points to MSH's different Article 18 reply of 20 March 2001, which was, however, superseded by the [submission] made by MSH (see footnote 852 above).

1013 Intel submission of 5 February 2009 related to the 17 July 2008 SSO, paragraph 142.

1014 Intel submission of 5 February 2009 related to the 17 July 2008 SSO, paragraph 142.

communication on 11 November 1997, without actually describing which precise message was communicated to MSH on that day.

(758) The e-mail exchanges related to the negotiations of the [first] renewal of the contribution agreement include reports by Intel employees discussing the likelihood that MSH would also start to offer AMD-based PCs, including reports that, in negotiations, MSH had been telling Intel that they were actively evaluating offers from AMD.[1015] Intel concludes from these exchanges that *"[f]irst, it is clear that even under the contribution agreements, MSH continued to assess competing offers from both Intel and AMD and did not consider itself bound to use only PCs equipped with Intel microprocessors. Second, and equally important, the emails reveal that Intel's response to the AMD competitive threat at MSH was to attempt to provide more compelling product offers and reduced prices to maintain MSH's business. Nothing in the documents suggests that Intel ever considered reducing payments to MSH under the contribution agreement as a means of preventing MSH from using AMD microprocessors."*[1016]

(759) None of Intel's conclusions disproves the Commission's findings. The first conclusion confirms the fact that MSH continuously considered the possibility to purchase also AMD-based PCs. As stated in recital (754), the Commission does not contend that MSH was legally barred from switching to AMD, but only that switching to AMD would affect disproportionately the level of its payments. The fact that MSH continuously considered the possibility to purchase also AMD-based PCs, but nevertheless never actually purchased any, is, if anything, a confirmation of the effect of Intel's conditional payments.

(760) The second Intel conclusion does not disprove the Commission's findings either. It is only normal that, in the context of the negotiations of the prolongation of its exclusivity agreement with Intel, MSH tried to extract as much (conditional) payments as possible from Intel. The obvious business means to achieve this goal was to seriously consider AMD-based PCs, and to communicate this to Intel. These communications with Intel say nothing on what would have been the consequence of an actual switch from MSH to AMD. Moreover, there is no merit in Intel's statement that it did not reduce the payments to MSH as a means to prevent MSH from switching to AMD. The reduction of payments can act as a deterrent only if it is presented as an *ex post* sanction.

(761) The e-mail exchanges related to the negotiation of the [Third] agreement are similarly unconvincing. Intel uses these documents to essentially show that MSH

1015 Intel submission of 5 February 2009 related to the 17 July 2008 SSO, paragraphs 146 and 147.

1016 Intel submission of 5 February 2009 related to the 17 July 2008 SSO, paragraph 148.

quoted contacts with AMD in order to improve its negotiating position. Intel then quotes an e-mail from its executive [...] of 9 October 2000 with the statement that "*[a] non-100% approach would be acceptable.*"[1017] However, this statement has to be seen in the context of the full e-mail exchange from which it originates and bearing in mind that in fact, not only did MSH not give up its 100% exclusivity after 2001, but also as explained in sections 2.8.4.6. and 2.8.4.7, it subsequently did not introduce a [OEM Z] computer with an AMD processor and realigned MSH [country Y] to full Intel exclusivity. In fact, the e-mail exchange quoted by Intel was triggered by a "*wish list*" submitted by [MSH Executive] that is summarised in bullet points in the first e-mail of the chain by [MSH Executive] to which [Intel executive] responds. In this "*wish list*", [MSH Executive] submitted that he would like to have "*1. (...) a 80/20 or 90/10 mss option*"; and "*5. solution for all key segments. Big concern today is entry level notebooks where Intel does not have a solution for. Their main supplier,* [OEM Z] *does not have an IA* [Intel Architecture] *offering for this segment*"; and also "*6. offered to extend cooperation to* [country] *(17 stores),* [country] [sic] *(?) and* [country Y] *(36).*"[1018] Thus, the real background of [Intel executive's] statement was a request from MSH to have an exemption from the exclusivity agreement and to be able to source 10% to 20% of MSH's computer requirements with other competitors' x86 CPUs. [MSH executive], who summarises [MSH Executive's]"*wish list*" concludes on this point "*[t]toughest will be #1!*". It is correct that in the course of the reflection captured by this e-mail exchange about the "*wish list*", [Intel executive] appears to be flexible on the exclusivity agreement in terms of being willing to consider potential alternative scenarios. However, in practice, MSH stayed fully exclusive with Intel after 2001 and moreover realigned MSH [country Y] to its exclusivity agreement. This is exemplified by the [flagship brand of OEM Z] issue described in section 2.8.4.6., where MSH did not manage to accomplish its negotiating goal of introducing a [OEM Z] product without an Intel architecture (that also was stated on the above wish list). It is therefore implausible that [Intel Executive] maintained this flexibility in the further course of the negotiations.

(762) The summary of the second negotiation related to the [Third] agreement which Intel claims demonstrates a lack of conditionality is even less conclusive than the first. Indeed, it highlights the opposite of what Intel seeks to demonstrate. In this regard, Intel quotes the following negotiation summary by [Intel Executive] of 10 November 2000: "*We defined exit clauses for the case that AMD share [at MSH] is getting to the point where a promotion for Intel does not make sense anymore*" as a proof "*that the potential for MSH to use AMD microprocessors under the*

1017 Intel submission of 5 February 2009 related to the 17 July 2008 SSO, paragraph 149.

1018 Intel submission of 5 February 2009 related to the 17 July 2008 SSO, Annex 529.

contribution agreement was openly discussed and agreed upon."[1019] Intel's quote is, however, selective since the full bullet point summarising this part of the negotiation reads: *"We defined exit clauses for the case that AMD share is getting to a point where a promotion for Intel does not make sense anymore. Details of these exit clauses should be negotiated in common agreement, for example no front/backpage ads for non Intel based PCs. All payments will be stopped in case of meeting those exit criteria.*"[1020] The exit option is also discussed in another summary quoted by Intel in its defence.[1021] However, the [Third] written agreement does not contain anything related to the "*exit criteria*" mentioned here, despite the statement of Intel that these criteria were "*agreed*". Moreover, the last sentence of that point makes it clear that in case MSH were to introduce AMD to a certain extent, "*all payments will be stopped*". This confirms the Commission's conclusions on the fact that Intel would disproportionately cut the MSH payments in case MSH would switch to AMD, to a point which could reach 100% of the payments if the shift would be large enough, as explained in particular in recital (746).

c) Intel's argument on the lack of conditionality in other retail contribution agreements

(763) Intel makes much of the fact that, as it claims, it *"has entered into contribution agreements with more than 15 retailers located throughout the EEA at various points in time"* and that *"virtually all of these retailers offer PCs based on both Intel and AMD microprocessors."*[1022] Intel claims that its conclusion that the Intel-MSH contribution agreements did not require exclusivity is further supported by an analysis of these agreements with other retailers.[1023]

(764) This Intel reasoning is difficult to follow. It would seem, however, that Intel claims that the fact that its agreements with other retailers do not contain exclusivity provisions would support the conclusion that its arrangements with MSH do not contain one either.

(765) This reasoning is not logical. The fact that the conduct of a company with regard to one company is of a certain nature cannot in itself demonstrate that its conduct with regard to another company in that segment is of the same nature. As such, without prejudice to the question of whether or not Intel's arrangements with other retailers

---

1019 Intel submission of 5 February 2009 related to the 17 July 2008 SSO, paragraph 150.

1020 Intel submission of 5 February 2009 related to the 17 July 2008 SSO, Annex 530.

1021 Intel submission of 5 February 2009 related to the 17 July 2008 SSO, paragraph 151.

1022 Intel submission of 5 February 2009 related to the 17 July 2008 SSO, paragraph 154.

1023 Intel submission of 5 February 2009 related to the 17 July 2008 SSO, paragraph 153.

are not conditioned on quasi-exclusivity,[1024] these arrangements are of no relevance to Intel's arrangements with MSH.

d) Intel's discussion of the Commission's conditionality evidence

(766) Intel seeks to portray the evidence stemming from within MSH as showing "*an internal decision by MSH headquarters to establish a policy of using only Intel microprocessors*".[1025] To support this claim, Intel again cites MSH's reply to an information request of 20 March 2001. However, as MSH makes clear, this is superseded by [MSH submission] and the contemporaneous evidence attached to it[1026] as well as that found at the inspection of 12 February 2008. As such, it has no evidentiary value.

(767) In this regard, first, in its submission [...], MSH makes clear the nature of its agreement with Intel: *"MSH management members involved in the negotiation and implementation of the Intel relationship knew that the partnership with Intel was based on the implicit requirement that MSH would sell exclusively, or at least essentially exclusively, computers equipped with Intel CPUs."* MSH further states that despite the substitution of the best efforts clause in the early agreements for an express non-exclusivity clause, *"[i]t was clear to MSH that* (...) *the exclusive nature of the relationship remained, for Intel, an essential element of the relationship between Intel and MSH. In fact,* [MSH Executive] *recalls that Intel representatives made it clear to him that* (...) *in reality the relationship was to continue as before, including the requirement that MSH sell essentially only Intel-based computers."*[1027] In the following years, *"[t]he requirement that the relationship be of an exclusive nature"* remained unchanged and was expressly confirmed by Intel at least on the occasion of the [flagship brand of OEM Z] issue and MSH [country Y]'s accession to the funding agreements.[1028]

(768) Second, contrary to what Intel claims, the existence of an exclusivity requirement between MSH and Intel is also demonstrated by the internal MSH communication cited in the 17 July 2008 SSO as shown, for example, by Document[...] and Document [...].[1029] Document [...] is an e-mail from [MSH executive] to [MSH

1024 There are indications that some of Intel's arrangements with other retailers are subject to such a condition.

1025 Intel submission of 5 February 2009 related to the 17 July 2008 SSO, paragraphs 161-166.

1026 See footnote 852.

1027 [MSH submission].

1028 [MSH submission].

1029 It should be noted that both documents are merely cited by way of example and thus without prejudice to the Commission's conclusion that all documents quoted in section 2.8.4.2.b) confirm the existence of an exclusivity agreement between MSH and Intel.

Executive], who was at that time renegotiating the funding agreement with Intel:[1030] *"Is there any feedback on your Intel discussion – special support for the hard-fought regions (...) – our exclusive agreement (in the future with* [one of MSH's sister companies]*)??"*[1031] Document [...] consists of another e-mail from [MSH executive], but this time to the [MSH management staff] of the MSH countries covered by the [Second] agreement, the attachment to which contains the following statement: *"This agreement* [between MSH and Intel] *contains a number of significant terms for the Media Markt-Saturn-Group, which however are linked to the condition that all PCs sold by us are based on Intel CPUs, i.e. that during the contract duration no CPUs of other producers may be sold."*[1032] Both documents clearly show that, contrary to what Intel claims, the exclusive sale of Intel-based PCs by MSH does not *"merely reflect an internal decision by MSH headquarters"*[1033] but rather the consequence of an exclusivity agreement between both companies. The fact that both documents were written by [MSH Executive] and that the addressee of Document [...] was [MSH Executive] who was in charge of the funding negotiations with Intel likewise rebuts Intel's argument that the existence of an exclusivity agreement between both companies was a mere assumption *"by personnel not directly involved in negotiations between MSH and Intel"*.[1034]

(769) With regard to the Commission's evidence stemming from the inspections conducted at Intel's premises, Intel argues that the Commission has interpreted certain of the documents in a biased way, in particular with regard to the usage of the abbreviation VOC.[1035] Intel thereby essentially makes reference to what these abbreviations and documents would have meant in the internal understanding of Intel at a certain point in time. Such descriptions are, however, not verifiable. Moreover, as highlighted in sections 2.8.4.2.b) and 2.8.4.2.c), such claims are not plausible in light of the actual correlation between the usage of the terms and MSH's factual understanding of Intel's communications, namely that the payments were conditioned upon exclusivity. This is even more the case since MSH has no interest to misinterpret the statements made by Intel.

e) Intel's arguments on the MSH fear of substantial loss as a result of switching to AMD

1030 See footnote 801.

1031 See recital (626).

1032 See recital (627).

1033 Intel submission of 5 February 2009 related to the 17 July 2008 SSO, paragraph 161.

1034 Intel submission of 5 February 2009 related to the 17 July 2008 SSO, paragraph 161.

1035 Intel submission of 5 February 2009 related to the 17 July 2008 SSO, paragraphs 167-175.

(770) Intel submits that MSH's statement that it expected a loss of all the payments from Intel if it would have started sourcing from AMD is contradicted by contemporaneous evidence from within MSH showing that MSH would have lost only a part of the payments that is proportionate to the amount of the units it would have switched to AMD.[1036]

(771) The evidence on which Intel relies in this regard essentially consists of an Excel calculation sheet found during the inspection of MSH's premises starting on 12 February 2008. This calculation sheet describes two scenarios illustrating the funding support that MSH could expect to receive by (i) continuing to use Intel-based systems exclusively; and (ii) converting [...]% of its desktop PC requirements and [...]% of its notebook PC requirements to AMD-based systems.[1037] Furthermore, Intel relies on three further e-mail exchanges in which MSH quantifies the risk of a switch.[1038]

(772) None of these documents contain, however, conclusive evidence showing that MSH expected a proportionate loss of payments from Intel in case of a partial switch to AMD. [Inspection document from MSH's premises] merely lists the proportionate payments from Intel that would remain in case of a switch to AMD calculated on the basis of the remaining units that would be sourced from Intel. Thus, the Excel sheet merely applies the written rule of the contribution agreement that foresees [,,,]. However, the sheet does not specify whether MSH would have continued to receive this payment or not and therefore cannot be used as proof that Intel would have continued paying this amount. In particular, the sheet does not contain any summary which would balance the financial pros and cons of staying with Intel and going for AMD, an exercise which would require the qualification of the expectation to continue to receive the Intel payment.

(773) Since MSH would have continued to buy from Intel, it is perfectly possible that the sheet in fact served the purpose of calculating the payments which would have been at risk in view of the unwritten exclusivity condition. Since this interpretation as well as Intel's interpretation can both be equally inferred from this document, it has no probative value in the present case. However, given that the other e-mails cited by Intel in this context clearly specify that a risk of financial loss was

---

1036 Intel submission of 5 February 2009 related to the 17 July 2008 SSO, paragraphs 181-185.

1037 [Inspection document from MSH's premises].

1038 Intel submission of 5 February 2009 related to the 17 July 2008 SSO, paragraphs 183-184. The documents on which Intel relies here are Document [...], Document [...] and Document [...] in all of which the precise value of AMD's counteroffer and the risk quantified by MSH in case of a switch have been redacted as MSH's business secrets.

described, which is also confirmed in MSH's [submission],[1039] the interpretation of [inspection document from MSH's premises] that sees it as a tool to quantify the risk of payment loss in case of a break of exclusivity is more plausible.

(774) Indeed, MSH could not reasonably expect to retain the Intel payment for the units it would purchase from AMD. This loss can therefore not be qualified as a risk. On the contrary, payments which were in principle still due under the written rule could be qualified as at risk in view of the known existence of an unwritten condition with exactly the opposite effect.

f) Intel's arguments on the payment holdback in 1998/1999

(775) With reference to the events mentioned in section 2.8.4.5., Intel alleges that *"Intel's concern was not with MSH's sales of AMD-based systems but rather with the prominent advertisement and promotional action surrounding the AMD-based systems."*[1040] Intel refers in particular to the title of the initial e-mail in the exchange, which is: *"Stopped MediaMarkt payment due to Imitator Promotion"*. Intel also refers to MSH *"advertising a* [OEM] *AMD K6-2 processor based PC."*[1041] Intel furthermore notes that the delay in payment which resulted from the incident was in any event minimal (*"a couple of weeks"*).[1042]

(776) Intel's argument is unconvincing. The references to *"promotion"* and *"advertisement"* in the e-mails quoted by Intel are linked to the fact that this is how Intel discovered the decision by the local MSH stores in [„„] and [„„] to sell this limited number of AMD-based PCs. Rather than focusing on the reason why Intel discovered this MSH local initiative, it is important to analyse what actions MSH undertook to remedy the situation to Intel's satisfaction. Had Intel's sole concern been the promotion, as opposed to the sale, of an AMD-based product, MSH could have resolved the issue by solely discontinuing the promotion of the products, but not necessarily stopping to sell them. However, as is clear from the e-mail exchange cited in recital (703), the issue was solved by "realigning" the local stores

---

1039 [MSH submission] reads: "*In particular,* [AMD's offers in the past were not sufficient to be accepted by MSH and to] *terminate the relationship with Intel. It was clear to MSH in this regard 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 under the contribution agreements (and thus in a reduction of the total payments received from Intel, even if the total volume of Intel-CPUs sold by MSH would have remained the same as in previous periods), although MSH never actually tested the issue with Intel. Against the background of MSH's existing arrangements with Intel and the likely impact that dealings with AMD would have had thereon, MSH has to date always considered that the commercial offers made by AMD would not have been attractive enough to MSH from a commercial point of view.*"

1040 Intel submission of 5 February 2009 related to the 17 July 2008 SSO, paragraph 187.

1041 Idem.

1042 Intel submission of 5 February 2009 related to the 17 July 2008 SSO, paragraph 190.

with 100% Intel sales: *"Both Media Markt and Saturn* [...] *are back 100% with Intel, supporting the roadmap.* (...) *Given the current course and strategy of MSH I would recommand* [sic] *to release the payment and have the meeting with* [MSH Executive] *ASAP to close the other issues."*[1043]

(777) As to the duration of the payment holdback, this is a matter which is immaterial to the question of the conditionality of the payments. The payment was held only for a relatively short period of time because the issue was resolved in a short period of time.

g) Intel's argument on the monitoring of MSH sales by Intel

(778) Intel makes reference to the monitoring of MSH sales by Intel which is described in section 2.8.4.8. As described in recital (727), MSH submitted to the Commission that *"[b]y comparing these* [...] *sales volumes with the information on MSH's sales of computers with Intel CPUs that MSH was to provide under the contribution agreements, Intel could see whether and to what extent MSH sold computers that were not equipped with an Intel CPU."*[1044]

(779) Intel claims that *"[t]his type of information sharing is common among business partners in a collaborative relationship and was not the result of any specific request from Intel"*[1045] and that *"[t]he allegation that Intel "could have" used these data to monitor exclusivity is undermined by the facts that no such discussions ever occurred at the Intel-MSH meetings and that there is no evidence in the case file that Intel ever used the data presented by MSH for such purposes."*[1046]

(780) There is no justification in Intel's reasoning. It is clear from the file that MSH almost always fulfilled the exclusivity condition which was required by its payment agreement with Intel. There was therefore no need for any significant action to be undertaken by Intel on the basis of MSH's global sales figures. The events mentioned in section f)show that Intel also had ways to monitor efficiently what took place at a very local level and to directly intervene to enforce the exclusivity agreement when necessary.

(781) To end with, it is noted that Intel quickly dismissed the other instances quoted in the 17 July 2008 SSO where Intel reacted to isolated incidents where MSH local stores attempted to sell also AMD-based products. According to Intel, *"[g]iven the background of close cooperation between Intel and MSH, it is hardly unusual that*

1043 Document IP11, p. 16.

1044 [MSH submission].

1045 Intel submission of 5 February 2009 related to the 17 July 2008 SSO, paragraph 213.

1046 Idem.

Intel salespersons would be interested in any apparent move by MSH to introduce AMD-based systems into its lineup. These inquiries, however, plainly do not involve any improper activity by Intel."[1047] However, this Intel argument does not address the Commission's point. Indeed, whatever background they are assessed against, the instances in question demonstrate that Intel was closely monitoring MSH's sales of AMD-based products.

2.8.5.2. Arguments relating to marketing activities in exchange for Intel payments

(782) In its submission of 5 February 2009 related to the SSO, Intel argues that the payments under the contribution agreements would have been made in exchange for clearly defined marketing activities and Intel closely would have monitored and audited the precise fulfilment of MSH's marketing obligations by assessing their value.[1048] Based on this description of the agreements, Intel then concludes that the Commission would wrongly state in recital (617) that "*Intel's payments under the funding* [agreements] *were not in practice conditioned on the performance by MSH of any specific promotional activities*".[1049]

(783) This specific conclusion in recital (617) is not used in this Decision to show that the payments were conditioned upon exclusivity (which, as described above in section 2.8.4.2 was an unwritten condition of the agreements). The Commission's narrative in recitals (615) to (617) merely illustrates that the written agreement listed possibly efficient promotional activities, at least partly as a pretext that would make the payments appear efficient, thereby concealing the fact that the payments would be lost or disproportionately reduced if MSH started sourcing from AMD. The Commission submits in that context that such possible efficiencies were not actually generated. By claiming that the payments indeed would have generated such efficiencies, Intel does not address the evidence presented in section 2.8.4. showing that without regard to whether MSH did something in exchange for the payments, these were also conditioned upon exclusivity for Intel-based PCs. Therefore, Intel's argument already from the outset does not address the existence of an unwritten exclusivity condition underlying the contribution agreements.

(784) Furthermore, Intel's description of MSH's reporting of marketing activities undertaken in exchange for the payments is self-contradictory and implausible. Intel argues that during the period of the [First] and [Second] contribution

---

1047 Intel submission of 5 February 2009 related to the 17 July 2008 SSO, paragraph 215.

1048 Intel submission of 5 February 2009 related to the 17 July 2008 SSO, paragraphs 100-118.

1049 Intel submission of 5 February 2009 related to the 17 July 2008 SSO, paragraph 119.

agreements, MSH would have demonstrated that it had spent [...] of Intel's payments on advertisement by submitting collections of its advertisement clippings.[1050] However, in the same context, Intel explains that its reporting mechanism required MSH to submit "*invoices*" of how the funds had been spent.[1051] According to Intel, the value of the ad clippings, which clearly did not constitute such invoices, was assessed by one of Intel's marketing employees as equalling [...].[1052] However, there is no explanation on what basis a collection of ad clippings relating to computers represents such a value (that is to say cost of such clippings and the share of these costs attributable to advertisement related to Intel and concretely funded by the contribution agreements).[1053]

(785) Moreover, such an assessment of the value of ad clippings is even more inappropriate in light of the requirement to provide "*invoices*" since, as explained by MSH, these specific clippings were partly financed by contributions that MSH received from computer OEMs in the context of the "Intel Inside"-program[1054] and therefore would by definition partly not have been covered by the payments under the contribution agreement. Nevertheless, the assessment of what money from the contribution agreements might have financed these clippings does not take any account of this fact or of any other financing support or own funds that MSH might have invested in these clippings and simply concludes without any justification on an overall value of [...]. Due to these inaccuracies, it is not credible that it was possible to make an assessment of the spending of the contribution agreement funds in a comparable way to what would have been the case if invoices for money MSH would have spent on promotional activities had been sent to Intel.

(786) Finally, Intel provides one e-mail from February 2002 in which the assessment of some clippings has been made.[1055] Intel argues that this would demonstrate Intel's analysis of the value of MSH's promotional activities over a period of 6 years (1997-2002). This isolated instance cannot be regarded as a coherent demonstration of precise monitoring of the spending of [...] the MSH funding under the contribution agreements.

1050 Intel submission of 5 February 2009 related to the 17 July 2008 SSO, paragraph 106.

1051 Intel submission of 5 February 2009 related to the 17 July 2008 SSO, paragraphs 103-105.

1052 Intel submission of 5 February 2009 related to the 17 July 2008 SSO, paragraph 106.

1053 Such ad of computer retailers usually contain the advertisement of computers incorporating Intel CPUs and therefore also promote the brand of the OEM and not only Intel's product.

1054 [MSH submisison].

1055 Intel submission of 5 February 2009 related to the 17 July 2008 SSO, paragraph 107.

(787) For the contribution agreements as of [...], Intel explains that [...] was replaced by [...]. With regard to the promotional activities, Intel states that *"[a]lthough Intel fully expected MSH to continue to promote Intel microprocessors actively, as recited in the agreements, MSH's entitlement to Intel's financial contributions under the agreements depended only on MSH's showing that* [...]"[1056] This statement largely corresponds with the Commission's conclusion in recital (615) that the payments were not made in exchange for promotional activities and therefore does not need to be addressed here in further detail.

2.8.6. Conclusion on facts

(788) As highlighted in section 2.8.4.2., on the basis of the broad range of contemporaneous evidence from both MSH and Intel, as well as the extensive [MSH submission], the Commission concludes that Intel and MSH have entered into an unwritten agreement providing for specific payments in exchange of exclusivity with regard to MSH's sales of desktop and mobile computers since October 1997 up to at least until 12 February 2008, the beginning of the inspections carried out at MSH's premises. This was an integral part of the funding agreements entered into between both parties since that time. Moreover, at Intel's request, the fact that this was an exclusivity agreement was kept secret (indeed, Intel even requested that the wording "*non-exclusive*" be introduced into the agreement in 2002 for optical purposes) as described in section 2.8.4.3.

(789) The at least in part conditional link between the exclusivity and the Intel payment is further confirmed by the operation of the arrangement in practice. More specifically:

(1) Section 2.8.4.4. describes how MSH feared that non-compliance with its exclusivity commitment would lead to a disproportionate loss of Intel's payments under the funding agreements.

(2) Sections 2.8.4.5. to 2.8.4.7. (namely payment holdback of 1998-1999, [flagship brand of OEM Z] incident of 2002 and negotiation of MSH [country Y]'s accession to the funding agreements in 2003/2004) provide specific examples which demonstrate the link between the Intel payments and the exclusivity.

(3) Section 2.8.4.8. depicts Intel's continuous and close monitoring of MSH's sales (in contrast to the lack of monitoring of MSH's marketing activities), and how as a result, MSH was careful to refrain from a unilateral deviation from its exclusivity commitment.

1056 Intel submission of 5 February 2009 related to the 17 July 2008 SSO, paragraph 117.

VII. LEGAL AND ECONOMIC ASSESSMENT

(790) This section outlines the Commission's legal and economic assessment of Intel's behaviour with regard to its trading partners outlined in sections VI.2.3 to VI.2.8.

(791) Subsections 1and 2of this section outline the relevant product market and the relevant geographical market. Section 3concludes on Intel's dominant position in the relevant market. Section 4describes Intel's abusive conducts.

1. Relevant product market

(792) The identification of the relevant market by the Commission in this Decision derives in particular from the evidence on demand and supply side substitution in the Commission's file. In particular, on 30 May 2006,[1057] the Commission sent requests for information pursuant to Article 18 of Regulation (EC) No 1/2003 ("Article 18 questionnaires") to 12 prominent PC and server OEMs[1058] in order to ascertain the situation as regards demand-side substitution from the perspective of the main purchasers of CPUs. 8 of the 12 OEMs responded.[1059] Similarly, during the course of June 2006, the Commission sent Article 18 questionnaires to the main worldwide manufacturers of CPUs, including manufacturers of both CPUs for computer systems and manufacturers of CPUs for other devices.[1060] The following sub-sections 1.1 and 1.2 will examine the issues of demand and supply side substitution in turn.

1.1 Demand-side substitution

(793) The Commission Notice on the definition of relevant market for the purposes of Community competition law explains that "*demand substitution constitutes the most immediate and effective disciplinary force on the suppliers of a given product*".[1061] This has been confirmed by the Court of First Instance.[1062]

(794) The main issues to be examined as regards demand-side substitution are the following: (i) whether there is substitution between CPUs for each of the three computer segments (namely CPUs for desktop computers, CPUs for laptop computers, and CPUs for server computers); (ii) whether there is substitution

---

1057 This will be referred to as the "May 2006 market enquiry".

1058 Acer, Actebis, Dell, Fujitsu Siemens, Gateway, HP, IBM, Lenovo, Medion, [NEC], Sony, Toshiba.

1059 Dell, Fujitsu Siemens, HP, IBM, Lenovo, [NEC], Sony, Toshiba.

1060 This will be referred to as the "June 2006 market enquiry".

1061 OJ C 372, 9.12.1997, p. 5.

1062 See Case T-177/04 *EasyJet v Commission* [2006] ECR II-1931, paragraph 99.

between CPUs destined for the business/commercial segment and CPUs destined for the private/consumer segment; (iii) whether there is substitution between CPUs based on the non-x86 architecture and CPUs based on the x86 architecture; and (iv) whether there is substitution between CPUs for non-computer devices and CPUs for computers. Each of these issues are examined in turn in the following sub-sections 1.1.1to 1.1.4.

1.1.1. Substitution between CPUs for desktop computers, laptop computers and server computers

(795) The OEMs that responded to the May 2006 market enquiry generally make clear that the end use of the different categories of computer (that is desktop, laptop or server) determine what CPU is used in that computer.[1063] For example, Dell states that "[t]*he selection of a particular microprocessor for a particular computer is determined by the specific end use design of the computer. The technical characteristics of microprocessors may be described on a performance continuum in terms of technical performance, cost and power consumption.*"[1064] Similarly, [NEC] states that "*the microprocessors incorporated in these three different segments have substantially different characteristics and performance levels and hence target different demands*".[1065] [NEC] goes on to describe the different requirements, and hence the different characteristics of CPUs which are used in desktops and laptops, outlining in particular how CPUs for laptops require lower consumption power in order to enable a longer battery life.[1066] This is an element which Dell and Toshiba also highlight.[1067]

(796) It should also be noted that the prices of CPUs used in the three segments are generally of a different magnitude. Fujitsu Siemens notes that both Intel and AMD have different pricing structures for the CPUs that they offer for the three respective computer segments.[1068] HP explains how "*the prices charged by Intel for (...) laptop-specific microprocessors* [are] *appreciably higher than those for 'desktop' microprocessors of comparable clock speed.*"[1069] IBM indicates that Intel's CPUs range in price from USD [...]to USD [...], depending on whether the

---

1063 The one exception appears to be Sony, which states on page 3 of its submission of June 19 2006 that the CPUs incorporated in its VAIO computers "*have similar characteristics/levels of performance whether those computers are desktop types or laptop types.*"

1064 Dell submission of 13 June 2006, p. 2.

1065 [NEC] submission of 12 June 2006, p. 5.

1066 [NEC] submission of 12 June 2006, p. 5.

1067 Dell submission of 13 June 2006, p. 2, and Toshiba submission of 22 June 2006, pp. 1-2.

1068 Fujitsu Siemens submission of 21 June 2006, p. 1.

1069 HP submission of 22 June 2006, p. 6.

CPUs are multi-processor, dual processor or uniprocessor, as well as performance differences within each such category, and that AMD's CPU pricing follows a similar structure.[1070] Similarly, [NEC] notes that CPUs for servers are generally more expensive than CPUs for laptops, which in turn are generally more expensive than CPUs for desktops.[1071] In the same vein, Toshiba estimates that "*prices of microprocessors designed for laptop computers are higher by approximately 50% than those designed for desktop computers*"[1072] and that "*the highest price of the most performant microprocessors specifically used for PC servers is almost 40 times higher than the price for the bottom of the range microprocessors used for desktop computers*"[1073] (although Toshiba does note that in those instances where the same CPU is used in a desktop and a server, the price is generally the same).[1074] This is backed up by an examination of Intel's and AMD's list prices for CPUs. An examination of Intel's June 2006 list prices reveals that the cheapest CPU is priced at USD 39, whilst the most expensive CPU is priced at USD 4 227.[1075] Similarly, AMD's list prices of 15 August 2006 range from USD 47 to USD 2 649.[1076]

(797) At the same time, a number of OEMs make clear that although different CPUs are generally used for the three different computer segments, there can be a limited degree of overlap in that in certain instances, CPUs which are generally targeted at one segment are also used in part of one of the other segments. For example, Fujitsu Siemens states that CPUs used in its desktops are used in "*selected portable notebooks*" and that "*mobile CPUs*" are used in its blade servers.[1077] Similarly, HP notes that there is a limited degree of overlap both between the CPUs used in its desktops and laptops, and between those used in its desktops and low-end servers,[1078] and Lenovo notes that certain of its desktop CPUs are used in its ThinkPad G series notebook (laptop), although those models are being phased out.[1079]

1070 IBM submission of 18 June 2006, pp. 1-2.

1071 [NEC] submission of 12 June 2006, p. 5.

1072 Toshiba submission of 22 June 2006, p. 4.

1073 Toshiba submission of 22 June 2006, p. 4.

1074 This point is also made by HP on p. 7 of its submission of 22 June 2006.

1075 See http://www.intel.com/intel/finance/pricelist/processor_price_list.pdf?iid=InvRel+pricelist_pdf, downloaded and printed on 29 August 2006.

1076 See http://www.amd.com/us-en/Processors/ProductInformation/0,,30_118_609,00.html, downloaded and printed on 29 August 2006.

1077 Fujitsu Siemens submission of 21 June 2006, p. 2.

1078 Description at p. 6 of HP submission of 22 June 2006.

1079 Lenovo submission of 23 June 2006, p. 3.

(798) In this respect, it should be noted that Professor [...], on behalf of Intel, argues that "*there is a great deal of direct substitution of microprocessors on the demand side across the desktop, mobile and server computers.*"[1080] Professor [...] therefore concludes that "*a chain of substitution operates on the demand side across the desktop, mobile and server segments*".[1081] Professor [...]'s report then goes on to outline a number of examples where a specific type of CPU is used in more than one type of computer.[1082]

(799) It is indeed the case that, as the OEMs themselves specify, certain CPUs that are designed for one type of computer can be and are used in another type of computer. However, on the basis of the examples provided by Professor [...], the Commission cannot subscribe to Professor [...]'s assertion that "*there is a great deal of direct substitution of microprocessors on the demand side across desktop, laptop and server computers* [underline added]".[1083] Rather, on the basis of the overall analysis outlined in recitals (795) and (796), in particular the submissions from the primary CPU customers, the OEMs, it is concluded that customers do not, in general, regard CPUs for desktop computers, CPUs for laptop computers and CPUs for servers as substitutes on the demand side, and indeed, the prices of CPUs for those three different segments vary significantly. However, there does appear to be some possibility for substitution at the margins of each of the three segments (that is at the boundaries of each category of computer). In particular, this relates to substitution between CPUs for certain desktops and laptops, and CPUs for certain desktops and low-end servers. It cannot therefore be excluded that there is a chain of substitution[1084] on the demand-side across the three different segments which could mean that all CPUs for computers are in one relevant product market even though, for example, the cheapest CPUs destined for low-end desktops are not direct substitutes for more expensive CPUs destined for expensive servers.

1.1.2. Substitution between CPUs destined for the business/commercial segment and CPUs destined for the private/consumer segment

(800) OEMs which responded to the May 2006 market enquiry confirmed that they distinguish, from a marketing perspective, between computers destined for the business/commercial segment and the private/consumer segment (as IBM points out, this distinction does not apply to server computers, since consumers generally

---

1080 Intel Reply to the 26 July 2007 SO. Report of Professor [...], paragraph 109.

1081 Intel Reply to the 26 July 2007 SO. Report of Professor [...], paragraph 111

1082 Intel Reply to the 26 July 2007 SO. Report of Professor [...], paragraphs 105-108.

1083 Intel Reply to the 26 July 2007 SO. Report of Professor [...], paragraph 109.

1084 See paragraphs 57-58 of the Commission notice on the definition of relevant market for the purposes of Community competition law. *Op. cit.* in footnote 1061.

do not purchase such computers).[1085] Generally speaking, consumers tend to have greater requirements in terms of entertainment and audiovisual needs, whilst business users are generally more focused on performance.[1086]

(801) Nevertheless, with one exception,[1087] all the OEMs which responded to the May 2006 market enquiry indicated that there is generally no difference between the CPUs incorporated in their computers according to whether they are destined for the business/commercial segment or the private/consumer segment.

(802) On this basis, it must therefore be concluded that whilst downstream end-markets for business/commercial and private/consumer customers may function differently (for example, in terms of importance or otherwise of price factors), and whilst OEMs may hence pursue differentiated business strategies according to whether their computers are destined for the business/commercial segment or for the private/consumer segment, this is unrelated to the issue of whether they regard CPUs for the business/commercial segment and CPUs for the private/consumer segment as demand-side substitutes. In this respect, CPUs destined for computers in each of the three segments are generally regarded as demand-side substitutes. Intel supports this finding.[1088]

1.1.3. Substitution between non-x86 CPUs and x86 CPUs

(803) The OEMs which responded to the May 2006 market enquiry were unanimous that as far as desktop and laptop computers were concerned, they would not consider switching from CPUs based on the x86 architecture to CPUs based on the non-x86 architecture.[1089] The main reasons cited are that: (i) the Windows PC operating system, which runs on the vast majority of desktop and laptop computers, is not compatible with non-x86 CPUs;[1090] and (ii) the x-86 architecture is the standard market architecture, and that "*products and applications designed for use with the*

1085 IBM submission of 18 June 2006, pp. 4-5.

1086 See for example Dell submission of 13 June 2006, p. 7; HP submission of 22 June 2006, p. 10; and Toshiba submission of 22 June 2006, p. 7.

1087 Lenovo, although it primarily sells products to commercial customers, states that: "*Lenovo's understanding is that CPU manufacturers typically market different processors for use in systems marketed to consumers and commercial customers.*" (Lenovo submission of 23 June 2006, p. 5).

1088 Intel Reply to the 26 July 2007 SO. Report of Professor [...], paragraph 112.

1089 Two OEMs ([NEC] and Toshiba) responded that such a switch might conceptually be considered, but only from a purely theoretical standpoint.

1090 See for example HP submission of 22 June 2006, p. 8, Lenovo submission of 23 June 2006, p. 4; Sony submission of 19 June 2006, p. 3; and Toshiba submission of 22 June 2006, p. 6.

x86 architecture are not generally compatible with other architectures (and vice versa)."[1091]

(804) As regards OEMs which also offer servers, Dell states that in 2001, it decided to launch a server based on the non-x86 architecture (using Intel's Itanium CPU) on the basis that this would provide better performance than an x86 CPU and if appropriate software was developed. However, since such compatible software was not developed, Dell stopped selling this server in 2005.[1092] Fujitsu Siemens indicates that its Unix systems run on non-x86 architecture servers,[1093] whilst HP offers both x86 and non-x86 based servers, with its non-x86 based servers being more expensive and more powerful, and hence targeted at the high end of the server segment.[1094] Similarly, IBM indicates that it sells servers that incorporate both x86 and non-x86 CPUs. However, there are as such no indications that producers would consider switching x86 CPUs for servers for non-x86 CPUs for servers (and vice-versa). Indeed, in this regard, IBM makes clear that it is unlikely to switch from x86 to non-x86 CPUs in its specific servers and vice-versa, since "[...]"[1095]

(805) Professor [...] argues that "[s]*ubstitution and competition between x86 and non-x86 server systems is also evident*",[1096] and in support cites a number of examples of such "cross-architecture" substitution. In essence, Professor [...] cites OEMs having migration programmes to help customers switch from a competitor's server system to one of their own (which may involve a switch from a server with an x86 architecture to a server with a non-x86 CPU architecture or vice-versa).[1097]

(806) The Commission can indeed subscribe to the fact that there can be switching between x86 and non-x86 server systems. However, this fact, and the examples cited by Professor [...] are not relevant to the question of the definition of the relevant CPU market because the analysis is not targeted at the correct level of the market. This is because the examples discuss the possibilities of competition between servers running different architectures. They do not discuss the possibility of using CPUs with different architectures within servers. Professor's [...]'s analysis would therefore be useful for the consideration of whether, for example, non-x86

1091 HP submission of 22 June 2006, p. 8.

1092 Dell submission of 13 June 2006, p. 5.

1093 Fujitsu Siemens submission of 21 June 2006, p. 3.

1094 HP submission of 22 June 2006, p. 9.

1095 IBM submission of 18 June 2006, p. 4.

1096 Intel Reply to the 26 July 2007 SO. Report of Professor [...], paragraph 123.

1097 Intel Reply to the 26 July 2007 SO. Report of Professor [...], paragraphs 123-127.

servers could be in the same market as x86 servers. It is not, however, directly relevant to the question of whether non-x86 CPUs are in the same market as x86 CPUs.

(807) Intel points to Apple's move in 2006 from the PowerPC architecture to x86 as an example of demand side substitutability of different microprocessor architectures.[1098] The outcome of the Commission's market test, is, however, clear and as has been specified in recital (803), the OEMs that responded unanimously stated that they would not consider switching from CPUs based on the x86 architecture to CPUs based on the non-x86 architecture. Pointing to one instance of a change of architecture does not alter this conclusion and is not in itself evidence of a sufficient level of substitution to also include other architectures in the product market definition. Furthermore, Apple's change of architecture was to the x86 architecture and not a move away from x86. Consequently, Apple's ability to carry out this move is not relevant to the fact that it is difficult to move away from the x86 architecture, which in itself, relates *inter alia* to very significant investments that have been made in x86 compatible software and data. Issues of demand side substitutability therefore do not point towards a product market wider than the x86 architecture.

(808) On the basis of the analysis outlined in this subsection, it must be concluded that there is no demand-side substitution between non-x86 CPUs and x86 CPUs However, it should be stressed that in the alternative (were there to be demand-side substitutability between non-x86 CPUs and x86 CPUs), there would be no alteration to the conclusions on market share and hence dominance.[1099]

1.1.4. Substitution between CPUs for non-computer devices and CPUs for computers

(809) The OEMs which responded to the May 2006 market enquiry were unanimous in that they did not regard CPUs for non-computer devices (often called "embedded CPUs") as possible substitutes on the demand-side for CPUs for computer systems. The main reasons cited were: (i) that the performance/adaptability of CPUs used in

---

1098 Intel Reply to the 26 July 2007 SO. Report of Professor [...], paragraph 130.

1099 Intel submission of 7 July 2006, p. 11. According to the market share data provided by Intel which combines x86 and non-x86 CPUs for computers, Intel's market shares between 2000 and Q1 2006 have ranged between [...]5 and [...]% (by volume) and between [...]% and [...]% (by value).

non-computer devices is not sufficient;[1100] and (ii) that CPUs used in non-computer devices are not compatible with operating systems that run on computers.[1101]

(810) Professor [...] states that "*some microprocessors used in non-computer devices are part of the relevant market*".[1102] In this regard, Professor [...] argues that the Commission's analysis does not take into account the views of "OEMs" that sell non-computer devices, such as video game systems, cash registers and automatic teller machines (ATMs).[1103] Consequently, he argues that "*the potential demand from non-computer devices can be an important source of market discipline that constrains the pricing of x86 processors sold for use in general-purpose computers.*"[1104] However, the relevance of this claim is not clear given the unanimous evidence referred to in recital (809) that OEMs do not regard CPUs for non-computer devices as possible substitutes on the demand-side for CPUs for computer systems

(811) Professor [...] goes on to state that "*for example, if the demand for low-end x86 processors in cash registers is sufficiently large and elastic, then microprocessor firms have an incentive to meet that demand by offering inexpensive x86 processors. The availability of such chips on the market will, in turn, put downward pressure on the pricing of other low-end and near low-end x86 processors used in computers. This chain of substitution implies that x86 processors sold in non-computer devices are potentially part of the relevant market. That is, x86 processors sold for use in non-computer devices can constrain the pricing of x86 processors sold for use in computers.*"[1105]

(812) This argument appears to state that in response to potentially high demand in cash registers, microprocessor suppliers will supply more microprocessors for cash registers, and then this greater supply will put downward pressure on the prices for microprocessors for computers. However, it is not clear how this argument relates

---

1100 See for example HP submission of 22 June 2006, p. 9; IBM submission of 18 June 2006, p. 4; Lenovo submission of 23 June 2006, p. 4; and [NEC] submission of 12 June 2006, p. 7.

1101 See for example Fujitsu Siemens submission of 21 June 2006, p. 3; HP submission of 22 June 2006, p. 9; IBM submission of 18 June 2006, p. 4; [NEC] submission of 12 June 2006, p. 7; and Toshiba submission of 22 June 2006, p. 6.

1102 Intel Reply to the 26 July 2007 SO. Report of Professor [...], paragraph 118. Professor [...] goes on to claim that: "[a]*t the same time, I recognize that many microprocessors in embedded applications are too highly specialized or insufficiently powerful to function as substitutes for microprocessors in general-purpose computers and, hence, they are not part of the relevant market. Determining which microprocessors used for embedded applications in non-computer devices are part of the relevant market would require an extensive and detailed analysis.*"

1103 Intel Reply to the 26 July 2007 SO. Report of Professor [...], paragraph 113.

1104 Idem, paragraph 114.

1105 Idem, paragraph 114.

to the question of demand-side substitutability, in other words, whether microprocessors used in non-computer devices are regarded by customers as a substitute on the demand-side for microprocessors used in computers. Again, the evidence relating to this question on the Commission's file unanimously indicates that they are not, and Intel has not demonstrated otherwise.

(813) On the basis of the analysis outlined in this subsection, it must be concluded that there is no demand-side substitutability between CPUs for computers and CPUs for non-computer devices.

1.1.5. Conclusion

(814) As outlined in subsections 1.1.1 to 1.1.4:

(1) it can be left open whether there is demand-side substitution between CPUs for desktop computers, CPUs for laptop computers and CPUs for server computers;

(2) there is demand-side substitution between CPUs destined for the business/commercial segment and CPUs destined for the private/consumer segment;

(3) there is no demand-side substitution between non-x86 CPUs and x86 CPUs; and

(4) there is no demand-side substitution between CPUs for non-computer devices and CPUs for computers.

(815) Therefore, on the basis of demand-side factors, it can be left open whether the appropriate market definition would be that for x86 CPUs for all computers (that is desktops, laptops and servers), or whether there are three separate markets, namely: (i) x86 CPUs for desktops, (ii) x86 CPUs for laptops, and (iii) x86 CPUs for servers.

1.2 Supply-side substitution

(816) The Commission Notice on the definition of relevant market for the purposes of Community competition law outlines that "*supply-side substitutability may also be taken into account when defining markets in those situations in which its effects are equivalent to those of demand substitution in terms of effectiveness and immediacy.*"[1106]

(817) The main issues to be examined as regards supply-side substitution are the same as those relating to demand-side substitution, namely: (i) whether there is substitution

---

1106 Commission notice on the definition of relevant market for the purposes of Community competition law. OJ C 372, 9.12.1997, p. 5.

between CPUs for each of the three computer segments (namely CPUs for desktop computers, CPUs for laptop computers, and CPUs for server computers); (ii) whether there is substitution between CPUs destined for the business/commercial segment and CPUs destined for the private/consumer segment; (iii) whether there is substitution between CPUs based on the non-x86 architecture and CPUs based on the x86 architecture; and (iv) whether there is substitution between CPUs for non-computer devices and CPUs for computers. Each of these issues are examined in turn in sub-sections 1.2.1 to 1.2.4.

1.2.1. Substitution between CPUs for desktop computers, laptop computers and server computers

(818) The two main worldwide manufacturers of CPUs for desktop computers, laptop computers and server computers are Intel and AMD. Both contend that there are no production lines that are specifically dedicated to the production of CPUs for desktop computers, laptop computers and server computers, and hence that production can quickly and easily be switched from the manufacture of CPUs for one type of computer to CPUs for another type of computer.[1107]

(819) On this basis, it can be concluded that there is likely to be supply-side substitutability between CPUs for desktop computers, laptop computers and server computers. Professor [...] agrees with this conclusion.[1108]

1.2.2. Substitution between CPUs destined for the business/commercial segment and CPUs destined for the private/consumer segment

(820) As highlighted in recital (801) above, there is generally no difference between the CPUs which OEMs incorporate in their computers according to whether the CPUs are destined for the business/commercial segment or the private/consumer segment. Professor [...] agrees with this conclusion.[1109] As such, the question of whether or not there is supply-side substitution between CPUs destined for the business/commercial segment and CPUs destined for the private/consumer segment is not relevant in that for a given computer (that is a specific type of desktop computer, laptop computer or server computer), the same CPU is typically used.

1.2.3. Substitution between non-x86 CPUs and x86 CPUs

(821) AMD contends that it is difficult to switch production from the manufacture of non-x86 CPUs to the manufacture of x86 CPUs. It points out that whilst the production process and equipment for the production of non-x86 CPUs and x86

1107 See for example Intel submission of 7 July 2006, p. 8; AMD submission of 27 June 2006, pp. 9-10.

1108 Report of Professor [...] of 2 January 2008, paragraph 133 and next.

1109 Report of Professor [...] of 2 January 2008, paragraph 137.

CPUs are similar,[1110] to develop and design an x86 CPU requires significant time and effort, and that even for AMD, which has significant expertise in the field, "*the development of a new generation of* [x86] *CPUs may take 2.5 years and amount to an R&D expenditure of more than USD 300 million.*"[1111] In contrast, Intel asserts that it is easy to quickly and easily switch production from the manufacture of non-x86 CPUs to the manufacture of x86 CPUs. In this regard, it states that the "*switching costs involve changing the mask set and adjusting tool set settings*" and that "*the time for changing mask set and adjusting the tool set is about* [...]"[1112]

(822) The evidence on the file shows that a manufacturer of non-x86 CPUs needs to invest significant time and resources in order to switch production to the manufacture of x86 CPUs. For example, Toshiba states that "*switching production is impractical for Toshiba because it would need to acquire the necessary technology and invest enormous resources in terms of time and money to manufacture x86 CPUs.*"[1113] Sony states that "*there may arise some specific unit process or know-how required to achieve the specific performance that is unique to* [the] *x86 architecture*",[1114] and that in particular, there is a "*need to design* [the] *x86 CPU*",[1115] thereby echoing the statements of AMD in this regard.

(823) Intel's claims that the switching cost is minimal rely on the assumption that a CPU manufacturer already produces CPUs of both an x86 and a non-x86 architecture, in other words that it has sunk costs into the (lengthy and expensive) design of both an x86 and a non-x86 CPU architecture. However, supply-side substitution must in this context also take account of these costs.[1116]

(824) On the basis of the analysis outlined in this subsection, it must be concluded that there is no supply-side substitution between non-x86 CPUs and x86 CPUs.[1117] However, as outlined in recital (808), it should be stressed that in the alternative (were there to be supply-side substitutability between non-x86 CPUs and x86

1110 AMD submission of 27 June 2006, p. 10.

1111 AMD submission of 27 June 2006, p. 11.

1112 Intel submission of 7 July 2006, p. 4.

1113 Toshiba submission of 7 July 2006, p. 4.

1114 Sony submission of 3 July 2006, p. 6.

1115 Sony submission of 3 July 2006, p. 6.

1116 Although it should be noted that another CPU manufacturer which manufactures both non-x86 CPUs and x-86 CPUs, IBM, notes that even once a company has a design for both non-x86 and x-86 CPUs, [...]" - IBM submission of 3 July 2006, p. 6.

1117 Professor [...] states that he has "*not studied this issue, and* [his] *analysis and opinions do not turn on this issue in any significant respect.*" Intel Reply to the 26 July 2007 SO. Report of Professor [...], paragraph 138.

CPUs), there would be no alteration to the conclusions on market share and hence dominance.

1.2.4. Substitution between CPUs for non-computer devices and CPUs for computers

(825) As regards supply-side substitution between CPUs for non-computer devices and CPUs for computers, Intel again argues that there are no/minimal switching costs. It states that "*many embedded CPUs are identical to x86 CPUs that are sold into computing applications*".[1118] This in itself does not relate to the question of supply-side substitution but rather to demand-side substitution, and more specifically the issue of whether, to use Intel's words, a CPU for an embedded application can also be used in a computing application. It has already been demonstrated that this is not generally the case (see section 1.1.4 above). Intel also states that "*the switching costs involve changing the mask set and adjusting the tool set*",[1119] and that the time involved in this process is about [...].[1120]

(826) In contrast, AMD notes that the leading-edge CPUs are x86 CPUs for desktops, laptops and servers,[1121] and that "[e]*mbedded microprocessors are typically produced on an earlier technology node which is no longer competitive for the production of x86 CPUs for desktops, laptops and servers.*"[1122] In other words, embedded CPUs are essentially an earlier generation of x86 CPU, and therefore "*often, embedded microprocessors are produced on equipment and in fabs that have been used in the past for the production of x86 CPUs for desktops, laptops and servers.*"[1123] As such, according to AMD, the switching costs of changing manufacture from embedded CPUs to x86 CPUs entail "*either a complete retooling of the factory or the building of a new factory*",[1124] and that this costs USD 2.6-3.2 billion and would take more than one year. Moreover, AMD notes that there substantial research and development and design investment would also need to be undertaken.[1125]

(827) The other evidence on the file confirms the view that the costs of switching manufacture from embedded CPUs to x86 CPUs are significant. For example,

---

1118 Intel submission of 7 July 2006, p. 10.

1119 Intel submission of 7 July 2006, p. 10.

1120 See Intel submission of 7 July 2006, p. 9.

1121 AMD submission of 27 June 2006, p. 11.

1122 AMD submission of 27 June 2006, p. 11.

1123 AMD submission of 27 June 2006, p. 11.

1124 AMD submission of 27 June 2006, p. 11.

1125 AMD submission of 27 June 2006, pp. 11-12.

Freescale, the world's leading embedded CPU manufacturer[1126] echoes AMD's assertions that embedded CPUs generally use earlier generation x86 CPU technology and that x86 CPUs are generally "*leading edge*",[1127] and hence that to switch production from embedded CPUs to x86 CPUs requires investment in new equipment capable of supporting the latest capability,[1128] and that this would "*be approximately 12-25% (US$350 - 700 million) in excess of the purchase price of the original equipment for producing the embedded microprocessors*",[1129] which in itself costs EUR 3 000 million and takes 15-18 months to complete.[1130]

(828) In a similar vein, Toshiba states that "*switching production* [from embedded CPUs to x86 CPUs] *is impractical for Toshiba because it would need to acquire the necessary technology and invest enormous resources in terms of time and money*",[1131] whilst NEC highlights that "*the high-performance, low-power feature of x86 microprocessors is closely linked to the process technology of the facility, and therefore, it would not be possible for our facility to produce x86 microprocessors with equivalent performance as those of Intel or AMD based on our own process technology.*"[1132] Another leading manufacturer of embedded CPUs, Renesas, states that it "*does not produce and has no plans to produce x86 microprocessors. Accordingly, Renesas does not have sufficient knowledge of the time and costs involved in switching production from embedded microprocessors to x86 microprocessors in order to answer this question*".[1133]

(829) Sony echoes AMD's points about the need to design an x86 CPU, stating that it cannot make an estimate of the time and cost associated with completing such a design.[1134] NEC also states that "*we would need to develop our design for the x86 microprocessors from scratch, which would require a considerable amount of time and cost*".[1135] In the same vein, IBM states that the cost and time involved in switching from embedded CPU production to x86 CPU production depends in the

---

1126 In terms of market shares by revenues - see Intel submission of 7 July 2006, p. 11.

1127 Freescale submission of 30 June 2006, p. 2.

1128 Freescale submission of 30 June 2006, p. 2.

1129 Freescale submission of 30 June 2006, p. 2.

1130 Freescale submission of 30 June 2006, p. 2.

1131 Toshiba submission of 7 July 2006, p. 4.

1132 NEC submission of 14 July 2006, p. 5.

1133 Renesas submission of 29 June 2006, p. 2.

1134 Sony submission of 3 July 2006, p. 6.

1135 NEC submission of 14 July 2006, p. 5.

first instance on the time and cost involved in designing a new (that is to say, x86) CPU. Once this is done, IBM states that [...].[1136]

(830) On the basis of the analysis outlined in this subsection, it can be seen that the time and costs associated with switching production from the manufacture of embedded CPUs to x86 CPUs are significant, both in terms of the time and costs associated with designing the x86 CPU, and in terms of the time and costs associated with investing in the necessary production equipment.[1137] As such, it must be concluded that there is no supply-side substitution between CPUs for non-computer devices and CPUs for computers.[1138]

1.2.5. Conclusion

(831) As outlined above in subsections 1.2.1 to 1.2.4:

(1) there is likely to be supply-side substitutability between CPUs for desktop computers, laptop computers and server computers;

(2) for a specific type of computer, the same CPUs are used in the business/commercial segment and the private/consumer segment;

(3) there is no supply-side substitution between non-x86 CPUs and x86 CPUs; and

(4) there is no supply-side substitution between CPUs for non-computer devices and CPUs for computers.

(832) Therefore, on the basis of supply-side factors, the relevant market definition does not need to be broadened to include non-x86 CPUs or CPUs for embedded devices. Section 1.3 summarises the overall findings on market definition, and in particular examines the relevance of the likely supply-side substitutability between CPUs for desktop computers, laptop computers and server computers for the conclusion on market definition.

1136 See IBM submission of 3 July 2006, p. 7.

1137 The evidence on the file demonstrates that these findings also apply to the costs of switching production from the manufacture of embedded CPUs to the manufacture of non-x86 CPUs. This has not been outlined in greater detail in this section since there is no supply-side substitutability between non-x86 CPUs and x86 CPUs (see section VII.1.2.3), and hence the market does not need to be broadened to include non-x86 CPUs.

1138 On this issue, Professor [...] states in paragraph 139 of his report that: "*my analysis and opinions do not turn on the ease of supply-side substitution between microprocessors for non-computer devices and x86 processors for computers.*" Professor [...] nevertheless adds that: "*I note, however, that embedded x86 processors are often identical to x86 processors for general-purpose computers, and that the costs of switching between production of x86 processors for computers and non-computer devices are modest*". This last statement is based on Intel's own earlier submission to the Commission attached as Annex 82 of Professor [...] report in which it remains unsubstantiated and indeed, is not consistent with the body of evidence in the present sub-section.

1.3 Conclusion

(833) On the demand-side, it can be left open whether the appropriate market definition should incorporate x86 CPUs for all computers (desktops, laptops and servers), or whether there are three separate markets, namely: (i) x86 CPUs for desktops; (ii) x86 CPUs for laptops; and (iii) x86 CPUs for servers.

(834) On the supply-side, there is likely to be supply-side substitutability between x86 CPUs for desktop computers, laptop computers and server computers. However, it is not necessary to assess whether the effects of the likely supply-side substitutability between x86 CPUs for desktop computers, laptop computers and server computers "*are equivalent to those of* [the] *demand substitution in terms of effectiveness and immediacy.*"[1139] This is because irrespective of whether there is one relevant market of x86 CPUs for all computers (i.e. desktop computers, laptop computers and server computers), or whether there are three separate relevant markets of: (i) x86 CPUs for desktop computers; (ii) x86 CPUs for laptop computers; and (iii) x86 CPUs for server computers, there is no difference in the analysis of dominance (see section 3).[1140]

(835) In conclusion therefore, it can be left open whether there is one relevant market of x86 CPUs for all computers (desktops, laptops and servers), or whether there are three separate relevant markets of: (i) x86 CPUs for desktop computers; (ii) x86 CPUs for laptop computers; and (iii) x86 CPUs for server computers.[1141] In either case, on the basis of the substitutability considerations outlined is sections 1.1 and 1.2, the relevant market definition does not include non-x86 CPUs or CPUs for non-computer devices.

1139 Commission Notice on the definition of the relevant market for the purposes of Community competition law, *op. cit.*

1140 It should also be noted that whilst it has been outlined that non-x86 CPUs should not be included in the relevant market, the conclusions on market share and hence dominance do not change (see footnote 1099).

1141 As will be outlined in section VII.3 below on dominance, Intel and AMD are essentially the only two players in the market. At points, Intel appears to claim that this is not the case because the market definition should be broader. However, in paragraph 703 of its submission of 5 February 2009 related to the 17 July 2008 SSO, Intel concedes that: "*In this case the essential competitive battle is between Intel and AMD*". This recognition is also implicitly confirmed from evidence from within Intel. In an e-mail of 6 May 2005 from an Intel executive which refers to problems with Intel's CPU development and how these might be resolved, it is stated that: *"there is so much ingrained 'bad habits' and inertia that has developed over the past decade (which has been hidden/tolerated because we've had a money printing machine with really no competition until recently)."* E-mail of 6 May 2005 from [Intel executive] to [Intel executive] entitled *"CPU development"*, Annex 1 of Intel submission of 2 June 2008, document 20.

2. Relevant geographic market

(836) There is no controversy between the parties on the geographic scope of the market - they agree that it is worldwide.[1142] The Commission shares this position. This conclusion is supported by the fact that the main suppliers compete globally, CPU architectures are the same around the world, the main customers (OEMs) operate on a worldwide basis, and the cost of shipping CPUs around the world is low compared to their cost of manufacture.

3. Dominance

3.1 Introduction

(837) The assessment of whether an undertaking is in a dominant position and of the degree of market power it holds is a first step in the application of Article 82 of the Treaty. According to the case-law, holding a dominant position confers a special responsibility on the firm concerned, the scope of which must be considered in the light of the specific circumstances of each case.[1143]

(838) According to settled case law, dominance is a position of economic strength enjoyed by an undertaking, which enables it to prevent effective competition being maintained on the relevant market by affording it the power to behave to an appreciable extent independently of its competitors, its customers and ultimately of consumers.[1144]

(839) The notion of independence which is the special feature of dominance[1145] is related to the level of competitive constraints facing the undertaking in question. It is not required for a finding of dominance that the undertaking in question has eliminated all opportunity for competition on the market.[1146] However, for dominance to exist, the undertaking concerned must have substantial market power.

1142 See for example Intel Reply to the 26 July 2007 SO, or AMD submission of 24 February 2006, paragraph 732, p. 4.

1143 Case 322/81 *Nederlandsche Banden Industrie Michelin (Michelin I) v Commission* [1983] ECR 3461, paragraph 57; Case T-83/91 *Tetra Pak v Commission (Tetra Pak II)* [1993] ECR II-755, paragraph 114; Case T-111/96 *ITT Promedia v Commission* [1998] ECR II-2937, paragraph 139; Case T-228/97 *Irish Sugar v Commission* [1999] ECR II-2969, paragraph 112; and Case T-203/01 *Michelin v Commission (Michelin II)* [2003] ECR II-4071, paragraph 97.

1144 Case 27/76 *United Brands and United Brands Continentaal v Commission* [1978] ECR 207, paragraph 65, and Case 85/76 *Hoffmann-La Roche v Commission* [1979] ECR 461, paragraph 38.

1145 Case *Hoffmann-La Roche*, *op. cit.*, paragraphs 42-48.

1146 Case *United Brands*, *op. cit.*, paragraph 113, and Case T-395/94 *Atlantic Container Line and Others v Commission* [2002] ECR II-875, paragraph 330.

(840) In this regard, the Commission will first assess market shares in the relevant market (section 3.2), and will then analyse barriers to expansion and entry in the market (section 3.3). Intel's arguments are then addressed in section 3.4, whilst the conclusion is set out in section 3.5.

3.2 Market shares

(841) Market shares provide a useful first indication for the Commission of the market structure and of the relevant importance of the various undertakings active on the market. The market shares used in this sub-section which are outlined in the associated charts are derived from one of the two main industry sources for CPU statistics: Mercury.[1147] Charts are based on volume (number of x86 CPUs sold) and on value data (revenues from x86 CPUs sold in USD).

3.2.1. Market shares for the overall x86 CPU market

(842) In the overall x86 CPU market, as defined in section 1, in volume terms, as outlined in Chart 1a, between the first quarter of 1997 and the first quarter of 2008, Intel's quarterly volume shares ranged from [...]% (second quarter of 2006) to [...]% (second quarter of 1997). Intel's average volume share in this period has been [...]% per quarter, with only three quarters below [...]%.[1148] AMD's quarterly volume market shares in that period ranged between [...]% (second quarter of 1997) and [...]% (fourth quarter of 2006). AMD's average volume share in that period was [...]%.

(843) The number of x86 CPUs for computers manufactured by producers other than Intel and AMD was marginal throughout that period, and was in the region of [...]% per quarter.[1149] Those figures include CPUs manufactured by VIA and Transmeta (x86 architecture) IBM Power CPUs for IBM servers and Apple client desktops/laptops (RISC architecture), and CPUs manufactured by HP and Sun for their own servers (SPARC architecture).[1150]

Chart 1a: Total x86 CPU market (volume; Mercury)
[...]

1147 Mercury data 1997-2008, Q32006 edition, Unit and volume shares.

1148 Quarters where Intel's volume shares have been below 75% in the 1997- 1Q2008 period: [...].

1149 In the first two quarters of 2006, other CPU manufacturers' volume market share was in the region of [...]%. This is due to [...]. This is outlined in further detail in the July 2006 Mercury report entitled 'PC processors and Chipsets Updated Edition 3Q2006 – Market Strategy and Forecast report' by Dean McCarron at Section 3.3.1.3.

1150 Strictly speaking, these collective data are not therefore for the x86 CPU market since they include such non-x86 CPUs. However, given that the quantities are negligible, there is no difference to the overall analysis.

(844) In revenue terms, as demonstrated in Chart 1b, between the first quarter of 1997 and the first quarter of 2008, Intel's shares ranged from [...]% (second quarter of 2006)to [...]% (second quarter 1997), with an average of [...]% per quarter. AMD's market shares in that period ranged between [...]% (first quarter of 1997) and [...]% (third quarter of 2006), with an average of [...]% per quarter.

(845) The overall Mercury data also capture revenues from VIA and Transmeta CPUs ("Others"), which are very limited (below [...]%).[1151] Mercury does not capture the RISC and SPARC CPUs from IBM, HP and Sun because these are generally sold as a part of the end product, and hence the price cannot be readily discerned. However, this will not significantly alter the market share analysis given the very limited number of those CPUs that have been sold with these architectures.

Chart 1b: Total x86 CPU market (value; Mercury)

[...]

3.2.2. Market shares for x86 CPUs for desktop computers

(846) In volume terms for x86 CPUs for desktops, as outlined in Chart 2a, between the first quarter of 1997 and the first quarter of 2008, Intel's volume shares ranged from [...]% (fourth quarter of 2007) to [...]% (second quarter of 1997), with an average of [...]% per quarter. AMD's market shares in that period ranged between [...]% (second quarter of 1997) and [...]% (fourth quarter of 2006), with an average of [...]% per quarter.

Chart 2a: x86 CPUs for desktops (volume; Mercury)

[...]

(847) In revenue terms for x86 CPUs for desktops, as outlined in Chart 2b, between the first quarter of 1997 and the first quarter of 2008, Intel's shares ranged from [...]% (first quarter of 2006) to [...]% (first quarter of 1997), with an average of [...]% per quarter. AMD's market shares in that period ranged between [...]% (first quarter of 1997) and [...]% (first quarter of 2006), with an average of [...]% per quarter.

Chart 2b: x86 CPUs for desktops (value Mercury)

[...]

1151 With the exception of the period between the first quarter of 1997 and the fourth quarter of 1998, when value market shares are between [...]% and [...]%; and the first and second quarter of 2006, when they are around [...]%. See explanation in footnote 1149 above.

3.2.3. Market shares for x86 CPUs for laptop computers

(848) In volume terms for x86 CPUs for laptops, as outlined in Chart 3a, on the basis of the relevant Mercury data, between the first quarter of 1997 and the first quarter of 2008, Intel's shares ranged from [...]% (fourth quarter of 2006) to [...]% (between the first quarter of 1997 and the first quarter of 1999), with an average of [...]% per quarter. AMD's market shares in that period ranged between [...]% (between the first quarter of 1997 and the first quarter of 1999) and [...]% (third quarter of 2007), with an average of [...]% per quarter.

Chart 3a: x86 CPUs for laptops (volume; Mercury)

[...]

(849) In revenue terms for x86 CPUs for laptops, as outlined in Chart 3b, between the first quarter of 1997 and the first quarter of 2008, Intel's shares ranged from [...]% (third quarter of 2006) to [...]% (between the first quarter of 1997 and the first quarter of 1999), with an average of [...]% per quarter. AMD's market shares in that period ranged between [...]% (between the first quarter of 1997 and the first quarter of 1999) and [...]% (third quarter of 2007), with an average of [...]% per quarter.

Chart 3b: x86 CPUs for laptops (value; Mercury)

[...]

3.2.4. Market shares for x86 CPUs for servers

(850) In volume terms for x86 CPUs for servers, as outlined in Chart 4a, on the basis of the relevant Mercury data, between the second quarter of 1998 and the first quarter of 2008,[1152] Intel's shares ranged from [...]% (fourth quarter of 2006) to [...]% (between the second quarter of 1998 and the fourth quarter of 2000), with an average of [...]% per quarter. AMD's market shares in that period ranged between [...]% (between the second quarter of 1998 and the fourth quarter of 2000) and [...]% (second quarter of 2006), with an average of [...]% per quarter.

Chart 4a: x86 CPUs for servers (volume; Mercury)

1152 It should be noted that market shares for servers are indicated from the second quarter of 1998, as opposed to other segments, where the first quarter of the relevant period is the first quarter of 1997. Mercury gives server market shares from the second quarter of 1998, and Gartner gives server market shares from the first quarter of 1999. This is because AMD started selling server CPUs only as of the first quarter of 1998, although its sales remained negligible (below [...]%) until the third quarter of 2001. The increase in AMD's server market shares is a result of AMD's 32-bit Athlon MP server CPU, announced in May 2001.

[...]

(851) In revenue terms for x86 CPUs for servers, as outlined in Chart 4b between the second quarter of 1998 and the first quarter of 2008, Intel's shares ranged from [...]% (second quarter of 2006) to [...]% (between the second quarter of 1998 and the fourth quarter of 2000), with an average of [...]% per quarter. AMD's market shares in that period ranged between [...]% (between the second quarter of 1998 and the fourth quarter of 2000) and [...]% (second quarter of 2006), with an average of [...]% per quarter.

Chart 4b: x86 CPUs for servers (value; Mercury)

[...]

3.2.5. Conclusion

(852) It follows from the market share data in subsections 3.2.1 to 3.2.4 that Intel consistently held very high market shares in excess of or around 80% in an overall x86 CPU market and in excess or around 70% in any of the sub-markets mentioned in these subsections throughout the six year observation period. In this regard, it should be recalled that very large market shares, of over 50%, are considered in themselves, and but for exceptional circumstances, evidence of the existence of a dominant position.[1153] Market shares between 70% and 80% have, according to the case law, been held to be in themselves a clear indication of the existence of a dominant position.[1154] This insight is subject to further verification in any given case by reference to contextual factors such as barriers to entry and expansion and buyer power.

3.3 Barriers to expansion and entry

(853) The Commission has identified a number of barriers to entry and expansion in the relevant market(s). They relate to: (i) the nature and the size of sunk investment required (both in terms of research and development and investment in manufacturing facilities) combined with capacity constraints; and (ii) significant product differentiation, in particular through brands. These are examined in turn in subsections 3.3.1 to 3.3.3.

1153 Judgment of the Court of Justice in Case C-62/86 *Akzo v Commission* [1991] ECR I-3359, at paragraph 60, and Judgment of the Court of First Instance in Case T-228/97 *Irish Sugar v Commission* [1999] ECR II-2969, at paragraph 70.

1154 Judgment of the Court of First Instance in Case T-30/89, *Hilti v Commission* [1991] ECR II-1439, at paragraph 92, confirmed by the Court of Justice in Case C-53/92 P *Hilti v Commission* [1994] ECR I-667.

3.3.1. Sunk investment in production facilities and research & development required to enter the market

3.3.1.1. Introduction

(854) Entering the market is both costly and requires a significant amount of time. This relates to both the issues of: (i) design of x86 CPUs; and (ii) manufacture of x86 CPUs. In its Reply to the 26 July 2007 SO, Intel acknowledges "*the existence of substantial sunk costs associated with R&D and manufacturing facilities*".[1155]

3.3.1.2. Access to technology and x86 CPU design

(855) AMD states that "*R&D expenses constitute a very significant expenditure and consequently, the number of units over which to spread the cost plays a significant role.*"[1156]

(856) A major specific element of the research and development effort required is the need to develop a basic x86 CPU design. AMD notes that "*it will require a significant expenditure to develop the required know how to design competitive x86-microprocessor for the use in computers. Both AMD and Intel have a long history of developing x86 microprocessors and have built a significant knowledge base which it will be very costly for a new entrant to replicate.*"[1157] More specifically, AMD states that "*the x86 instruction set is subject to substantial intellectual property right protection. A potential entrant will thus require either a license from Intel, or an enormous combination of ingenuity, time and capital committed to the seemingly impossible task of creating a non-infringing x86 instruction set.*"[1158] AMD also notes that "[*a*] *further very important element is that critical technology and intellectual property necessary to design, manufacture and sell a microprocessor that executes the x86 instruction set is owned and vigorously enforced by Intel. It will therefore be very costly, time consuming and difficult to develop a product which is compatible with the x86 instruction set and may ultimately be impossible.*"[1159]

(857) This echoes the findings already set out in sections V.3.1 and 1.2, which highlighted that there were significant costs associated with either the acquisition of the necessary technology to be able to manufacture x86 CPUs and/or the process of designing an x86 CPU.

1155 Intel Reply to the 26 July 2007 SO, paragraph 715.

1156 AMD submission of 27 June 2006, p. 5.

1157 AMD submission of 27 June 2006, p. 1.

1158 AMD submission of 27 June 2006, p. 11.

1159 AMD submission of 27 June 2006, p. 2.

(858) As outlined in section V.3.1.2, AMD manufactures its x86 CPUs on the basis of a cross licence agreement with Intel. The current agreement followed on from a number of patent infringement cases brought by Intel against AMD and a global settlement between the two companies in 1995. The extensive litigation history highlights the significant intellectual property-related barriers that any new entrant to the x86 CPU market would have to overcome.

3.3.1.3. Costs of production and economies of scale

(859) Once the investment has been undertaken to develop an x86 CPU design, there are significant sunk costs associated with the manufacture of such CPUs. As outlined in section V.2.2, a new fab costs at least USD 2 500 – 3 000 million and takes several years to build. As such, there is a high cost and time associated with building a fab which constitutes a significant barrier to entry. By way of illustration, Toshiba states that it would need to "*invest enormous resources in terms of time and money to manufacture x86 microprocessors*"[1160] and that it "*has no plans to make such investments and has not carried out detailed investigations into likely costs.*"[1161]

(860) As regards actual production of x86 CPUs, AMD states that "*within a current state-of-the-art fab, it is possible to achieve increased economies of scale through to close to 100% utilization. The scope for economies of scale is more significant at the low range of utilization and AMD estimates the scope for economies of scale will be less significant once the Fab reaches utilization rates in excess of 65-75%. However, even at these utilization levels, AMD believes that it is still possible to achieve economies of scale moving towards full utilization for that fab.*"[1162]

(861) Intel also highlights that "*increases in plant-level manufacturing capacity produce significant reductions in per-unit manufacturing costs at scales between zero and approximately* [...]. *Reductions in manufacturing costs continue beyond the* [...] *point through all plausible ranges of plant sizes, but at a diminished rate. Because incremental costs are lower than the average cost, the average cost curve continues to decline at a modest rate over the range of plausible plant sizes. Accordingly, there is no identifiable point at which the lowest average total cost per unit is achieved.*"[1163]

1160 Toshiba submission of 7 July 2006, p. 4.

1161 Toshiba submission of 7 July 2006, p. 4.

1162 AMD submission of 27 June 2006, p. 5.

1163 Intel submission of 7 July 2006, p. 3.

(862) In a similar vein, IBM states that [...]",[1164] and that "[...]"[1165] Sony also points out that *"Semiconductor (including, without limitation, Microprocessors which are used in desktop computers, laptop computers and servers) business has an advantage of scale, i.e. by mass-production, we can achieve lower manufacturing cost per product unit."*[1166]

(863) It can therefore be seen that lower or minimised average costs of production are achieved at higher levels of production. What is more, these levels of production are high relative to the overall size of the market. A good illustration of this is AMD which, with its market shares of 10-20%, supplied virtually its entire stock of x86 CPUs from just one production facility until the end of 2005,. In this regard, it is also noteworthy that the only other company which sells x86 CPU, VIA Technologies, which has a market share of about 1%, does not produce any x86 CPUs - rather, it subcontracts their production *"to third party 'fabs' or foundries"*.[1167]

(864) Intel notes that its *"network of manufacturing facilities and assembly and test facilities gives us a competitive advantage. This network enables us to have more direct control over our processes, quality control, product cost, volume, timing of production, and other factors. These facilities require significant upfront capital spending, and many of our competitors do not own such facilities, because they cannot afford to do so or because their business models involve the use of third-party facilities for manufacturing and assembly and test."*[1168] This demonstrates that in order to be cost competitive, it is more efficient to have manufacturing facilities for x86 CPU production.

(865) This is confirmed by the fact that [...] and [...], [...], have exited or are exiting the x86 CPU market (see sections V.3.1 and 3.2). In this respect, [OEM] specifies that it "*does not regard firms such as* [...] *or* [...] *as "viable" competitors of Intel/AMD for most of the x86 microprocessors which* [OEM]*purchases from Intel/AMD (i.e. for mainstream client/server microprocessors) because these firms do not meet* [OEM]*viability requirements, namely: the ability to offer x86 microprocessors able to run all applications with mainstream Microsoft and Linux platforms with sufficient performance and capability to run these applications well; enough brand*

1164 IBM submission of 3 July 2006, p. 3, answer 3.

1165 IBM submission of 3 July 2006, pp. 3-4, answer 4.

1166 Sony submission of 3 July 2006, p. 5.

1167 VIA submission of 7 July 2006, p. 1.

1168 Intel Form 10-K Annual Report of 27 February 2006 for the fiscal year ended on 30 December 2006, downloaded and printed on 30 March 2009, p. 12. See http://www.sec.gov/Archives/edgar/data/50863/000089161807000111/f23627e10vk.htm

presence to appear viable to consumers or corporate customers' IT departments; and sufficient manufacturing capacity and ability to fulfil [OEM]*supply chain – in terms of scale, expertise, track record and security of supply assurance. Large PC OEMs such as* [OEM]*purchase very large volumes of x86 microprocessors giving rise to complex logistical issues and* [OEM]*will only purchase x86 CPUs from suppliers with a track record of dealing with these issues successfully. In addition,* [OEM]*will not make the level of investments required to build a roadmap for a* [OEM]*client/server computers system around an x86 CPU unless* [OEM]*is sure that the supplier in question will still be in the market in four-five years time and will still have the ability to meet* [OEM]*supply chain requirements at that point.*"[1169]

3.3.1.4. Conclusion

(866) In conclusion, a potential entrant will be faced with significant intellectual property barriers and will have to engage in substantial initial research and development and production investment to be able to start up production of x86 CPUs. Once this investment has been made, it will be necessary to achieve a high capacity utilisation to maximise average cost reductions and hence compete most efficiently with the producers already in the market (essentially, AMD and Intel). Therefore, in the light of: (i) the significant sunk costs in research and development, (ii) the significant sunk costs in plant production and (iii) the resulting significant economies of scale which mean that the minimum efficient scale is high relative to overall market demand, it can be concluded that there are significant barriers to entry in the market. Furthermore, once entry has taken place, a manufacturer's production capacity is limited by the size of the existing facilities. Expanding output requires additional (sunk) investment into new property, plant and equipment as well as several years' lead time.

3.3.2. Product differentiation through brands

(867) A second important group of barriers to expansion and entry arises from product differentiation. The barriers to entry arise from the fact that the necessary investment in marketing involves sunk costs. On the basis of Intel's and AMD's Form 10-K SEC filings, the table 13 shows their respective marketing, general and administrative expenditures.

Table 13 - Marketing, general and administrative expenditure of Intel and AMD (in USD million)

	1997	1998	1999	2000	2001	2002

1169 [OEM]submission of [...].

Intel	2 891	3 076	3 872	5 089	4 464	4 334
AMD	401	420	540	599	620	670

	2003	2004	2005	2006	2007
Intel	4 278	4 659	5 688	6 096	5 401
AMD	587	812	1 016	1 140	1 373

Source: Intel and AMD Form 10-K filings[1170]

(868) Intel's accounts show that between 1997 and 2007, it spent considerably higher amounts on marketing than AMD. Intel's expenditure on marketing its x86 CPUs amounted to approximately 14%-17% of its annual turnover during each year.

(869) Through its marketing budget, Intel funds extensive advertising campaigns (on the television, news press and the web), and engages in continuing marketing efforts via its BDMs ("business development managers") and ACMs ("account managers) who work directly with OEMs, corporate IT managers and retailers.

(870) During the period covered by this Decision, Intel's brand equity resulting from its investment in product differentiation and its installed base have given it "must-stock" status at the OEM level, in other words, it is an unavoidable trading partner for OEMs. All the main OEMs offer predominantly or exclusively Intel-based products. Intel's must-stock status provides it with significant leverage over its OEM customers because a switch to an all- or majority-AMD product line-up would be unrealistic for them.

(871) This is confirmed by evidence from OEMs on the Commission's file. For example, HP has stated that "[a]*s regards consumer/business PCs, notebooks and servers,* [Intel's CPUs are a 'must have" in any new product]"[1171] Similarly, NEC states that "*clients frequently specify in their tender document, that they wish to see Intel CPU*

1170 Intel Form 10-K Annual Report of 11 March 2003, p. 34 at http://www.sec.gov/Archives/edgar/data/50863/0001012870-00-001562.txt; Intel Form 10-K Annual Report of 27 February 2006, p. 32 at http://www.sec.gov/Archives/edgar/data/50863/000089161806000089/f12963e10vk.htm; and Intel Form 10-K Annual Report of 20 February 2008, p. 32 at http://www.sec.gov/Archives/edgar/data/50863/000089161808000106/f36442e10vk.htm. AMD Form 10-K Annual Report of 9 March 2004, p. 19 at http://www.sec.gov/Archives/edgar/data/2488/000119312504037179/d10k.htm; and AMD Form 10-K Annual Report of 26 February 2008, p. 46 at http://www.sec.gov/Archives/edgar/data/2488/000119312508038588/d10k.htm. Downloaded and printed on 7 April 2009.

1171 HP submission of 6 August 2004, answer 6.1.

included in the products. The Intel brand has a stronger reputation in the professional market than AMD."[1172]

(872) IT managers deciding on large IT purchases for governments, corporations or educational institutions are more conservative in their choices and more inclined to buy Intel. In this regard, referring to a study among IT decision-makers in the Government, University and Financial sectors in May-June 2004, an internal Intel memo states that among these managers, Intel's brand equity (preference) is "*significantly stronger for Intel microprocessors with* [...]*%, compared to a much lower* [...]*% who prefer AMD for their servers. The preference for AMD increases* [...]*% points for low end servers while the gap between Intel* ([...]*%) and AMD* ([...]*%) is narrower in* [...]." It adds that "*the* [brand preference] *gap between these two main end use segments* [the consumer (freedom of choice: lower preference)] *and that in the business (safety of purchase: higher preference) remains large*". This gap is estimated by Intel at [...].[1173] This gap corresponds to the tendency of IT managers to put a premium on branded and reliable equipment.[1174]

(873) According to a study by BusinessWeek/Interbrand of 27 July 2006,[1175] Intel owned the world's fifth-most valuable brand behind Coca Cola, Microsoft, IBM and GE. Its brand value was estimated at USD 32 billion. Given that investment in branding constitutes sunk costs, Intel's brand equity therefore creates significant barriers to expansion and entry in the x86 CPU market.

(874) In its reply to the 26 July 2007 SO, Intel did not contest the Commission's analysis on product differentiation, in particular the fact that Intel is a must-stock product for OEMs.[1176]

1172 NEC submission of 15 December 2005, p. 12, answer 29.

1173 Intel submission EC-ART18-012621 – 012622.

1174 This is also outlined in 'Abuse of Dominance in the Market for x86 Processors, RBB Economics paper of 15 September 2006, pp. 9-10, supporting document 3 to AMD submission of 15 September 2006.

1175 BusinessWeek/Interbrand 2006 Annual Ranking of the 100 Best Global Brands, http://www.interbrand.com/images/studies/BGB06Report_072706.pdf, downloaded and printed on 30 March 2009.

1176 In this regard, in Case 85/76 *Hoffmann-La Roche v Commission* [1979] ECR 461, paragraph 41, the Court stated that: "*An undertaking which has a very large market share and holds it for some time, by means of the volume of production and the scale of the supply which it stands for – without those having much smaller market shares being able to meet rapidly the demand from those who would like to break away from the undertaking which has the largest market share – is by virtue of that share in a position of strength which makes it an unavoidable trading partner and which, already because of this secures for it, at the very least during relatively long periods, that freedom*

3.3.3. Financial data

(875) The level of product differentiation, economies of scale and, hence, market power is reflected in the financial results of the various undertakings involved in the manufacture of computer components. Table 14 highlights the economics of the industry.[1177]

Table 14 - Financial results for 2005 (all monetary figures in USD million)

2005	Intel	AMD	Dell	HP	Microsoft
Net revenue	38 826	5 848	55 788	86 696	44 282
Cost of Goods sold (CoGS)	15 777	3 456	45897	66 440	7 650
Gross margin	23 049	2 392	9 891	20 256	36 632
%	59%	41%	17,7%	23%	83%
Operating expenses*	10 959	2 160	5 509	16 783	20 160
Operating income	12 090	232	4 382	3 473	16 472
%	31%	4%	7,8%	4%	37%
Net income	8 664	165	3 602	2 398	12 599
%	22%	3%	6,5%	3%	28%

Source: companies' SEC Form 10-K reports for 2007[1178]
Note that financial year may be different from calendar year. For the purpose of this table, financial quarters have not been matched with calendar quarters.[1179]

---

of action which is the special feature of a dominant position." Similarly, in Case T-219/99 *British Airways v Commission* [2003] ECR II-5917, paragraph 217, the Court of First Instance established that British Airways was an 'obligatory business partner'. British Airways argued that it was not an obligatory business partner on account of the fact that the travel agencies had to offer the tickets of a broad range of airlines, and therefore they had substantial bargaining power. The Court rejected British Airways' argument given that British Airways was a single airline accounting for a large proportion of the tickets sold by a travel agency.

1177 The Commission chose 2005 as a representative example and has no reason to believe that the conclusions drawn do not apply to other years. Moreover, Intel has not contested or commented on the financial data included in the 26 July 2007 SO, Section 3.3.3 entitled 'Financial data'.

1178 Intel 10-K report filed on 20 February 2008, for the financial year ended 31 December 2007, pp. 23, 32 and 47, downloaded and printed on 30 March 2009 from http://www.sec.gov/Archives/edgar/data/50863/000089161808000106/f36442e10vk.htm.

AMD 10-K report filed on 26 February 2008, for the financial year ended 29 December 2007, pp. 46 and 60, downloaded and printed on 30 March 2009 from http://www.sec.gov/Archives/edgar/data/2488/000119312508038588/d10k.htm.

Dell 10-K report filed on 31 March 2008, for the financial year ended 1 February 2008, pp. 20 and 23, downloaded and printed on 30 March 2009 from http://www.sec.gov/Archives/edgar/data/826083/000095013408005718/d55156e10vk.htm.

* Including R&D, marketing, general & administrative expenses and similar items.

(876) The basic structure of the profit and loss statement reflects the fact that some cost items vary with output (such as cost of goods sold) and others are fixed (such as R&D and marketing). Therefore, the profit and loss statement provides important information about the potential profitability and risks of a business, such as for example the effect of demand fluctuations on profits. Gross margins essentially reflect the difference between sales and the variable cost of producing the relevant output, before fixed costs. A company with a large proportion of fixed costs thus needs to generate substantial gross margins to cover its fixed costs and remain profitable.

(877) The barriers to entry discussed in sections 3.3.1 and 3.3.2 result from sunk investment, which is associated with fixed costs for activities such as R&D, marketing and plant investment. In general, a high share of fixed costs is indicative of significant barriers to entry and expansion. These barriers to entry give rise to market power, which in turn enables a firm to set prices above marginal costs. In the presence of fixed costs, pricing above marginal cost is necessary for a firm to generate profits and thus remain viable. As long as barriers to entry remain moderate, new entrants could be expected to compete away any supra-competitive profits, leading to more or less comparable levels of net profits across companies (after accounting for risk). The higher the proportion of fixed costs in a given industry, the more concentrated it is likely to be, because higher mark-ups are necessary for firms to remain profitable.

(878) Assuming that gross margins represent the closest approximation of mark-ups on marginal costs available in the published accounts, both Intel and AMD, with gross margins of 59% and 41% respectively, earn significant mark-ups. However, as indicated above, these economic rents are necessary for the firms to profitably remain in a market that is characterised by substantial fixed costs. Research and development and marketing, general and administrative expenses each account for approximately half of Intel's and AMD's operating expenses. Both the high mark-ups on marginal costs and the high fixed costs are consistent with the observation that entry into the x86 CPU market requires high sunk investment in R&D and

---

HP 10-K report filed on 18 December 2007, for the financial year ended 31 October 2007, pp. 34 and 45, downloaded and printed on 30 March 2009 from http://www.sec.gov/Archives/edgar/data/47217/000104746907010151/a2181429z10-k.htm.

Microsoft 10-K report filed on 31 July 2008, for the financial year ended 30 June 2008, pp. 20, 29-30, 41 and 72, downloaded and printed on 30 March 2009 from http://www.sec.gov/Archives/edgar/data/789019/000119312508162768/d10k.htm.

1179 Financial years: Intel: beginning of January – end of December; AMD: beginning of January – end of December; Dell: beginning of February – end of January/beginning of February; HP: beginning of November – end of October; Microsoft: end of June/beginning of July – end of June.

branding. Likewise, the prevailing cost structure is consistent with the fact that the x86 CPU market is highly concentrated. Despite its significant gross margin, in 2005, AMD generated an operating margin of only 4%, whereas Intel earned substantial operating margins, of 31%.

(879) In contrast, the production of PCs and servers is a lower-margin operation, and the OEMs' financial data reflect this. Dell generates gross margins of 18%. In the case of HP, approximately [...] the company's turnover relates to PCs, servers and related products. Its group-wide gross margin of 23% also includes the imaging and printing business, where it has a market-leading position and may be expected to earn somewhat above-average returns. The OEMs' lower level of fixed costs is consistent with the fact that the PC/server market is significantly less concentrated than the x86 CPU market. Dell and HP's operating margins of 9% and 4%, respectively, are, *a priori*, not indicative of substantial market power. The same applies to AMD: its 4% operating margin is in the same range as the PC assemblers, despite its much higher share of fixed costs.

(880) In contrast, Intel's financial data are indicative of the fact that the company has substantial market power that cannot be explained by the need to cover fixed costs alone. In fact, Intel's operating margins are comparable to those of Microsoft, which enjoys a near-monopoly in its market and has been found to be dominant in a previous Commission Decision.[1180] The financial data hence confirm that there are significant barriers to expansion and entry in the x86 CPU market. Due to these barriers, Intel enjoys substantial market power that has not been effectively contested over a prolonged period.

3.3.4. Conclusion

(881) On the basis of the above analysis, it can be concluded that there are significant barriers to entry and expansion present in the x86 CPU market. They arise from the sunk investment in research and development and production facilities that is necessary to supply x86 CPUs. Intel has not contested the Commission's findings on barriers to entry.[1181] Intel's strong must-stock brand and the resulting product differentiation provide it with additional market power.

1180 Case no. COMP/37.792 - Microsoft, Decision of 24 March 2004. See http://ec.europa.eu/comm/competition/antitrust/cases/decisions/37792/en.pdf.

1181 The only comment Intel has made in its Reply to the 26 July 2007 SO with respect to barriers to entry is that *"the SO's conclusion with regard to dominance is based simply on a formalistic application of market share data and entry barrier analysis."* (paragraph 727 of Intel Reply to the 26 July 2007 SO) and that *"[m]arket shares and barriers to entry and expansion, by themselves, are not very informative about the intensity of competition in the relevant market."* (paragraph 728 of Intel Reply to the 26 July 2007 SO)

(882) The identified very high barriers to entry and expansion are consistent with the observed market structure, where all competitors to Intel, except AMD, have exited the market or are left with an insignificant share. Prior to 2000, a number of other companies manufactured x86 CPUs. Those companies included IDT, Rise Technology, SGS-Thomson, IBM and Texas Instruments. None of those companies manufacture x86 CPUs any longer.[1182]

3.4 Intel's arguments

(883) Intel argues that the Commission has incorrectly asserted that Intel is dominant.[1183] To support that claim, Intel argues that in order to establish dominance under the case-law, the Commission should show that Intel had a freedom of action that allowed it to act largely in disregard of its competitors and customers.[1184] Intel asserts that it did not enjoy such a freedom of action during the relevant period.

(884) Intel essentially makes two main arguments. The first is that the degree of buyer power in the market means that Intel cannot behave independently of its customers. In this regard, Intel makes reference to paragraph 71 of the *Hoffmann-La Roche*[1185] judgment where the Court ruled that "*the fact that an undertaking is compelled by the pressure of its competitors' price reductions to lower its own prices is in general incompatible with that independent conduct which is the hallmark of a dominant position.*" Intel's second argument logically follows on from the first, and it is that prices in the CPU industry have experienced significant declines in recent years. According to Intel, this is indicative of healthy competition in the industry, and would hence demonstrate that Intel cannot be dominant. These arguments are examined in subsections 3.4.1 and 3.4.2.

3.4.1. OEM buyer power

(885) Intel at several points argues that it cannot possess market power on the grounds that OEMs exert significant buyer power. For example, Intel states that OEMs "*wield very substantial negotiating leverage by virtue of their ability to shift business to AMD, which they routinely use to play Intel and AMD off each other to extract discounts and drive prices down. This evidence, which is reinforced by the pattern of consistent, large price declines over time, is wholly incompatible with the independent conduct that is the hallmark of a dominant position*".[1186]

1182 Mercury Report "PC Processors and Chip Sets – Updated Edition 3Q2006", pp. 3-3.

1183 Intel Reply to the 26 July 2007 SO, paragraph 757.

1184 Intel Reply to the 26 July 2007 SO, paragraph 759.

1185 Case 86/76 *Hoffmann-La Roche*, paragraph 71.

1186 Intel Reply to the 26 July 2007 SO, paragraph 729. See also for example paragraphs 762 and 764 of Intel Reply to the 26 July 2007 SO.

Consequently, Intel implies that the discounts it offered to OEMs are the result of competitive pressure exerted by OEMs.

(886) However, throughout its argumentation on buyer power, Intel ignores the fundamental element in its relationship with OEMs, namely the fact that it is an unavoidable trading partner for them: OEMs depend on Intel for what is the most important single hardware component in their computers. As such, Intel is a must-stock brand.

(887) As has been outlined in section 3.2, Intel has been the market leader for many years, and has consistently supplied more than 70-80% of the market. In the overall x86 CPU market, in volume terms, on the basis of the relevant Mercury data, between the first quarter of 1997 and the first quarter of 2008, Intel's quarterly volume shares ranged from [...]% (second quarter of 2006) to [...]% (second quarter of 1997). Intel's average volume share in that period was [...]% per quarter, with only three quarters below [...]% (see recital (842)). In revenue terms, on the basis of the relevant Mercury data, between the first quarter of 1997 and the first quarter of 2008, Intel's shares ranged from [...]% (second quarter of 2006) to [...]% (second quarter 1997), with an average of [...]% per quarter (see recital (844)). Those historically high market shares ensure Intel a legacy advantage in its relations with OEMs. OEMs therefore buy Intel x86 CPUs because no other x86 CPU manufacturer would be able to supply exclusively all the OEMs in the market; Intel's position ensures that it will be on the market in the foreseeable future. A new entrant or competitor would evidently have to overcome such a barrier.

(888) At the same time, Intel has built up a formidable brand presence.

(889) As was described in section 3.3.2, between 1997 and 2007, Intel spent considerably higher amounts on marketing than AMD. Intel's expenditure on marketing its x86 CPUs amounts to approximately 14%-17% of Intel's annual turnover during each year. Through its marketing budget, Intel funds extensive advertising campaigns (on the television, news press and the web), and engages in continuing marketing efforts via its BDMs ("business development managers") and ACMs ("account managers") who work directly with OEMs, corporate IT managers and retailers.

(890) As a result of this, OEMs' customers demand PCs and servers with Intel x86 CPUs. For example, HP has stated that "[a]*s regards consumer/business PCs, notebooks and servers,* [Intel's CPUs are a 'must have' in any new product]."[1187] Similarly, NEC specifies that "*clients frequently specify in their tender document, that they wish to see Intel CPU included in the products. The Intel brand has a stronger reputation in the professional market than AMD.*"[1188] In the same vein, referring to a study among IT

1187 HP submission of 6 August 2004, p. 5, answer 6.1.

1188 NEC submission of 15 December 2005, p. 12, answer 29.

decision-makers in the Government, University and Financial sectors in May-June 2004, an internal Intel memo states that among those managers, Intel's " brand equity (preference) is "*significantly stronger for Intel CPUs with* [...]*% compared to a much lower* [...]*% who prefer AMD for their servers. The preference for AMD increases* [...]*% points for low end servers while the gap between Intel* ([...]*%) and AMD* ([...]*%) is narrower in* [...]." It adds that "*the* [brand preference] *gap between these two main end use segments* [the consumer (freedom of choice: lower preference) and that in the business segment (safety of purchase: higher preference)] *remains large*".[1189]

(891) Therefore, OEMs generally need to have branded computers with Intel x86 CPUs to satisfy their customers' needs or preferences.

(892) The barriers to entry on the market which were outlined in recitals (854) to (866) also reinforce Intel's status as an unavoidable trading partner. There has been no entry in the market in the past 10 years. On the other hand, several companies which were active on the marked prior to 2000 have exited the market.[1190]

(893) The dependence of OEMs on Intel extends not only to the x86 CPU product itself, but also to their financial bottom line (in this respect, the low OEM operating margins, both in absolute terms and in comparison to Intel (outlined in section 3.3.3) are significant). The rebates that Intel grants are an important element for OEMs to consider. Indeed, this is often illustrated by the OEMs themselves in contemporaneous evidence. For example, HP stated that "[...]"[1191] NEC stated that "*the annual* [Intel] *funds* (...) *is a key point to achieve the budget.*"[1192] Acer stated that "*the ecap funding could have made the difference between nearly breaking even or showing a profit* (...)".[1193]

(894) It is of course natural that OEMs will attempt to exert leverage vis-à-vis Intel by using the possibility that they could switch some of their supplies to AMD, in particular when AMD is an increasing competitive threat. But this does not change the fundamentals of their relationship with Intel - Intel remains an unavoidable trading partner on which the OEMs depend. Given this, it is not plausible to argue that OEMs hold buyer power over Intel (at least not to the extent that Intel would not possess substantial market power). Therefore, in this case, buyer power may not be considered a sufficiently effective constraint because it only ensures that a limited segment of OEMs' purchases from Intel could at any time be shielded from the market power of Intel.

1189 Intel submission EC-ART18-012621 – 012622.

1190 See recital (126).

1191 E-mail from [HP executive] to [HP executive]of 3 September 2004 entitled 'RE: AMD'. HP submission of 23 December 2005, Appendix 19.

1192 NEC Supervisory Board Report of 27 June 2003, p. 6. Document SS3 of the [NEC] Inspection file.

1193 Acer submission of 9 February 2006, reply to question 43.

(895) Indeed, the Intel conduct which is the subject of this Decision must be seen in the light of the increasing competitive threat represented by AMD. Therefore, Intel's argument that the discounts it offered to Dell and HP constitute proof of the existence of price reductions due to competitive pressure cannot be accepted.[1194] This is because the discounts in question were conditional on Intel exclusivity or quasi-exclusivity, and they constitute an abuse of a dominant position the aim of which was to foreclose AMD from the market. The fact that Intel was able to make the rebates conditional upon (quasi)exclusivity or that OEMs were willing to accept such conditionality shows that it had market power.

(896) Intel argues that Toshiba exercised substantial negotiating leverage over Intel by threatening to shift a part of its x86 CPU purchases to AMD.[1195] Without prejudice to the legality of Intel's rebate arrangements with Toshiba, the Commission has chosen not to examine Intel's rebate arrangements with Toshiba in greater detail. Nevertheless, Intel's argument about Toshiba threatening to shift a part of its x86 CPU supplies to AMD and thereby pressuring Intel to offer better rebate terms is somewhat undermined by the very telling market figures: in the server and desktop segments, Toshiba was 100% Intel-exclusive between 2000 and 2007. In the mobile segment, while it was Intel exclusive between 2001 and 2006, in 2000 it purchased [...]% and in 2007, [...]% of its supplies from AMD.[1196] These market data, which show that Toshiba was almost entirely Intel-exclusive in the period covered by this Decision and hence had a close relationship with Intel, undermine the strength of Intel's claim.

(897) Intel also makes reference to case-law which it argues would support its argument relating to buyer power.

(898) Firstly, Intel refers to paragraph 366 of *Italian Flat Glass*[1197] where the Court found that the Commission erred in establishing that three flat glass manufacturers held a collective dominant position vis-à-vis the Fiat group and stated that *"The Commission has not even attempted to gather the information necessary to weigh up the economic power of the three producers against that of Fiat, which could cancel each other out."*[1198]

1194 With respect to Dell, see Intel Reply to the 26 July 2007 SO, paragraphs 135, 154 and 155. With respect to HP, see Intel Reply to the 26 July 2007 SO, paragraphs 323, 326-327 and 330.

1195 Intel Reply to the 26 July 2007 SO, paragraphs 492-493.

1196 Gartner data.

1197 Intel Reply to the 26 July 2007 SO, paragraph 762 and footnote 1531.

1198 Joined Cases T-68, 77 and 78/89, *Società Italiana Vetro v Commission* (Italian Flat Glass), paragraph 366.

(899) The first point to note in this regard is that in this case, the Commission has carried out an assessment of Intel's position in the market and that of the OEMs. Moreover, while the cited sentence from *Italian Flat Glass* indeed recognises the importance of assessing the buyers' economic strength that might counterbalance the suppliers' dominance, the factual situation in *Italian Flat Glass* was significantly different to that in this case.

(900) Firstly, Fiat enjoyed a monopsony in the relevant market. The Commission considered that *"Fiat enjoys a position of almost total monopoly in Italy as a purchaser."*[1199] In his case, none of Intel's customers enjoys a market position that comes even close to that of Fiat. The largest OEM has a worldwide share of sales of computers of 15-20%.

(901) Secondly, in *Italian Flat Glass*, the Commission alleged that three companies held collective dominance and together had 79% of the market. The market structure in this case is markedly different because Intel, as the sole dominant x86 CPU manufacturer, constantly held market shares consistently in excess of or around 70-80% in the overall x86 CPU market (as well as any sub-markets) during the period covered by this Decision.

(902) Therefore, it cannot be concluded that OEMs' buyer power in this case might balance Intel's market power in the same way that Fiat's buyer power could have balanced that of the flat glass manufacturers in Italy.

(903) In its Reply to the 26 July 2007 SO, Intel also makes reference to paragraph 32 of the *Gøttrup-Klim* judgment[1200] where the Court stated that: *"In a market where product prices vary according to the volume of orders, the activities of cooperative purchasing associations may, depending on the size of their membership, constitute a significant counterweight to the contractual power of large producers and make way for more effective competition."*[1201] *Gøttrup-Klim* examined the compatibility with competition law of membership restrictions in the statute of cooperative purchasing associations. In paragraph 35 of the judgment, the Court noted that one of the primary objectives of such associations was to maintain a contractual power in relation to producers. Therefore, paragraph 32 must be understood in this context, that is, that while individual members would not be in a position to represent their interests, gathering a critical mass, they could be more effective together in negotiations. Therefore, it is not a situation which resembles that of OEMs vis-à-vis Intel, where OEMs negotiate individually with Intel, unaware of the conditions that Intel offers to their competitors.

1199 *Società Italiana Vetro v Commission* (Italian Flat Glass), *op.cit.*, paragraph 254.

1200 Intel Reply to the 26 July 2007 SO, paragraph 762 and footnote 1531.

1201 Case C-250/92 *Gøttrup-Klim* [1994] ECR I-5641, paragraph 32.

(904) In order to establish that OEMs have countervailing buyer power, Intel also refers to the *Enso/Stora* merger decision[1202] where the Commission concluded *"that Tetra Pak has countervailing buyer power to such an extent that it will neutralise the potential increase in market power of the merger between Stora and Enso."*[1203] The Commission also added that *"the merger will result in a market structure with one large and two smaller suppliers facing one large and two smaller buyers. This is a rather exceptional market structure. On balance, the Commission considers that the buyers in these rather special market circumstances have sufficient countervailing buyer power to remove the possibility of the parties' exercising market power".*[1204]

(905) In this regard, it should first be made clear that in the *Enso/Stora* merger decision, the Commission specified that the market structure was exceptional. Therefore, taking into account that buyer power has to be established on a case-by-case basis, conclusions in the *Enso/Stora* case cannot be generalised. Secondly, Tetra Pak's situation vis-à-vis its suppliers was different from that of the OEMs vis-à-vis Intel and/or AMD. Tetra Pak bought its supplies from a wide range of suppliers: Enso, Stora, AssiDomän and Korsnäs, and outside the EEA, Tetra Pak also sourced from other local suppliers.[1205] The *Enso/Stora* decision also refers to Tetra Pak's business strategy to diversify its suppliers in order not to become dependent.[1206] Because Intel is an unavoidable business partner for OEMs, they have no means to neutralise Intel's market power by diversifying their supply sources other than by attempting to partially source from AMD. In this regard, AMD may capture only a part of OEMs' supplies, which will be a fraction of the supplies they must under any circumstances buy from Intel. Therefore, it is not realistic to consider that an OEM would switch its entire x86 CPU sourcing away from Intel.

3.4.2. Falling prices

(906) Intel also argues that "*evidence on pricing outcomes points to intense competition in the market for microprocessors. Microprocessor prices declined at an average rate of more than 35 percent per year during and after the SO exclusion period. Microprocessor prices in fact declined considerably more rapidly than prices for personal computers, storage devices and other computer-related products. These price declines brought large gains to the ultimate consumers who purchase computers. This evidence is incompatible with a finding of market domination by an undertaking.*"[1207] In the same vein, Intel states

---

1202 Intel Reply to the 26 July SO, paragraph 762 and footnote 1531.

1203 Case IV/M.1225 *Enso/Stora,* paragraph 92.

1204 Case IV/M.1225 *Enso/Stora,* paragraph 97.

1205 Case IV/M.1225 *Enso/Stora,* paragraphs 89-90.

1206 Case IV/M.1225 *Enso/Stora,* paragraph 91.

1207 Intel Reply to the 26 July 2007 SO, paragraph 749.

that *"Professor [...] shows in his report that prices of quality adjusted microprocessors have fallen over time, and have fallen faster than the prices of any other product for which price data is available"*.[1208]

(907) The fact that prices in a market may be falling is not in itself inconsistent with the existence of a dominant position.[1209] In this case, there are a number of factors which reinforce, rather than negate the existence of a dominant position, even if prices were falling. These will be further outlined in this subsection.

(908) The first point to make is that the microprocessor industry is characterised by rapid technological progress. Indeed, as was specified in section V.5, CPU transistor density generally doubles about every two years, a development called "Moore's Law" after Gordon Moore, the founder of Intel.[1210] In this regard, Professor [...], on behalf of Intel, refers to Mr. Moore indicating that fast technological change *"was the way electronics was going to be cheap"* and *"make the yields go up, and get the cost per transistors down dramatically"* every two years.[1211] In other words, according to how it is termed, over time, this translates into either increased performance of the CPU at equivalent cost or equal performance at lower cost. As such, falling prices are an intrinsic feature of this industry given its technical characteristics irrespective of the state of competition in the market. Intel cannot therefore argue that the fact that prices are falling indicates that it does not hold a dominant position.

(909) As an additional point, the Commission notes that the concept of "quality adjusted" price is a very subjective notion: even supporting documents to Professor [...]' report point out that they are particularly difficult to measure in high technology industries: *"It has been very difficult to estimate the value of improvements or deteriorations in products, such as computers, semiconductors, and so forth. Manufactured by companies included in "high-tech" industries. These industries may frequently develop new products that are technologically superior and cost less. The conventional quality adjustment methodology is suitable for situations in which increased resource costs for producing a product are necessary for improved performance. This is the exact opposite of what typically happens in industries that manufacture sophisticated products composed of electronic components."*[1212]

1208 Intel Reply to the 26 July 2007 SO, paragraph 765.

1209 Case 85/76 *Hoffmann-La Roche*, paragraph 74.

1210 See footnote 153.

1211 Excerpts from A Conversation with Gordon Moore: Moore's Law, in Intel Reply to the 26 July 2007 SO, [...] Report, in Exhibit II.1, supporting document to Section VI of his Report.

1212 United States Bureau of Labour Statistics, Handbook of Methods, Chapter 14, p. 3. INtel reply to the 26 July 2007 SO. Report of Professor [...], Annex 33.

(910) Finally, it should be noted that Intel has applied loyalty-enhancing rebates to OEMs. In *Hoffmann-La Roche*, the Court considered that fidelity rebates, when prices are falling, indicate the existence of dominant position, rather than negate it.[1213] This is because such rebates show that the dominant company is able or free to adopt a price policy to forestall competitive pressure.

3.4.3. Conclusion

(911) In the light of the analysis outlined in the subsections 3.4.1 and 3.4.2, the Commission concludes that OEMs did not possess buyer power during the period covered by this Decision, or sufficient buyer power to counterbalance Intel's freedom of action. In addition, the fact that prices may be falling does not indicate that Intel does not hold a dominant position.

3.5 Conclusion on dominance

(912) In the light of the analysis contained in sections 3.2-3.4, it is concluded that at least in the infringement period covered by this Decision (which is between October 2002 and December 2007),[1214] Intel held a dominant position in the market.

4. Abuse of a dominant position

4.1 Introduction

(913) Article 82 of the Treaty prohibits as incompatible with the common market any abuse by one or more undertakings of a dominant position within the common market or in a substantial part of it, insofar as it may affect trade between Member States. Article 54 of the EEA Agreement contains a similar prohibition.[1215]

(914) In a long line of consistent case law, the Court of Justice and the Court of First Instance have set out that "*the concept of abuse is an objective concept relating to the behaviour of an undertaking in a dominant position which is such as to influence the structure of a market where, as a result of the very presence of the undertaking in question, the degree of competition is weakened and which, through recourse to methods different from those which condition normal competition in products or services on the basis of the transactions of commercial operators, has the effect of hindering the*

1213 Case 85/76 *Hoffmann-La Roche*, paragraph 76.

1214 See recital (1640) where the Commission explains how it uses its discretion as regards the relevant period.

1215 However, the reference in Article 82 to trade "*between Member States*" is replaced in the EEA Agreement by a reference to trade "*between Contracting Parties*", and the reference to abuse "*within the common market or in a substantial part of it*" is replaced by a reference to abuse "*within the territory covered by this* [EEA] *Agreement or in a substantial part of it*".

maintenance of the degree of competition still existing in the market or the growth of that competition".[1216]

(915) The Community Courts have also ruled that Article 82 of the Treaty "*prohibits a dominant undertaking from eliminating a competitor and thereby reinforcing its position by having recourse to means other than those within the scope of competition on the merits. From that point of view, not all competition on price can be regarded as legitimate.*"[1217]

(916) On 24 February 2009, a Commission Communication entitled "Guidance on the Commission's enforcement priorities in applying Article 82 of the Treaty to abusive exclusionary conduct by dominant undertakings" ("guidance paper") was published.[1218] The guidance paper is not intended to constitute a statement of the law and is without prejudice to the interpretation of Article 82 by the Court of Justice or the Court of First Instance.[1219] As a document intended to set priorities for the cases that the Commission will focus upon in the future, it does not apply to proceedings that had already been initiated before it was published, such as this case. In this context, the Commission also takes account of the fact that the guidance paper was published only after Intel had been given the opportunity to make its views known on the 26 July 2007 SO, the 17 July 2008 SSO and the Commission's letter of 19 December 2008. Consequently, the Commission considers that the guidance paper does not apply to this case. The Commission nevertheless takes the view that this Decision is in line with the orientations set out in the guidance paper.

(917) Sections 4.2 and 4.3 show that Intel has engaged in two separate types of exclusionary abuses of its dominant position, the effects of which reinforce each other. These are conditional rebates and payments (section 4.2) and so called "naked restrictions" (section 4.3). After examining certain general Intel arguments relating to

---

1216 Judgment of 11 December 2008 in Case C-52/07 *Kanal 5 and TV 4* not yet reported, paragraph 25. See also Case 85/76 *Hoffmann-La Roche v Commission*, paragraph 91; Case 322/81 *Nederlandsche Banden-Industrie-Michelin v Commission* [1983] ECR 3461, paragraph 70; *AKZO v Commission*, *op. cit.*, paragraph 69; Case C-95/04 P *British Airways v Commission* [2007] ECR I-2331, paragraph 66; Judgment of 2 April 2008 in Case C-202/07 P *France Télécom v Commission* not yet reported, paragraph 104; Case T-219/99 *British Airways v Commission* [2003] ECR II-5917, paragraph 241.

1217 Case C-62/86 *AKZO v Commission*, *op. cit.*, paragraph 70; Case T-228/97 *Irish Sugar v Commission*, *op. cit.*, in particular, paragraph 111.

1218 OJ C 45, 24.2.2009, p. 7.

1219 See paragraph 3 of the Guidance Paper.

AMD (section 4.4), section 4.5 explains that Intel has engaged in a single, continuous strategy aimed at foreclosing AMD from the market.[1220]

(918) As a preliminary general point, in paragraph 674 of its submission of 5 February 2009 related to the SSO, Intel states that in the 17 July 2008 SO, the Commission "*has adopted the expedient of eliminating the requirement to show actual foreclosure in order to establish an infringement of Article 82.*" In the following paragraph, Intel goes on to state that: "*Such a per se approach is wholly misconceived as a matter of law. It is clear from both the case law and the Commission's own guidance on Article 82 that is essential to establish actual foreclosure in order to establish an infringement*".[1221]

(919) In this regard, two points are noteworthy. Firstly, there has been no change in approach by the Commission throughout this case. The approach that has been followed has been clearly set out in both the 26 July 2007 SO and in the 17 July 2008 SO, and has been maintained in this Decision.[1222] Secondly, contrary to Intel's unsubstantiated assertions, there is no requirement in the case-law to demonstrate actual foreclosure in order to prove an infringement of Article 82 of the Treaty.[1223] Similarly, leaving aside the fact that the guidance paper does not apply to this decision, there would be no support for Intel's contentions in that document either.[1224]

4.2 Conditional rebates

4.2.1. Introduction

(920) The Court of Justice has consistently ruled that "*an undertaking which is in a dominant position on a market and ties purchasers - even if it does so at their request - by an obligation or promise on their part to obtain all or most of their requirements exclusively from the said undertaking abuses its dominant position within the meaning of article 82 EC, whether the obligation in question is stipulated without further qualification or whether it is undertaken in consideration of the grant of a rebate. The*

1220 The Commission points out that according to the case law, a breach of Article 82 of the Treaty can also result from the anticompetitive object pursued by a dominant undertaking; see Case T-203/01 *Michelin II*, op. cit, paragraph 241; Joined Cases T-24/93, T-25/93, T-26/93 and T-28/93 *Compagnie maritime belge*, op. cit, para 149; confirmed by Joined Cases C-395/96 P and C-396/96 P *Compagnie Maritime Belge Transports*, *op. cit.*, paragraph 118-120. See also Judgment of 2 April 2009 in Case C-202/07 P *France Télécom v Commission* not yet reported, paragraphs 107 to 113.

1221 Intel makes similar arguments in paragraphs 693-703 of its submission of 5 February 2009 related to the 17 July 2008 SSO, although these are more specifically related to the naked restrictions category of abuse.

1222 In terms of labelling, at no point has the Commission stated that it has employed a *per se* approach.

1223 Case T-203/01 *Michelin v Commission (Michelin II)* [2003] ECR II-4071, paragraph 239; and Case T-219/99 *British Airways v Commission* [2003] ECR II-5917, paragraph 293; see also recital (922).

1224 See paragraphs 20 and 21 of the Guidance Paper, and, in the context of price-based exclusionary conduct, paragraph 27.

same applies if the said undertaking, without tying the purchasers by a formal obligation, applies, either under the terms of agreements concluded with these purchasers or unilaterally, a system of fidelity rebates, that is to say discounts conditional on the customer's obtaining all or most of its requirements - whether the quantity of its purchases be large or small - from the undertaking in a dominant position".[1225] The Court also held that the granting of such "fidelity discounts" "*in order to give the buyer an incentive to obtain its supplies exclusively from the undertaking in a dominant position was incompatible with the objective of undistorted competition within the common market.*"[1226] Furthermore, the Court qualifies as an abuse of a dominant position discounts "*the grant of which was, for most of the time, expressly linked to the condition that the co-contractor obtained its supplies over a given period entirely or mainly from* [the dominant company]".[1227]

(921) It should be noted that the Court of First Instance has stated 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.[1228]

(922) Intel argues that beyond the requirement of an exclusivity or quasi-exclusivity condition of the discounts required by the case law quoted in recital (920), the Court also considered *"whether the scheme in question did in fact affect the situation of competitors (i.e. whether they did actually or likely foreclose competitors)"*.[1229] However, a reading

---

1225 Case 85/76 *Hoffmann-La Roche v Commission* [1979] ECR 461, paragraph 89. See also Case C-62/86 *AKZO v Commission* [1991] ECR I-3359, paragraph 149; Case T-65/89 *BPB Industries and British Gypsum v Commission* [1993] ECR II-389, paragraphs 71 and 120; Case C-393/92 *Municipality of Almelo and others* [1994] ECR I-1477, paragraph 44; Joined Cases T-24/93, T-25/93, T-26/93 and T-28/93 *Compagnie Maritime Belge and Others v Commission* [1996] ECR II-1201, paragraphs 182 to 186; Case T-203/01 *Michelin v Commission (Michelin II)* [2003] ECR II-4071, paragraph 56; and Case T-219/99 *British Airways v Commission* [2003] ECR II-5917, paragraph 244, confirmed on appeal in Case C-95/04 P *British Airways v Commission* [2007] ECR I-2331, paragraphs 62 and 65.

1226 Case C-95/04 P*op. cit.British Airways v Commission, op. cit.*, paragraph 62.

1227 Case C-95/04 P *British Airways v Commission, op. cit.*, paragraph 62. See also case 85/76 *Hoffmann-La Roche v Commission, op. cit.*, paragraph 90.

1228 In this regard, the Court of First Instance has stated that *"In those circumstances, the applicant cannot accuse the Commission of misjudging or misinterpreting the evidence cited in the contested decision where it stated that 'any increases in Siúcra volumes purchased by ... were likely to lead to a reduction in 1 kg ... purchases, which was the product for which Burcom was competing as supplier' (end of point 82), and that 'the likely effect of the rebate was to tie ... to [the applicant]' (end of point 151). The case-law shows (see recital 114 above) that such a practice is an abuse within the meaning of Article 86 in so far as it seeks, through the granting of a financial advantage, to prevent customers from obtaining their supplies from competitors"*, Case T-228/97 *Irish Sugar v Commission* [1999] ECR II-2969, paragraph 221.

1229 Intel Reply to the 26 July 2007 SO, paragraph 775 with reference to Case T-219/99 *British Airways v Commission, op. cit.*, paragraphs 96-100.

of the case law referred to in recital (920) reveals that this is not the case.[1230] Contrary to what Intel argues, the Courts do not look into the actual impact of the alleged anticompetitive conduct on the market in the analysis undertaken in cases like *Microsoft*[1231] or *British Airways*[1232] [1233] either. Indeed, even with regard to conduct that does not constitute fidelity discounts within the meaning of the *Hoffmann La Roche* case law the Community Courts have established that *"for the purposes of establishing an infringement of Article 82 EC, it is not necessary to demonstrate that the abuse in question had a concrete effect on the markets concerned. It is sufficient in that respect to demonstrate that the abusive conduct of the undertaking in a dominant position tends to restrict competition or, in other words, that the conduct in question is capable of having or likely to have such an effect."*[1234]

(923) According to the case-law,[1235] as regards discounts other than fidelity discounts within the meaning of the Hoffmann-La Roche case-law, "*it is necessary to consider all the circumstances particularly the criteria and rules for the grant of the discount and to investigate whether, in providing an advantage not based on any economic service justifying it, the discount tends to remove or restrict the buyers freedom to remove or to choose its sources of supply*".[1236] Contrary to what Intel argues, however, this does not require evidence of actual foreclosure.[1237] In addition, a violation of Article 82 may also

---

1230 Intel's arguments that a demonstration of actual foreclosure is generally required under Article 82 of the Treaty (that is to say beyond the scope of conditional rebates) are addressed in section VII.4.1 above.

1231 Case T-201/04 *Microsoft v Commission* [2007] ECR II-3601, at paragraph 1035.

1232 Case C-95/04 *British Airways v Commission* [2007] ECR I-2331, paragraphs 92-95.

1233 In that respect, Intel wrongly concluded in paragraph 778 of its Reply to the 26 July 2007 SO that the Commission was not in a position to scrutinise the actual effects of British Airways pricing scheme and therefore had to limit itself to the assessment of the likely effects due to the fact that the conduct had started only shortly before the issuing of the second Statement of Objections in those proceedings, and therefore that an assessment of the actual effects was factually impossible. As is clear from paragraph 308 in case T-219/99, the infringement started in 1992 and therefore had lasted for over 7 years at the time of the Commission's Decision. It therefore would have been possible to at least in part assess the actual impact of BA's conduct on the market. Although the Court explicitly ruled that the Commission was not obliged to show actual foreclosure (paragraph 293 of the judgement), the Commission had in fact analysed the actual impact of BA's pricing conduct (paragraph 294 of the judgement). Consequently, it is incorrect to state that the Commission was not in a position to fulfil an actual foreclosure standard of proof as part of an argument that the situations can be differentiated in terms of the case law.

1234 Case T-219/99 *British Airways*, *op. cit.*, paragraph 293. See also Case T-203/01 *Michelin II*, *op. cit.*, paragraph 239.

1235 In Case 85/76, *Hoffmann-La Roche, op. cit.*, paragraph 90, confirmed in Case C-95/04 P *British Airways*, *op. cit.*, paragraphs 61-67.

1236 *Michelin I*, *op. cit.*, paragraph 73; The same idea has been expressed in paragraph 343 of the 26 July 2007 SO. Moreover, the same quote is also set out in paragraph 774 of Intel Reply to the 26 July 2007 SO as being the relevant standard.

1237 See also the case law quote in recital (920).

result from the anticompetitive object of the practices pursued by a dominant undertaking.[1238]

(924) In section 4.2.2, the Commission will show that the level of the Intel rebates granted to Dell, HP, NEC and Lenovo was *de facto* conditional upon those companies purchasing all or nearly all of their x86 CPUs (at least in a certain segment) from Intel and thereby restricting those companies' freedom to choose. Equally, in the case of MSH, the Commission will show that the payments granted were conditional upon selling only PCs based on Intel x86 CPUs and that they thereby restricted MSH's freedom to choose. The Commission considers that the rebates in question were part of a long-term comprehensive strategy aimed at foreclosing competitors from the market (sections 4.3.1 and 4.5).

(925) Whilst the findings referred to in the preceding recital, in the absence of any objective justification, are in themselves sufficient to find an infringement under Article 82 of the Treaty according to the case law,[1239] the Commission will in addition demonstrate in sections 4.2.3-4.2.6 that, on top of fulfilling the conditions of the case law referred to in recitals (920), (921) and (923),[1240] 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 (which is likely to result in consumer harm). Although not indispensable for finding an infringement under Article 82 of the Treaty according to the case law, one possible way of showing whether Intel's rebates and payments were capable of causing or likely to cause anticompetitive foreclosure is to conduct an as efficient competitor analysis (section 4.2.3). On the basis of the results of this analysis and the qualitative and quantitative evidence (sections 4.2.4 and 4.2.5), and given the lack of objective justification and efficiencies (section 4.2.6), the Commission concludes that Intel's conditional rebates to Dell, HP, NEC and Lenovo, as well as Intel's conditional payments to MSH, were an abuse under Article 82 of the Treaty which deserve its particular attention.

1238 Case T-203/01 *Michelin II*, op. cit, paragraph 241; Joined Cases T-24/93, T-25/93, T-26/93 and T-28/93 *Compagnie maritime belge*, op. cit, para 149, confirmed by Joined Cases C-395/96 P and C-396/96 P *Compagnie Maritime Belge Transports*, *op. cit.*, paragraph 118-120. See also Case C-202/07 P *France Télécom v Commission* not yet reported, paragraphs 107 to 113.

1239 In its reply to the 26 July 2007 SO, Intel has claimed that a necessary condition of the case law as regards conditional rebates is the as efficient competitor analysis, although this is not in fact the case (see for example Case C-85/76 *Hoffmann-La Roche*, *op. cit.*, paragraph 89; Case C-62/86, *Akzo*, *op. cit.*, paragraph 149; Case T-203/01 *Michelin II*, *op. cit.*, paragraph 56; and Case C-95/04 P *British Airways*, *op. cit.*, paragraphs 62 and 68).

1240 One objective of Article 82 of the Treaty that underlies the Court's case law in *Hoffmann-La Roche* is indeed to ensure that undertakings in a dominant position do not behave in such a way *"which may directly prejudice consumers but also (...) which indirectly prejudices them by impairing the effective competitive structure as envisaged by Article 3(f) of the Treaty."* (Case 85/76 *Hoffmann-La Roche, op. cit.*, paragraph 125).

4.2.2. Nature and operation of the rebates

4.2.2.1. Introduction

(926) This section explains that the level of the Intel rebates granted to Dell, HP, NEC and Lenovo was *de facto* conditional upon those companies purchasing all or nearly all of their x86 CPUs (at least in a certain segment) from Intel and thereby restricting those companies' freedom to choose. In addition, although this is not indispensable according to the case-law quoted in recitals (920), (921) and (923), the Commission will show that the conditional rebate schemes prevented or made it more difficult for each of those OEMs to source x86 CPUs from AMD. Similarly, the section shows that the payment schemes to MSH were *de facto* conditional upon that company selling exclusively Intel-based PCs. In addition, although not indispensable according to the case-law quoted in recitals (920), (921) and (923), the Commission will show how the Intel conditional payment schemes to MSH operated as an incentive for MSH to sell exclusively Intel-based PCs, and prevented or made it more difficult for MSH to sell AMD-based PCs.

4.2.2.2. Dell

(927) As specified in section VI.2.3, Intel's MCP rebate, or at least a large part of it, was granted in return for Dell's exclusivity to Intel. In other words, the Intel rebates in question were *de facto* conditional on Dell exclusively obtaining its x86 CPU requirements from Intel. The rebate applied across the entire relevant range of output.

(928) Intel argues that, even if its rebates were conditional, the Commission inflated the extent of Dell's consideration of the possibility of losing rebates.[1241] Intel refers to a range of other reasons which it alleges are the actual reasons for Dell not buying AMD x86 CPUs.[1242] Intel also argues that its rebates, even if they were conditional, could not be exclusionary since they did not prevent Dell from switching part of its x86 CPU supplies to AMD in 2006.[1243]

(929) On this point, the Commission first notes that the question is not relevant to the application of the relevant case-law referred to in recital (920), (921) and (923), which has already been addressed in section 4.2.1.

(930) However, in any case, it is clear that the Intel conditional rebates were an important element for the Dell decision to source x86 CPUs exclusively from Intel. Indeed, Dell submitted to the Commission that, during the period 2003-2005, it "*continuously evaluated technology options, including the possibility of introducing*

1241 Intel Reply to the 26 July 2007 SO, paragraph 139.

1242 Intel Reply to the 26 July 2007 SO, paragraph 138.

1243 Intel submission of 6 July 2007.

products utilizing processors from AMD", that it has undertaken "*a deliberate assessment of the pros and cons of adopting a dual-source processor* strategy" and that "*An important part of this assessment was a consideration of the financial impact on Dell of the potential change in processor strategy*".[1244] This assessment consisted in analysing the impact of a dual source strategy on the amount of Intel rebates to Dell. As Dell concluded in its submission: "*there was a general consensus within Dell that such a change* [to a dual source processor strategy] *would result in a reduction of MCP* [Intel rebates to Dell], *which would have a negative financial impact on Dell, and that this would need to be taken into account in evaluating the benefits of such a fundamental change in strategy.*"[1245]

(931) As outlined in section VI.2.3.2, in the period from late 2002 until December 2005, Dell, which at the time was 100% Intel-exclusive, was actively considering switching a share of its x86 CPU supplies to AMD, whose products it recognised had improved and which in its view offered certain price and performance advantages.

(932) However, given the conditional MCP rebates granted by Intel to Dell, Dell remained exclusively loyal to Intel throughout the period from late 2002 until December 2005. This is clear from Dell's own analysis - any advantage in going with AMD would be more than offset by the associated loss or reduction of the Intel rebate (see section VI.2.3.4.1) as well as from internal Intel documents (see section VI.2.3.4.2), and indeed, Dell did make the decision to remain loyal to Intel.

(933) Therefore, Intel cannot successfully dispute that the conditional rebate payments and particularly projections of their potential loss had an influence on Dell's single sourcing decision. This conclusion can be derived from the part of Dell's company statement which states: "*An important part of this assessment* [pros and cons of adopting a dual source strategy] *was a consideration of the financial impact on Dell* [described in the following sentences as the loss of Intel rebates] *of the potential change in processor strategy*".[1246] This quote even shows by the qualification of the projected rebate loss as "*an important part*" that loss of rebates was in any case not a minor consideration when Dell decided to maintain a single source strategy. The company statement specifies that it describes the thinking of Dell "*during the 2003-2005 time frame*".[1247] The Commission therefore concludes that from Dell's perspective, the business decision to source or not

---

1244 Dell submission of 17 April 2007, "Re: Procurement Strategy: the consequences of choosing AMD as a supplier".

1245 Dell submission of 17 April 2007, "Re: Procurement Strategy: the consequences of choosing AMD as a supplier".

1246 Dell submission of 17 April 2007, "Re: Procurement Strategy: the consequences of choosing AMD as a supplier".

1247 Idem.

from AMD was a multi-causal decision that was ("*importantly*") influenced by the potential loss of MCP rebates that Dell was receiving from Intel. The rebates therefore had the effect of restricting Dell's freedom to choose.

(934) In the same vein, Intel makes references to two concrete projects named [...] and Cassini by which Dell tried to implement AMD in its products, and claims that the reasons why those projects did not materialise cannot be attributed to Intel as they are imputable exclusively to AMD.[1248] However, the evidence presented by Intel does not support such an exclusive causality (i.e. that it was solely down to AMD conduct that Dell did not pursue the projects). With regard to project Cassini, Intel relies on a quote that reads: "*based on AMD backing off the Dell engagement and our* [Dell's] *internal budget constraints I believe we are in agreement we should communicate to AMD the cancellation of the Cassini project*".[1249] That quote clearly does not attribute the cancellation exclusively to "*AMD backing off*",[1250] but also to budget constraints. Indeed, it is very likely that the conditional Intel rebates which aimed to (and succeeded in) keeping Dell Intel-exclusive were a key consideration as regards both "AMD backing off" and Dell's budget constraints. This is demonstrated by the contemporaneous evidence from within Dell as well as Dell's company statement.

(935) Assuming that the MCP rebate would be reduced by 50% in the event that Dell shifted part of its supplies to AMD (see for example recitals (229)-(231)),[1251] requiring AMD to compensate Dell for the loss of those rebates would have had a significant effect on AMD. By way of illustration, in 2003, the annual MCP rebate that Dell would have lost if it had shifted part of its supplies to AMD can be estimated at about [...].[1252] In the same year, AMD made an operating loss of USD 233 million.[1253] In 2004, the annual MCP rebate that Dell would have lost if it had shifted part of its supplies to AMD can be

---

1248 Intel Reply to the 26 July 2007 SO addresses project [project] in its paragraphs 107 - 129 and project Cassini in paragraphs 157 - 160. See also paragraphs (163)-(164) of the present Decision on the way Intel has presented [project]in its Reply to the 26 July 2007 SO.

1249 Intel Reply to the 26 July 2007 SO, paragraph 158.

1250 "*AMD backing off*" does not in any case mean that AMD could not have fulfilled Dell's needs.

1251 This is in fact a conservative assumption which does not take into account the fact that in fact, other Dell assumptions involved a greater loss of rebate - see sections VI.2.3.4.1 and VII.4.2.3.2.

1252 Assuming a [...]% loss of the [...] rebate Dell has received during its FY 2004; for the size of the rebate in that year. See recital (168).

1253 AMD Form 10-K for the fiscal year ended on 28 December, 2003, p. 58. http://www.amd.com/us-en/assets/content_type/DownloadableAssets/TK0304.pdf, downloaded and printed on 25 June 2007.

estimated at about [...].[1254] In the same year, AMD made an overall operating profit of USD 222 million.[1255]

(936) In conclusion, as is outlined in recital (933), Dell's decision for staying Intel-exclusive or switching part of its inputs to AMD is most likely to have been based on a variety of motivators, like any important business decision. The Commission has demonstrated that the Intel rebates were aimed at influencing that choice and actually were one of the factors behind Dell's choice, and more precisely "*an important part*".[1256] This does not preclude the fact that other reasons might have contributed to Dell staying Intel-exclusive during a certain period. Nor does it preclude the possibility that other reasons might have eventually outweighed the effect of the Intel rebates.

(937) Intel finally argues that the MCP rebates were negotiated on a quarterly basis. According to Intel, any unwritten agreement between Dell and Intel about Dell's exclusivity could only have affected the terms offered under future discount negotiations, that is, for future quarters. Intel alleges that this could not render future discounts conditional, but would simply mean that the terms of each (unconditional) future discount, as negotiated each quarter, would differ according to the market circumstances.[1257]

(938) This characterisation of the mechanism of the Intel discounts to Dell is misleading. Conditional rebates incite customers to stay loyal to the dominant firm because they offer economically attractive conditions which can be obtained only if the customer achieves certain exclusivity conditions. In those circumstances, customers which, on the basis only of competition on the merits, may have awarded a part of their purchases to a competing supplier, may prefer to source all or nearly all of their inputs from the dominant company in order to obtain the benefit of the discount.

(939) This economic inducement mechanism functions irrespective of whether the benefits to the customer of staying exclusive are retrospective or prospective, and irrespective of whether they are guaranteed by contract or tacitly agreed. The mechanism works as soon as there is a sufficiently clear understanding for the customer that the dominant company will award it certain rebates if it remains exclusive, and will not award them if it buys from competition.

(940) In this case, as indicated in section VI.2.3.4, it was clear to Dell, and it had been made clear to Dell by Intel, that, if Dell were to stop being Intel exclusive, it would no

---

1254 See section VI.2.3.3.6.

1255 See footnote 1253.

1256 See recital (933).

1257 Intel Reply to the 26 July 2007 SO, paragraph 802.

longer receive a significant amount of the MCP rebates which it had consistently and increasingly been receiving in the past, and which it rightly assumed it would continue to receive it if remained exclusive.

(941) This is precisely the meaning of "conditionality". These MCP rebates were at least in part conditional because they would not be awarded, or not awarded in the same amounts, were Dell to decide not to purchase all its input from the dominant company. In this respect, Intel's depiction of rebates differing "*according to market circumstances*" is also misleading. If the main "*market circumstance*" which matters for the variation of a rebate is whether the customer stays Intel-exclusive or not, then the fact that the rebate falls when the customer switches a part of its supplies away from the dominant company confirms that there was *de facto* conditionality on exclusivity.

(942) Dell's freedom to choose was further limited by the lack of transparent and objective criteria used by Intel to determine the amount of MCP rebate which Dell would lose if it breached the Intel exclusivity. In this regard, there was no written agreement outlining the relevant terms, and Dell was uncertain about how much of the rebate it would lose if it broke its exclusivity with Intel (see section VI.2.3.4.1). The Court has outlined that the intransparency of a rebate scheme applied by a dominant undertaking can be a factor that contributes to its loyalty inducing effect.[1258]

(943) As regards the intransparency of its rebates to Dell, Intel argues that the situation in this case is not comparable to *Michelin I* where the intransparency of the pricing was introduced by Michelin because there is no such significant difference in size between Intel and Dell as there was between Michelin and its tyre resellers.[1259] Therefore, Intel argues that it did not create any intransparency but was itself merely subject to the usual intransparency of negotiations with a major customer which itself made use of the similar lack of knowledge on Intel's side.

(944) In addition, Intel argues that the intransparency of the pricing system is something normal in the x86 CPU market. Intel argues that the Commission "*bases its transparency analysis on the false premise that Intel determine[d] the level of MCP rebate rather than negotiated the discount levels with Dell*".[1260] Intel adds that "*supply arrangements were short in duration and were constantly being renegotiated*".[1261]

1258 In this regard, the Court of Justice has held that "*furthermore, the lack of transparency of Michelin NV's entire discount system, whose rules moreover changed during the relevant period, together with the fact that neither the scale of discounts nor the sales targets or discounts relating to them were communicated in writing to dealers meant that they were left in uncertainty and on the whole could not predict with any confidence the effect of attaining their targets or failing to do* so." See *Michelin I, op. cit.*, paragraph 83.

1259 Intel Reply to the 26 July 2007 SO, paragraph 804.

1260 Intel Reply to the 26 July 2007 SO, paragraph 225.

1261 Intel Reply to the 26 July 2007 SO, paragraph 225 and Report of Professor [...], paragraph 3.1.

According to Intel, Fujitsu-Siemens stated that AMD's discounting process *"is not as transparent and predictable as the Intel process"*.[1262] To conclude on this point, Professor [...] states: *"[t]he 'lack of transparent and objective criteria' is not a creation of Intel; it is a perfectly normal result of the fact that Intel's discounts to Dell were determined through negotiations between two large and sophisticated companies."*[1263]

(945) The Commission first underlines that it has not based its assessment of the unlawfulness of Intel's rebate schemes solely on their intransparency. However, the Commission has observed[1264] that the uncertainty about the share of those rebates which would be lost if Dell were to break the Intel exclusivity reinforces the effect of the conditional rebates. The question whether the uncertain setting of the Intel rebates is a normal feature of agreements in the industry or if it is a creation by Intel is therefore irrelevant to address the Commission's point: whatever its origin, it remains true that the effect of the intransparency reinforces that of the condition.

(946) Furthermore, the Commission also considers that Intel's portrayal of MCP discounts which *"were short in duration and were constantly being renegotiated"* is misleading. All Dell documents examined in section VI.2.3.4.1 in which Dell was analysing the financial consequences of a switch to AMD show that Dell had no doubt that its MCP discounts would remain at least stable or even increase if it stayed Intel-exclusive. The examination of the actual amounts of MCP rebates awarded by Intel to Dell as laid out in the tables in recital (216) (for the period covered by this Decision), as well as the table in recital (272) (for the subsequent period) clearly confirms that Dell expectation: the MCP rebates never decreased, and on the contrary, usually increased steadily during the entire exclusivity period.[1265] They started to decrease immediately after the partial Dell switch to AMD. As Dell explained in its company statement, the MCP arrangement *"was negotiated against the historical backdrop of Dell products being based solely on Intel processors"*.[1266] The notion of a rebate *"negotiated against an historical backdrop"* is inconsistent with one of discounts which would be uncertain by the nature of the industry, *"short in duration"* and *"constantly being renegotiated"*. Intel's claim in that respect is also contradicted by an email of 1 April 2004 from [Intel executive] to [Dell executive]: *"Given some recent communication uncertainties i* [sic] *wanted to capture a few things we've talked about over the past month. –MCP3 started* [...]. – [...]*payout guidelines were;* [...]*%,* [...]*% and* [...]*%...*[...]*% payout agreed to be*

1262 Intel Reply to the 26 July 2007 SO, paragraph 224.

1263 Intel Reply to the 26 July 2007 SO, paragraph 225 and Report of Professor [...], paragraph 64.

1264 As expressed in paragraphs 117, 347, 372 and 492 of the 26 July 2007 SO.

1265 With only one quarter of exception, Q3FY06, where the total MCP rebates decreased from Q2FY06. However, the rebates started increasing again in Q4FY06. In Q4FY06, they were already above the level of Q2FY06 (see tables in recital (216)).

1266 Dell submission of 17 April 2007, p. 1.

[...] *(...).*"[1267] If indeed the MCP arrangement was "*constantly being renegotiated*", it is difficult to understand how it could only be in its third version in April 2004, at least two years after its inception.

(947) During the Oral Hearing, in reply to a Commission question seeking to confirm the Dell submissions described in recitals (190) and (191) on the absence of written formal agreements, Intel submitted that the rebates were indeed concluded on the basis of written exchanges, and that it would provide the Commission with copies of those. However, the documents which Intel eventually transmitted in that respect were only samples of quarterly exchanges of emails between Dell and Intel concerning the [...] and [...] MCP, in which each party summarised the rebates granted for the specific upcoming quarter, and attributed them to certain categories of x86 CPUs or to certain marketing programmes.[1268] These quarterly exchanges do not touch upon the matter of the rates of the categories of rebates agreed between Dell and Intel for the [...] and [...]MCPs, as described in sections VI.2.3.3.1 and VI.2.3.3.2, let alone the conditions attached to those rates or the time horizon thereof. They only implement the rates. Furthermore, they do not address any of the other categories of MCP rebates. Therefore, contrary to what Intel claims, those exchanges do not reflect a quarterly renegotiation of the MCP rebates understanding with Dell, but rather refer to the detailed implementation of rates agreed at higher level, and over a longer period.

(948) Intel's targeted use of its customers' uncertainty is further confirmed by the fact that Intel indicated to its customers that it could move rebates to and from competitors. Thus Intel was able to influence the overall competitive landscape of its customers. For instance, on 18 June 2006, [Intel senior executive] wrote to [Lenovo Senior Executive] about the consequence of Dell's recent announcement of its decision to introduce AMD-based computers in its portfolio. [Intel senior executive] wrote: "[...]".[1269] In the same email, [Intel senior executive] went on to suggest that as a consequence of Dell's move, Intel could shift rebates to Lenovo. He wrote: "[...]"[1270]

(949) By way of illustration, the Commission notes that in the period after that e-mail, Intel's rebates to Lenovo increased substantially (see section VI.2.7, where it is shown how the increased rebates to Lenovo were also conditional upon the cancellation of certain Lenovo AMD-based products). Furthermore, the Commission also notes that

---

1267 Email from [Intel executive] to [Dell executive] of 27 May 2004, *'follow-up'*. Annex to Dell submission of 23 June 2006, F073-L00006273.

1268 Intel's letter to the Commission of 25 March 2008; these quarterly exchanges were submitted by Intel as the following annexes to its 6 January 2006 submission: EC-ART18- 017527-544; 017615-634; 017767-788; 017974-993; 018178-190; 018358-367.

1269 Email from [Intel senior executive] to [Lenovo Senior Executive] of 18 June 2006, entitled "*Re: status check*". Intel submission of 2 June 2008, annex 2, document 2.

1270 Idem.

during 2006, Dell lost [...]% of its overall market share in terms of sales of computers, and hence was reduced to its share of mid-2002.[1271]

(950) In light of the above, it can be concluded that the level of MCP rebates granted by Intel between December 2002 and December 2005 was *de facto* conditional on Dell obtaining all of its x86 CPU requirements from Intel. The rebates in question constitute fidelity rebates which fulfil the conditions of the relevant case-law for qualification as abusive (see recitals (920), (921) and (923)). In addition, they had the effect of restricting Dell's freedom to choose its source of x86 CPU supply and preventing other competitors from supplying Dell over the period in question.

4.2.2.3. HP

(951) As was concluded in recital (413), Intel provided HP with rebates which were conditioned in particular on HP sourcing at least 95% of its corporate desktop x86 CPUs from Intel. The tables in recital (346) show that those rebates amounted in total to [...] from November 2002 to May 2005.

(952) As outlined in section VI.2.4, HP was the first large OEM to offer in 2002 a business desktop with an AMD x86 CPU. The launch of that product by HP derived from a demand from US IT managers for an AMD-based desktop from a top tier OEM. According to an HP internal memo, 343 US IT managers had petitioned for an AMD-based desktop from a top tier OEM. In addition, AMD-based corporate desktops had already won several big tenders (EDF, Siemens AG, City of Berlin) in the EMEA region.[1272] The product was "*targeted at SMB* [Small and Medium Business segment]"; it was also deemed "*suitable for enterprise deployments*" and "*ready to launch in all regions summer 2002 including Americas, EMEA, Asia Pacific*". HP was committed "*to ship* [...] *units in the first 12 months with potential* [...] *additional upside*".[1273] HP also published a press release in which it stated that it had received "*inquiries from large companies about Athlon based machines*" and that HP "*didn't rule out the possibility that H-P might use Hammer too* [the next generation of AMD x86 CPUs] *in some machines.*"[1274] The press release also stated that HP considered that AMD's new architecture for PCs and servers ('*Hammer*') had "*very interesting performance and cost attributes*" and was considered to be "*a disruptive product to Intel*".[1275]

1271 Gartner OEM data of 2006.

1272 See recital (327).

1273 See recital (328).

1274 See recital (329).

1275 See recital (329).

(953) However, despite its plans for a significant deployment of AMD-based corporate desktops, HP ended up shipping only limited amounts of such products, representing less than 5% of the x86 CPUs purchased by HP for that segment.

(954) HP explained that the Intel rebates were a material factor in HP's final decision to enter the HPA agreements and thereby, to scale down its original plans for the deployment of AMD-based products. In this regard, HP stated that it "*can confirm that Intel's inducements (in particular the block rebates) were a material factor in determining HP's agreement to the unwritten conditions. As a result:*

a) HP BPC found it undesirable to offer AMD-based desktops to any substantial degree to "enterprise" customers;

b) HP BPC stayed at least 95% aligned to Intel"[1276]

(955) Requiring AMD to compensate HP for the loss of the Intel rebates would have had a significant effect on AMD. By way of illustration, the annual rebate to HP under HPA 1 was [...]. In 2003, AMD made an operating loss of USD 233 million.[1277] Similarly, the annual rebate to HP under HPA 2 was [...]. In 2004, AMD made an overall operating profit of USD 222 million.[1278]

(956) In fact, at the beginning of July 2002, HP had asked AMD for an offer which would compensate for the loss of Intel rebates which would happen should HP deploy AMD-based solutions on a significant scale.[1279] AMD's reply, as evidenced in a contemporaneous e-mail quoted below in this recital, shows that AMD was not in a position to offer a compensating rebate of the size required by HP. However, in order to seek to accommodate HP's concern, AMD offered HP one million x86 CPUs for free. This was worth approximately [...].[1280] In this context, [AMD Executive], specified to HP: "*Agreement to these terms, as you must know, would require AMD to pay HPQ* [HP] *tens of millions of dollars to use its processors during the first year of this partnership. No reasonable business could offer these*

1276 HP submission of 23 December 2005, p. 8.

1277 AMD Form 10-K for the fiscal year ended on 28 December 2003, p. 58. http://www.amd.com/us-en/assets/content_type/DownloadableAssets/TK0304.pdf, downloaded and printed on 25 March 2009.

1278 AMD Form 10-K for the fiscal year ended on 28 December 2003, p. 18. http://www.amd.com/us-en/assets/content_type/DownloadableAssets/TK0304.pdf, downloaded and printed on 25 March 2009.

1279 AMD submission of 20 May 2005, p. 21.

1280 AMD submission of 20 May 2005, p. 21.

financial terms. The best we can do is to offer you the processors for free, which no reasonable business partner could refuse to accept."[1281]

(957) However, HP ended up taking only 160 000 of the processors for free.[1282] HP submitted to the Commission that this was a consequence of HP not wishing to lose the Intel conditional rebate: "[HP] *can confirm that Intel's inducements (in particular the block rebates) were a material factor in determining HP's agreement to the unwritten conditions. As a result: (...)*

c) HP BPC did not take advantage of AMD's one million free CPUs: HP only took a small number of these because the restricted distribution model adopted for the D315 and the other HPA1 requirements meant that HP was not producing the D315 in any significant volumes."[1283]

(958) As explained in recital (373), Intel contends that the HPA agreements do not include any binding MSS condition. Intel argues that, even if they did, those conditions could not have an effect because Intel "*could not reasonably expect to enforce "unwritten conditions" in written business agreements.*"[1284] Intel also refers to the fact that HP would have proposed the binding MSS condition (which Intel would have refused).[1285] Moreover, Intel argues that the 30 day termination notice of the HPA agreements would have given HP more freedom of action by allowing it to weigh the Intel discounts against AMD competitive offers at any time.[1286] Finally, Intel argues that HP did not purchase more than 5% of its x86 CPU needs in the relevant segment because it had a strong preference for Intel, justified by several reasons.[1287] All Intel arguments will be addressed in turn in subsections a) to d).

a) Intel's argument that it could not reasonably expect to enforce unwritten conditions in written business agreements.

1281 E-mail of 11 July 2002 from [AMD Executive] of AMD to [HP Executive] and [HP executive]of HP (p. 1 of attachment to e-mail of 24 March 2006 from [...] to [...] and [...]).

1282 AMD submission of 20 May 2005, p. 21.

1283 See HP submission of 23 December 2005, answer 2.21.c. The Commission considers that this clear explanation from HP itself of the reasons why HP did not take advantage of the 1 million CPU for free offered by AMD suffices to set aside Intel's speculation that HP would not have taken advantage of the offer because there would have been special conditions attached to the AMD offer, and which the Commission would have disregarded (Intel Reply to the 26 July 2007 SO, paragraph 325).

1284 Intel Reply to the 26 July 2007 SO, paragraph 294.

1285 Intel Reply to the 26 July 2007 SO, paragraph 319.

1286 Intel Reply to the 26 July 2007 SO, paragraph 294.

1287 Intel Reply to the 26 July 2007 SO, paragraph 322.

(959) The driving principle of conditional rebates resides in the fact that the purchaser is faced with a choice between receiving rebates from the dominant company if it purchases all or nearly all of its supplies from it or losing a disproportionate part of the rebates if it purchases a significant amount of its supplies from competitors. The purchaser is incited to stay loyal to the dominant company as soon as the prospect of the loss of rebates is sufficiently plausible to alter the purchaser's free choice based on competition on the merits.

(960) In order to achieve that objective, the dominant company does not need to put conditionality clauses in writing. It is sufficient that has at its disposal a tool which it can plausibly use to cut the rebates in case its customer begins to purchase a significant amount of supplies from competing suppliers, and that the customer is aware of this.

(961) The 30-day termination notice period described in recital (338) plays this role in the HPA agreements. HP knew that Intel viewed the unwritten conditions as integral parts of the agreements,[1288] and that Intel could monitor HP's compliance with these conditions in particular through the monthly senior management meetings.[1289] HP also knew that Intel could unilaterally use the 30 day termination notice and end all further rebates without any legal recourse for HP. In fact, in the first drafts of the arrangement negotiated between Intel and HP, that clause was even explicitly tied to the fulfilment of the MSS condition.[1290]

(962) HP was therefore entitled to reasonably assume that Intel would use the 30 day termination notice to end the rebates if HP did not comply with the unwritten conditions. This situation incited HP to stay loyal to Intel, thereby distorting competition on the merits.

(963) This was confirmed by HP to the Commission: "*HPA1 also contains mutual 30 day termination notice provisions. HP regards Intel's ability to terminate the agreement on 30 days notice as having incented HP to comply with the above-mentioned conditions* [the unwritten conditions]."[1291] [1292] HP also made the same point for HPA2.[1293]

1288 See recital (349).

1289 See recital (355).

1290 See recital (352).

1291 HP submission of 23 December 2005, answer 2.9.

1292 The Commission notes that Intel portrays this clear HP submission as an interpretation by the Commission (see paragraph 327 of Intel Reply to the 26 July 2007 SO) and therefore does not attempt to explain the reasons why HP made a statement which contradicts Intel's position.

1293 HP submission of 23 December 2005, answer 3.11.

b) Intel's argument that HP proposed the binding MSS condition.

(964) Intel's argument that HP was the first to offer a binding 95% MSS condition is not relevant for the analysis of the lawfulness of the HPA rebates.[1294] Indeed, according to *Hoffmann-La Roche*, "*an undertaking which is in a dominant position on a market and ties purchasers – even if it does so at their request – by an obligation or promise on their part to obtain all or most of their requirements exclusively from the said undertaking, abuses its dominant position*".[1295] This approach has been reinforced in *Irish Sugar*: "*It is of little importance in that respect to determine whether the applicant* [the dominant company] *or SDL took the initiative in the product swap* ",[1296] and in *BPB Industries* : "*The fact* (...) *that the promotional payments represented a response to request and to the growing buyer power of the merchants does not, in any case, justify the inclusion in the supply contracts* (...) *of an exclusivity clause*".[1297]

c) Intel's argument that the 30 day termination notice of the HPA agreements gave HP more freedom of action.

(965) Intel's argument that the 30 day termination notice provision gave HP more freedom by allowing it to weigh the Intel discounts against AMD competitive offers at any time does not alter the conclusion that the rebates induced loyalty and distorted competition on the merits.

(966) Indeed, at any point in time, HP was faced with exactly the same situation as that which prevailed at the time it signed HPA1, which had led it to prefer Intel rebates over its original plan for a wider introduction of AMD-based products. As Intel was an unavoidable trading partner from which HP would have to purchase the majority of its input, and would remain so for the foreseeable future, HP could not envisage leaving Intel completely and avoid being confronted with the same parameters.

(967) All other things being equal, the same economic rationale therefore consistently led HP to the same conclusion for the entire duration of the agreements and as long as HP had a prospect of renewing such an agreement. At any time during the arrangement, the only way for AMD to push HP to another conclusion would have been to make offers to HP going much beyond what competition on the merits

---

1294 In any event, as was demonstrated in section VI.2.4.4.2.b) above, Intel has not demonstrated on the facts that this was the case. Moreover, Intel's contention that it would have rejected the notion of a 95% MSS binding condition is factually incorrect.

1295 See Case 85/76, *Hoffmann-La Roche op. cit.*, paragraph 89 (emphasis added).

1296 See Case T-228/97 *Irish Sugar v Commission* [1999] ECR II-2969, paragraph 228.

1297 See Case T-65/89 *BPB Industries and British Gypsum v Commission*, paragraph 68.

would warrant, for instance by accepting HP's request for compensation of the loss of Intel's rebates, which, as was explained in recital (956), was not a viable option. Furthermore, even in such a situation, Intel would have had the possibility to increase its monthly rebates, as it did for HPA2, so that it once again outweighed any economic benefit of the AMD option for HP.

(968) Furthermore, here again, Intel's contention about the alleged freedom given to HP by the 30 day termination notice is contradicted by HP's own submission that this clause incented it to comply with the unwritten conditions of HPA (see recital (963)).

d) Intel's argument that HP did not purchase more than 5% of its x86 CPU needs in the relevant segment because it had a strong preference for Intel.

(969) Finally, as regards Intel's argument that HP had several reasons (not linked to the conditionality of HPA rebates) for having a strong preference for Intel and not purchasing more than 5% of AMD x86 CPUs,[1298] the Commission first notes that the question of whether the rebates were in fact the cause for HP's choice for staying nearly Intel-exclusive is not relevant for the application of Article 82 of the Treaty according to the relevant case law. This aspect has already been addressed in section 4.2.1.

(970) Furthermore, if indeed HP had had a strong preference for Intel which would naturally have led it to purchase no more than 5% of its x86 CPU needs from AMD, it is difficult to understand why it was necessary for Intel to put conditions on its rebates and to explicitly remind HP of the fact that they were material conditions of the rebates.[1299]

(971) In any case, the Commission has shown, based in particular on a clear statement from HP,[1300] that the conditionality of the HP rebates was "*a material factor*"[1301] which induced HP to stay nearly Intel exclusive. The rebates therefore had the effect of restricting HP's freedom to choose.

e) Conclusion

(972) In light of the above, it can be concluded that the level of HPA1 and HPA2 rebates granted by Intel between November 2002 and May 2005 was *de facto* conditional

---

1298 Intel Reply to the 26 July 2007 SO, paragraph 322.

1299 See for example recitals (348) to (350).

1300 See in particular recital (954).

1301 See recital (954).

on HP sourcing almost all of its x86 CPU requirements for corporate desktops from Intel. The rebates in question constitute fidelity rebates which fulfil the conditions of the relevant case-law for qualification as abusive (see recitals (920), (921) and (923)). In addition, they had the effect of restricting HP's freedom to choose its source of x86 CPU supply for corporate desktops and preventing other competitors from supplying HP with corporate desktop x86 CPUs over the period in question.

4.2.2.4. NEC

(973) As specified in section VI.2.6.3, between the fourth quarter of 2002 and the second quarter of 2003, Intel made the payment of rebates to NEC conditional on NEC purchasing at least 80% of its worldwide client PC x86 CPU requirements from Intel (this was broken down into a 70% requirement for [...]and a 90% requirement for [...]). From the third quarter of 2003 to November 2005, a proportion of the total rebates paid by Intel to NEC was conditional upon NEC fulfilling an Intel market share requirement of 80% in the client PC segment. In other words, the Intel rebates in question were *de facto* conditional on NEC obtaining the vast majority of its client PC x86 CPU requirements from Intel.[1302] The rebates in question applied across the entire relevant range of output.

(974) Prior to the Santa Clara agreement, NEC had increased its purchases of AMD x86 CPUs (see Gartner data). However, the grant of the rebates resulting from the Santa Clara deal materially influenced NEC to switch to Intel. Intel's share of NEC's x86 CPU requirements rose sharply after the Santa Clara deal, increasing from [...] to 80% within 2 quarters. NEC continued to fulfil that 80% requirement thereafter.[1303]

(975) NEC's adherence to the relevant conditions was closely monitored by Intel through the implementation of the [...], which was part of the Realignment Plan in 2002

1302 In this respect, the Court of First Instance has stated 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: "*in those circumstances, the applicant cannot accuse the Commission of misjudging or misinterpreting the evidence cited in the contested decision where it stated that 'any increases in Siúcra volumes purchased by (...) were likely to lead to a reduction in 1 kg (...) purchases, which was the product for which Burcom was competing as supplier (end of point 82), and that 'the likely effect of the rebate was to tie (...) to [the applicant] (end of point 151). The case-law shows (See recital 114 above) that such a practice is an abuse within the meaning of Article 86 in so far as it seeks, through the granting of a financial advantage, to prevent customers from obtaining their supplies from competitors;* Case T-228/97 *Irish Sugar v Commission* [1999] ECR II-2969, paragraph 221.

1303 Intel argues that NEC did not purchase 80% of its requirements from Intel over the period in question (See recital (494) above). It does not substantiate this argument. Section VI.2.6.3 has outlined that [...] specified that it "*occasionally failed to meet the required threshold* [...]". Therefore, this does not invalidate the general finding about the conditionality relating to the NEC 80% threshold.

(see section VI.2.6.3.1). Under the [...], Intel organised Quarterly Business Reviews where it assessed the fulfilment of the various obligations contained in the [...], [...]. [NEC] has explained that during the Quarterly Business Review meetings, Intel also "*assesses whether or not* [...] *has complied not only with the reporting obligations, but also with the 70%+ market share agreed with Intel.*"[1304]

(976) [...]: "*the Income after tax is at* [...]."[1305]

(977) In June 2003, on the occasion of the Supervisory Board meeting of [...], the Board stated that the Intel rebates were an important factor in NEC's finances: "[t]*he annual* [support] *of* [...] *from Intel, is a key point* [...]."[1306]

(978) [NEC] executives also considered the risks related to switching a higher portion of their requirements to AMD: "[NEC Executive] *mentions that, besides the fund issue, Intel is not competitive* [...].[NEC Executive] *mentions it will have consequences for* [NEC] *if* [...] *decides to switch to AMD.*"[1307]

(979) The Santa Clara agreement therefore had the effect of reversing NEC's purchasing policy within a few quarters by "*realigning* [NEC's] *CPU strategy based on Intel* [...] *and worldwide average ratio.*"[1308] The fact that NEC reached the agreed 80% target within a short period of time (two quarters) provides direct evidence of the loyalty-inducing effect of the rebates granted by Intel.

(980) As set out in section VI.2.6.3, Intel claims in its Reply to the 26 July 2007 SO that it was NEC which initiated the realignment, that is to say the increase of Intel's x86 CPU share in its processor mix. However, as has been outlined in recitals (469)-(471) of this Decision, this is not the case. Moreover, as has been stated in recital (964), this is not a relevant consideration according to the case law.

(981) In light of the above, it can be concluded that the level of the rebates granted by Intel between the fourth quarter of 2002 and November 2005 was *de facto* conditional on NEC sourcing almost all of its x86 CPU requirements in the client PC market segment from Intel. The rebates in question constitute fidelity rebates which fulfil the conditions of the relevant case-law for qualification as abusive (see recitals (920), (921) and (923)). In addition, they had the effect of restricting NEC's freedom to choose its source of x86 CPU supply for client PCs and preventing

---

1304 [NEC] submission of 15 December 2005, p. 2.

1305 See document JH 7, p. 8/35, [NEC] inspection file.

1306 See Document SS3 of the [NEC] Inspection file, [...], p. 6.

1307 Idem.

1308 See [...], p. 2, schedule 1, attached to NEC submission of June 30, 2005.

other competitors from supplying NEC in respect of its client PC x86 CPU needs over the period in question.

4.2.2.5. Lenovo

(982) As specified in section VI.2.7, in December 2006, Intel and Lenovo concluded a Memorandum of Understanding for 2007, running until 31 December 2007. That strategic agreement included [...] rebate funding for the 2007 financial year paid in quarterly amounts and [...].[1309] These payments were incremental to payments from Intel under other funding programs agreed before and separately from the Memorandum of Understanding.[1310]

(983) An unwritten condition of the Memorandum of Understanding was that Lenovo had to cancel its AMD notebook projects entirely, which Lenovo did. This included both those AMD-based notebook models for which manufacturing preparations were advanced and those eventual models that would have naturally been their continuation in the AMD notebook line. [Intel executive] wrote into his Accomplishments Report for 2006: *"Top 5 ACCOMPLISHMENTS in 2006: 1. Achieved 100% Intel NB CPU MSS in '06 in Lenovo's full NP product portfolio, including* [...] *branded notebooks sold worldwide. Received Division Recognition Award at 3Q'06 BUM for creating comprehensive meet comp response that enabled Intel to win two key "at risk" Lenovo notebook refresh designs and maintain 100% Intel NB CPU MSS at Lenovo worldwide.* (...) *2. Reached formal agreement with Lenovo (signed MOU) on '07 deal that awards Intel 100% Lenovo NB CPU business in '07."*[1311]

(984) An internal Lenovo presentation of November 2006 explained that *"[...]"; "NB business will be 100% Intel – No AMD NB."*[1312] On 11 December 2006, a Lenovo manager sent an e-mail stating that *"Last week Lenovo cut a lucrative deal with Intel. As a result of this, we will not be introducing AMD based products in 2007 for our Notebook products* (...)*."*[1313]

1309 Lenovo submission of 27 November 2007, Annex 23, Intel PowerPoint presentation of 5 December 2006 entitled *"Lenovo / Intel 2007* [...] *Discussion – December 5th 2006 Update"*, slide 3.

1310 Lenovo submission of 27 November 2007, Annex 22, e-mail [between Lenovo Executives] of 5 January 2007 entitled *"2007 Lenovo-Intel* [...]*Relationship."*

1311 *"2006 Accomplishments"* of [Intel executive], p. 1. Intel submission of 2 June 2008, Annex 2, Document 32.

1312 Lenovo submission of 27 November 2007, Annex 23, Lenovo PowerPoint presentation of November 2006 entitled *"Intel* [...] *Relationship"*, slide 1.

1313 Lenovo submission of 27 November 2007, Annex 22, e-mail from [Lenovo Executive] to [Executive of Lenovo supplier] of 11 December 2006 entitled *"Cease and Desist all Activity on AMD Product."*

(985) Lenovo has submitted evidence cited in sections VI.2.7.3 to VI.2.7.5 that it had numerous business reasons to introduce AMD-based notebooks in parallel with its already existing Intel based notebooks. Most importantly, Lenovo experienced growing market demand for AMD x86 CPUs, as is shown by an e-mail [between Lenovo Executives] which states that. *"[i]f the AMD notebook product in* [geographical area] *is what is required to meet customer requirements then we should get the product announced and shipped."*[1314] Lenovo's intention to introduce AMD-based products was particularly driven by the fact that, as Lenovo explained at an internal meeting in September 2005, *"AMD has widespread penetration"; "AMD is Especially Strong in Small Business"; "AMD Has the highest penetration in the market Lenovo is targeting for growth"; "AMD gaining momentum in Notebooks"; "AMD Gaining Momentum in the Enterprise; AMD technologies are competitive; Lenovo sales teams are asking for an AMD alternative"; "AMD CPU Prices Are Significantly Below Intel; ASP Gap growing due to Intel ASP increasing while AMD ASP is decreasing"; "AMD Gaining* [geographical area] *Market Share; EXPECTATIONS: Large CPU cost gap will continue to drive AMD share;* [Lenovo notebook product] *will increase mobile share".*[1315] *"*[...]*."* [1316] AMD CPUs were also cheaper in segments critical to Lenovo. In some executives' views, *"the combination of price and performance favoured at times AMD over Intel."*[1317]

(986) In addition to AMD's competitiveness and growing demand for AMD-based notebooks, Lenovo recognised that pursuing a dual-source strategy for notebooks, as it already did for its desktops, would result in more advantageous business relationships and commercial terms with both AMD and Intel, and would also secure supplies in times of shortages. The following examples from evidence submitted by Lenovo capture this business rationale very clearly. [In] 2005, it was suggested at an internal Lenovo meeting to *"establish dual source to mitigate Intel supply constraints."*[1318] [Lenovo Executive] wrote: *"The supply is still tight in 2006. We cannot solve this problem without two in one box supply fuarantee* [sic – guarantee]*."*[1319] As mentioned above in this recital, the dual source strategy also

---

1314 Lenovo submission of 27 November 2007, Annex 22, e-mail [between Lenovo Executives] of 19 August 2005 at 06:22 AM entitled *"Fw: LC non-Intel Mobile product status."*

1315 Lenovo submission of 27 November 2007, Annex 23, Draft Lenovo PowerPoint presentation of September or October 2005, entitled *"Intel "Meet Comp" Program for 2006 – DRAFT"*, slides 8-13.

1316 Lenovo submission of 27 November 2007, Annex 23, Lenovo presentation entitled *"Intel "Meet Comp" Proposal for 2006 – Preliminary Lenovo Counterproposal"* of 13 September 2005, slide 8.

1317 Lenovo submission of 27 November 2007, answer to question 4, p. 12.

1318 Lenovo submission of 27 November 2007, Annex 23, Draft Lenovo presentation of 12 August 2005 entitled *"*[...] *Alliance Update (Draft)"*, slide 4.

1319 Lenovo submission of 27 November 2007, Annex 22, e-mail [between Lenovo Executives] of 15 March 2006 at 04:56 AM entitled *"Re: UPDATE: Lenovo* [geographical area] *Notebook Letter of Intent."*

functioned to "[o]*ptimize aggregate investments from Intel and AMD alliances*" and to achieve "[c]*ompetitive price pressure on Intel.*"[1320]

(987) Lenovo has specified that "[d]*uring 2006 and 2007 Lenovo discussed with AMD ([...]) the possibility of launching* (...) *a range of notebook computers based on the AMD platform.*"[1321] While the plan encompassed four specific notebook models, it is evident that if Lenovo had pursued its original plan, other AMD-based models would probably have followed later. This is because the introduction of a new platform, especially of a new supplier, is a considerable investment on the part of an OEM. Therefore, it is cheaper to continue building on that platform than migrate again to another one. There is evidence that this was indeed Lenovo's intention. Lenovo submitted that in view of the expected *"growth of the relationship, including the trend towards AMD supplying* [...][1322] *per cent of Lenovo's CPUs"*,[1323] Lenovo considered moving from a transactional-type relationship into a [...] alliance with AMD. This proves that Lenovo had long-term plans with AMD.

(988) Such business co-operation with Lenovo would have had a significant positive effect on AMD's business reputation, market acceptance and financial situation. However, requiring AMD to compensate Lenovo for the loss of the [...] incremental Intel rebates for the 2007 financial year would have had a significant negative effect on AMD.

(989) In light of the above, it can be concluded that the level of the rebates granted by Intel to Lenovo under the Memorandum of Understanding for 2007 was *de facto* conditional on Lenovo obtaining all of its x86 CPU requirements for its notebooks from Intel. The rebates in question constitute fidelity rebates which fulfil the conditions of the relevant case-law for qualification as abusive (see recitals (920), (921) and (923)). In addition, they had the effect of restricting Lenovo's freedom to choose its source of x86 CPU supply for notebooks and preventing other competitors from supplying Lenovo's notebook x86 CPU needs over the period in question.

1320 Lenovo submission of 27 November 2007, Annex 23, Lenovo presentation of January 2006 entitled *"AMD Update – [...] Alliances"*, slide 3.

1321 Lenovo submission of 27 November 2007, answer to question 4, p. 12.

1322 Paraphrase of the original text as provided by Lenovo.

1323 Lenovo submission of 27 November 2007, answer to question 4, p. 13, referring to Lenovo presentation of January 2006 entitled *"AMD Update – [...] Alliances"*, slide 2, in Annex 23 to Lenovo submission of 27 November 2007.

4.2.2.6. MSH

(990) Despite the absence of a direct supplier-customer relationship between the two parties, the nature of Intel's payments to MSH can be compared to a rebate offered by a supplier to one of its direct customers, that is a deduction or cash payment made retrospectively to a customer in accordance with its purchases over a period of time. Given the importance of the x86 CPU within a computer, such payments produce similar effects to loyalty rebates granted to direct customers. Therefore, it is justified to apply the same principles for the assessment of those practices under Article 82 of the Treaty.

(991) As explained in section VI.2.8.3.2., in particular since [...], when [...] were replaced by [...], the final amount of payments was calculated on the basis of [...] (see for example recitals (606) and (612)). However, the payments under the previous funding agreements can also be considered rebates with regard to their overall effect. Although not directly linked to [...], they were made in consideration of [...] (see recital (605)). Moreover, MSH itself perceived the payments *"as a means to reduce its purchasing cost for the computers containing Intel CPUs"* and consequently treated them *"for accounting purposes as (...) contributions that were not intended as a cost reimbursement for specifically defined promotional activities."*[1324] This is confirmed by the fact that MSH's internal payment overviews contain not only [...], but also a calculation of [...].[1325]

(992) Second, as demonstrated by the evidence outlined in section VI.2.8.4., Intel's payments to MSH under the funding agreements were at least in part conditional upon MSH exclusively selling Intel-based PCs.

(993) Despite the wording of the funding agreements, in particular since [...], MSH has been bound by an unwritten exclusivity commitment underlying the funding agreements since the beginning of the parties' contractual relationship in [...] (see section VI.2.8.4.2.). Exceptions to that exclusivity commitment - even minor ones - were never agreed by Intel and were at best tolerated in certain exceptional circumstances, such as the sell-down of existing AMD stock before entirely switching to Intel exclusivity in the case of MSH [country Y] (see recitals (623) and (714)).

(994) The fact that Intel's payments were conditional on MSH's compliance with its exclusivity commitment is clearly shown by MSH's understanding that *"the amounts paid under the agreements were at least in part a reflection of the special*

1324 [MSH submission].

1325 See recital (614).

and exclusive relationship it had with Intel"[1326] and the extensive documentary evidence presented in section VI.2.8.4.

(995) The conditionality of Intel's payments is further confirmed by the fact that the promotional activities to be carried out by MSH, which according to the funding agreements were meant to be MSH's service in return for Intel's payments, would not have justified the substantial amount of payments offered to MSH. Indeed, some of the listed activities are of such a general nature[1327] or have no sense in view of MSH's exclusivity commitment[1328] that they are unlikely to have caused any appreciable cost which a commercially rational company would nonetheless be willing to reimburse to the tune of [...]. This finding is confirmed by the amendments resulting from the "[...] Framework Agreement", under which the promotional activities funded by Intel since [...] were all of a sudden to be carried out by MSH [...][1329] (see recital (600)). In addition, while Intel has never shown any particular interest in MSH's compliance with its promotional obligations under the funding agreements (see recital (588)), it has intensively audited MSH's total sales figures and closely monitored MSH's compliance with its exclusivity commitment (see recitals (613) and (726) to (734)).

(996) Third, the payments made by Intel to MSH since 1997 have induced MSH to refrain from switching parts of its demand to products containing x86 CPUs manufactured by Intel's main competitor, AMD, and to continue to sell exclusively Intel-based PCs.

(997) In MSH's perception, certain AMD-based products constituted a competitive and attractive alternative to comparable Intel products, in particular with regard to specific price ranges, as highlighted in a number of documents mentioned above.[1330] MSH's serious commercial interest in dealing with AMD-based products

---

1326 [MSH submission]

1327 See for example the obligation to [implement certain promotional activities] (wording of Contribution Agreement [...] by way of example).

1328 For example, the obligation to [implement certain promotional activities] (see wording of Contribution Agreement [...] by way of example) is *de facto* void of meaning given that MSH has exclusively sold Intel-based PCs and could therefore only [...]in any case.

1329 See [...] "[...] Framework Agreement" and [...] Contribution Agreement for [...].

1330 See for example the following documents from section VI.2.8.4.2.b) above:

Document [...] of [spring] 1999: *"[W]e repeatedly receive ads from* [city] *in which they massively advertise AMD (sometimes several sets). Therewith they can cover price ranges which we normally don't have. I thought that there is an agreement with Intel that we are not allowed to do this. Should such an agreement not exist, I would also like to advertise AMD processors to cover the different price ranges."* (original in [...]).

Document [...] of [autumn] 2000: *"I refer to the telephone conversation we had today during which I described for the umpteenth time the situation with regard to AMD 1 Gigahertz.* (...) *Merely the*

is also reported in several internal Intel briefings.[1331] Against that background, MSH has repeatedly strived to negotiate an exception from its exclusivity agreement with Intel for cases in which *"a certain AMD processor is clearly and verifiably more competitive and cheaper"*,[1332] or at least *"for the sales of specific brand products equipped with AMD processors (e.g.* [OEM Z]*)."*[1333] However, these endeavours were eventually unsuccessful (see recital (623)).

(998) In addition, as explained in recitals (690)and (692), MSH has *"repeatedly reviewed its purchasing strategy"* and thus reconsidered its exclusive relationship with Intel in view of the resulting lack of product variety and the apparent lack of competitiveness of Intel x86 CPUs in the entry price ranges. As a result, MSH has repeatedly entered into negotiations with AMD *"to explore whether, under terms potentially offered by AMD, terminating the exclusive sales of Intel equipped computers would be commercially sensible for MSH."*

(999) However, it was clear to MSH that a change in its supplier strategy would lead at least to a substantial and disproportionate reduction of total payments from Intel,

---

Media Markt and Saturn Group does not offer these products since we would otherwise violate the spirit of our agreement. (...) *It cannot be in the sense of our partnership that the company Media Markt and Saturn as the only remaining 100% Intel compliant partner suffers in terms of image and competitiveness and has to beg for the mercy of a positive reaction from Intel."* ([...], original in [...]).

Document [...] of [summer] 2003: *"Last Monday we had a meeting with Intel* [country] *where they told us that the prices are going down the end of October. The problem is that we have exclusivity with them as you know, and AMD is becoming more and more aggressive to get market share".* ([...]).

Document [...] of [winter] 2004: *"Apart from* [OEM], *we are the only PC-supplier that only uses Intel CPUs. In view of AMD's attractive 64-bit-processors* [OEM]*l now offers the possibility to also source chips from the production of the Intel competitor AMD in the future. How do we see this? We have the impression that we cannot achieve important price points because we only market Intel."* (original in [...]).

1331 See for example the following selection of documents from section VI.2.8.4.2.c) above:

Document JABR17 of 27-28 May 2002: *"Meeting focus will be on discussion the strong competitive threat especially in the notebook arena, driven by key OEMs like* [OEM Z]. *Discussion will be if we should have an "AMD window" in the collaboration agreement for* [...]." (p. 1).

Document IP38 of 22-23 July 2002: *"Risk for Intel is that AMD is approaching them directly and we now even have major design wins from AMD at A-Brand OEMs like* [OEM Z]. *MSH feels forced to offer also these SKUs."* (p. 1).

Document PEB7 of 22-23 July 2002: *"AMD is aggressively approaching MSH. Since AMD has high MSS in consumer MSH thinks they do miss a portion of the market by not offering AMD".* (p. 5).

Document FK6 of 19 September 2005: *"DT entry level segment still considered as major problem by MSH, as they could not replicate entry level DT AMD system prices of 299. No Intel solution yet in the pipe. CRA contract negotiations ongoing but very challenging."* (p. 2).

1332 [Inspection document from MSH's premises], see recital (643).

1333 [Inspection document from MSH's premises]. For the entire quote, see recital (629).

although there was some uncertainty as regards the amount of payments MSH would lose if it switched even minor parts of its demand to AMD (see recitals (691) to (699)).[1334] Against that background, MSH *"has to date always considered that the commercial offers made by AMD would not be attractive enough to MSH from a commercial point of view"*,[1335] and has, in fact, stayed 100% loyal to Intel since 1997.

(1000) In the light of the above, it can be concluded that the level of payments which Intel granted to MSH, at least during the period from October 2002 to December 2007,[1336] was conditional on MSH selling exclusively Intel-based PCs. Their effect was equivalent to that of fidelity rebates, and they therefore fulfil the conditions of the relevant case-law for qualification as abusive (see recitals (920), (921) and (923)).[1337] In addition, they had the effect of restricting MSH's freedom to source any PCs equipped with an AMD or another third-party x86 CPU and thus prevented other competitors from supplying x86 CPUs for PCs to be shipped to MSH over the period in question.

4.2.2.7. Conclusion

(1001) On the basis of the evidence presented in sections 4.2.2.2 to 4.2.2.6 above, and the case law referred to in section 4.2.1, it is concluded that the level of the rebates granted by Intel to Dell, HP, NEC between the fourth quarter of 2002 and December 2005 was *de facto* conditional upon those customers sourcing their x86 CPUs exclusively (Dell) or, within defined segments, almost exclusively (HP and NEC) from Intel. With regard to Dell, the level of the rebates was conditional upon purchasing all of the x86 CPUs required from Intel. With regard to HP and NEC, the level of the rebates was conditional upon sourcing most of their requirements for corporate desktop PCs and client PCs respectively from Intel. In addition, the level of the rebates granted by Intel to Lenovo under the Memorandum of Understanding for 2007 was *de facto* conditional on Lenovo obtaining all of its x86 CPU requirements for its notebooks from Intel. Similarly,

---

1334 In this regard, the Court of Justice has held that *"furthermore, the lack of transparency of Michelin NV's entire discount system, whose rules moreover changed during the relevant period, together with the fact that neither the scale of discounts nor the sales targets or discounts relating to them were communicated in writing to dealers meant that they were left in uncertainty and on the whole could not predict with any confidence the effect of attaining their targets or failing to do so."* See Case T-203/01 *Michelin II*, *op. cit.*, paragraph 83.

1335 [MSH submission]. For the context of the quotes, See recital (691) above.

1336 See recital (1640) where the Commission explains how it uses its discretion as regards the relevant period.

1337 In this context, see also paragraph 80 of Case T-65/98 *Van den Bergh Foods v Commission* [2003] ECR II-4653. It follows from that paragraph that an exclusivity clause that requires retailers only to sell products of the dominant company amounts to an exclusive purchasing obligation, whose object normally is to restrict competition on the relevant market.

it is concluded that the level of the payments granted by Intel to MSH between October 1997 and 12 February 2008, and which may be ongoing, were *de facto* conditional upon MSH selling exclusively Intel-based PCs. The rebates and payments in question constitute fidelity rebates which fulfil the conditions of the relevant case law for qualification as abusive (see recitals (920), (921) and (923)). In addition, they had the effect of restricting the freedom to choose of the respective OEMs and of MSH.

4.2.3. As efficient competitor analysis

4.2.3.1. Introduction

(1002) One possible way of examining whether exclusivity rebates are capable or likely to cause anticompetitive foreclosure is to conduct an as efficient competitor analysis.

(1003) In essence, this examines whether Intel itself, in view of its own costs and the effect of the rebate, would be able to enter the market at a more limited scale without incurring losses. It thereby establishes what price a competitor which is 'as efficient' as Intel would have to offer x86 CPUs in order to compensate an OEM for the loss of any Intel rebate. The general parameters for the as efficient competitor analysis are outlined in the remainder of the present sub-section. Tailored as efficient competitor analyses are carried out in sections 4.2.3.2 to 4.2.3.6 respectively for Dell, HP, NEC, Lenovo and MSH. Section 4.2.3.7 concludes.

(1004) The as efficient competitor analysis is a hypothetical exercise in the sense that it attempts to analyse whether a competitor which is as efficient as Intel (in terms of producing x86 CPUs and in terms of delivering x86 CPUs that provide the same value to customers as Intel), but which would not have as broad a sales base as Intel, would be foreclosed from entering. This analysis is in principle independent of whether or not AMD was actually able to enter. To illustrate, it could be the case that AMD in reality was significantly more efficient than Intel in the sense that its x86 CPUs were produced much more cheaply, and/or the value of these x86 CPUs produced for customers exceeded those of Intel. In such a scenario, the rebates may have been capable of foreclosing competition without having produced actual exclusion vis-à-vis AMD. Similarly, it could be the case that AMD in reality was significantly less efficient than Intel, and that even if AMD were allowed to compete on the merits, it would not be successful.

(1005) The point of departure for an as efficient competitor analysis in this case is that Intel is an unavoidable trading partner. The rebate therefore enables Intel to use the inelastic or 'non-contestable' share of demand of each customer, that is to say the amount that would anyhow be purchased by the customer from the dominant undertaking, as leverage to decrease the price for the elastic or

'contestable' share of demand, that is to say the amount for which the customer may prefer and be able to find substitutes (see section 3.3 for description of Intel's must-stock/unavoidable trading partner status).[1338]

(1006) In order to assess whether the rebate system is capable of hindering the expansion or entry of as efficient competitors by hindering them from supplying part of the requirements of individual customers, it is necessary to determine, in view of the level of the rebate, what is the effective price for the buyer over a relevant range of its purchases, if this amount were to allow the buyer to benefit from the rebate. The lower the calculated effective price is compared to the average price of the dominant supplier, the stronger the foreclosure effect. As a general rule, it can be concluded that a rebate scheme is capable of foreclosing equally efficient competitors if the effective price is below a measure of viable cost.

(1007) Intel did not express any disagreement with the methodology of the as efficient competitor analysis. Intel adopted this methodology to conduct its own assessment of the [project] agreement, although this was not the subject of any of the Commission's objections.[1339] The formula on which the Commission based its analysis was originally submitted to the Commission by Intel's economic consultant, Professor [...].[1340]

(1008) Sub-sections a) to c) describe each of the parameters which are used in the analysis.

a) Contestable share of the customer's demand

(1009) It is first necessary to determine how much of a customer's purchase requirements can realistically be switched to a new competitor in any given period, that is to say its contestable share. This is because not all of a customer's requirements will be contestable at any point in time. This could be due to a number of factors.

(1010) In the first instance, it has been outlined that Intel is an unavoidable trading partner, whose product is of a "must-stock" nature (see section 3.3). In this regard, it should be noted that AMD's x86 CPUs are different from Intel's x86 CPUs in many different respects. Different types of customers will have different appreciations of the relative merits of the two products. Due to Intel's strong brand and long track record, many final customers would not consider switching away

---

1338 See Case T-203/01 *Michelin II*, *op. cit.*, paragraphs 162-163. See also Case T-219/99 *British Airways*, *op. cit.*, paragraphs 277 and 278.

1339 Intel Reply to the 26 July 2007 SO, paragraphs 124 to 129 and Report of Professor [...], p. 34.

1340 Intel Reply to the 26 July 2007 SO. Report of Professor [...], paragraph 177.

from Intel-based computers, even if an AMD-based alternative were offered. The contestable part of the market is thus limited by the fact that AMD-based computers would only be the most attractive product for a sub-segment of all the OEM's ultimate customers.

(1011) There may also be factors which are specific to an OEM which may also serve to limit how quickly an OEM can ramp-up non-Intel based products and therefore how much of its x86 CPU requirement is contestable at any given point in time. For example, these may relate to the fact that an OEM could have a range of different computer platforms based on a particular x86 CPU which it renews on a staggered, rolling basis, and which hence means that in a given period, it will only be seeking to source a limited share of its overall x86 CPU requirements.[1341]

(1012) The contestable share of the OEMs and the PC retailer covered by this Decision (Dell, HP, NEC, Lenovo and MSH) is relatively low. This is based on submissions provided by the companies in question as well as contemporaneous documentary evidence from each undertaking (as well as from AMD) which details in particular the rates at which the companies considered it was feasible to "ramp up" their supplies from AMD were they to choose to go down such a path.

b) Relevant time horizon

(1013) The assessment of the contestable share also requires a determination of the relevant time horizon on which the OEMs base their decisions on whether to change suppliers. The contestable share depends on the time horizon because a number of the constraints which in the short run prevent an OEM from shifting a large share of its purchases may be relatively less constraining over a longer time horizon. While it is natural to assume that OEMs' decisions from whom to source which x86 CPUs and in what quantities are not solely based on immediate, short-term considerations, it is also equally natural to assume that long term considerations are limited to the part of the future that is reasonably foreseeable.

(1014) There are a number of factors which indicate that the relevant period in which to examine what proportion of an OEM's supplies is contestable is at most one year. These are outlined in recitals (1015) to (1019) .

(1015) Industry practice with respect to x86 CPU contracts and rebates[1342] rarely appears to exceed one year, and is often shorter. For example, Intel has negotiated

---

1341 See, for example Figure 2 of the RBB paper, *op. cit.*, "Fujitsu-Siemens Esprimo E Series roadmap", p. 26.

1342 To the extent that formal contracts exist - the Commission has already noted that Intel does not have such contracts with [...], Dell and [...].

"Meet Comp" rebates with several major OEMs in the form of multi quarter arrangements, usually for a one year period. This is in particular the case with:

(1) HP with two successive one year programs, the HPA1 and HPA2 concluded in 2003 and 2004 for x86 CPUs for corporate desktops (see section VI.2.4);

(2) Lenovo with the arrangement concluded for one year in November/December 2006 for notebooks (see section VI.2.7).

(1016) Other rebate arrangements were concluded with major OEMs such as Acer and NEC. As regards Acer, the parties agreed in January 2003 on the [...] (see section VI.2.5). The same type of arrangement was put in place with NEC in the context of the May 2002 Santa Clara deal with MDFs and ECAP rebates agreed for the next 2 quarters and then renegotiated on a quarterly basis (see section VI.2.6).

(1017) Even when the rebates are agreed on a multi-quarter basis (for example [...], Dell, HP and [...]), they are subject to adjustment on a quarterly basis.

(1018) One significant difficulty associated with entering into longer term commitments in the x86 CPU market is that the products that are sold today are likely to be replaced by new products in a very short time horizon. Similarly the computer systems that the OEMs put on the market are subject to frequent refreshments or replacement cycles. Intel itself notes that "*Because of the rapid rate of innovation in the computer industry, personal computers have a very short shelf life before they are replaced by new technologies that offer consumers improved functionality, performance, or cost. As a result, PC manufacturers (OEMs) refresh their existing product offerings, and launch new designs, in regular cycles three or four times per year. These cycles, in which OEMs retire existing models that have become obsolete and replace them with newer models, are often referred to as 'refresh cycles.' In connection with each of these refresh cycles, OEMs negotiate with microprocessor suppliers to determine which supplier's processors will be used in the new models that the OEMs plan to introduce*".[1343]

(1019) The dynamic characteristics of the market do not mean that firms do not attempt to look as far into the future as possible (as any business will do), but they reduce the reliability of such predictions. In this context, it is relevant to note the failure of two attempts to enter into longer term strategic agreements. The failed AMD offer of 1 million x86 CPUs for free to HP was in the context of an

---

[1343] Intel submission of 2 March 2005, response to question 13-16, p. 2.

envisaged three-year partnership. The failed [...] project also involved a longer time perspective than one year.[1344]

(1020) In its main response to the 26 July 2007 SO, Intel has not contested the facts described in recitals (1015) to (1019) or disputed their relevance. However, Professor [...] notes in his report that the arguments relied on *"are weak"*.[1345]

(1021) Professor [...] presents calculations of the as efficient competitor analysis under longer time horizons (two and three years). He states: "*I also perform the test over a two-year time horizon for Intel's discounts to Dell and HP, and three years for* [project], *a potential collaboration among* [...]. *While my opinion does not depend upon using these longer time horizons, these time horizons appear to be more appropriate for performing the SO's required share test according to the methodology described in the SO itself.*"[1346]

(1022) Professor [...]'s opinion appears to be different from the position taken in Intel's main response stating that "*[t]wo years is a more appropriate time horizon for performing this analysis in relation to* [project] *than the one-year horizon used by the SO outside the* [project] *context*".[1347]

(1023) Notwithstanding the above, the Commission has examined the arguments brought forward by Professor [...] in support of his claim that the Commission's arguments "*are weak*". These are described and assessed in recitals (1024) to (1034).

(1024) Professor [...] argues that the length of contractual commitments between OEMs and microprocessor suppliers need not coincide with the part of the future that is reasonably foreseeable.[1348] To illustrate this, Professor [...] outlines the following example: "*For example, when I purchase a new car, the manufacturer's contractual commitment extends to the length of my warranty coverage; but as a buyer I nonetheless may consider the cost of owning and operating this vehicle over a period of time that extends beyond the length of the warranty. In fact, third parties provide information to consumers precisely so they can evaluate maintenance and repair costs after the warranty expires.*"[1349]

1344 See section VI.1.3.

1345 Intel Reply to the 26 July 2007 SO. Report of Professor [...], paragraph 142.

1346 Intel Reply to the 26 July 2007 SO. Report of Professor [...], paragraph 52.

1347 Intel Reply to the 26 July 2007 SO, paragraph 126.

1348 Intel Reply to the 26 July 2007 SO. Report of Professor [...], paragraph 54.

1349 Intel Reply to the 26 July 2007 SO. Report of Professor [...], paragraph 54.

(1025) Firstly, the Commission's argument is not that the two periods coincide. Indeed, quarterly contract negotiations are not inconsistent with a general finding that the relevant time horizon for the analysis is one year. Nevertheless, it cannot be denied that the ability to foresee likely consequences of signing a contract with one supplier rather than another is significantly reduced for the period beyond the one covered by the contracts under consideration.

(1026) Secondly, the duration of contracts as observed in a market is an informative indicator of how long into the future market participants feel comfortable predicting market conditions and thus committing to particular trading conditions.

(1027) Thirdly, Professor [...]'s example mainly illustrates the fact that any purchase decision may involve considerations about the benefits the purchase can provide throughout its lifetime. As such, it rather confirms the Commission's argument that the short shelf life of x86 CPUs and frequent refresh cycles contribute to shortening the relevant time horizon in this case.

(1028) With respect to the Commission's finding that the short shelf life contributes to difficulties in making long term predictions and long term contracts, Professor [...] argues that this: "*confuses the product life cycle for any one computer system with the time horizon used by an OEM that is considering any given procurement decision. (...) most microprocessor procurement decisions by OEMs, which involve specific computer systems, have relatively short-lived consequences, lasting perhaps a year or so into the future. But this does not imply that OEMs use this same time horizon when making larger strategic decisions about how to procure their microprocessors. For example, as observed in the SO itself, the* [...] *project involved a longer time horizon.*"[1350]

(1029) This argument does not address the fact that it is genuinely more difficult to predict the future consequence of a shift of supplier when the relative merit of the products offered by the different suppliers may not remain constant over time because new products are likely to replace those currently on offer.

(1030) With respect to the failure of attempts to enter into longer term partnerships, Professor [...] notes that "*the observation that certain longer-term strategic agreements failed simply does not imply that the time horizon used by OEMs is short, especially if those failures resulted from factors other than the inability of OEMs and microprocessor suppliers to reasonably foresee the future over the period of time considered. HP declined the AMD offer noted in the SO at ¶390 not because of HP's inability to foresee more than one year into the future, but*

1350 Intel Reply to the 26 July 2007 SO. Report of Professor [...], paragraph 54.

because Intel made an offer that HP found more attractive, and this was an outcome that HP explicitly anticipated."[1351]

(1031) This argument fails to take into account the fact that the HPA1 offer made by Intel which HP decided to accept was for a period of one year. This underlines the fact that HP's decision in this context had to be made without any visibility as regards the likely consequences of its choice beyond the one year time horizon of the HPA1 agreement.

(1032) The lack of any reliable long term visibility is illustrated in the calculations OEMs undertook in order to evaluate the consequences of a shift. For instance, the Dell [project] Status Review presentation of 17 February 2004[1352] contains a slide assessing the long term effects of choosing either the "AMD option" or the "Enhanced MCP Option". The slide contains estimates for each of the four fiscal years FY05-FY08. Dell expected additional benefits from the enhanced MCP option which would result, *inter alia*, in an additional "upside" of [...] in the first year. This number is assumed to remain constant for each of the following three years. The two scenarios also assume that the current MCP level from Intel would remain in force (and that half of this amount would go if Dell chose the AMD option).[1353]

(1033) This example shows that long term predictions are based simply on assuming that the current rebate structure remains in place for the next four years. As is clear from section VI, the terms and conditions of Intel's rebates to Dell and others were subject to changes on a more frequent basis of around one year, rendering these assumptions unrealistic. The fact that attempts were made to estimate long term effects of different options does not prove that these estimates were reliable or relied on.

(1034) For this reason, the Commission cannot accept Professor [...]'s claim that the existence of these four year estimates means that the relevant time horizon is longer than one year.[1354]

1351 Intel Reply to the 26 July 2007 SO. Report of Professor [...], paragraph 56.

1352 Dell presentation of 17 February 2007 entitled '[project] *Status review*'. Intel Reply to the 26 July 2007 SO, annex 113, p. 3.

1353 The growing dollar amount in rebates thus reflects the expected increase in sold volumes.

1354 See paragraph 57 and 143 of the Report of Professor [...]. In the latter, Professor [...] refers specifically to the *analysis* of the AMD ramp-up contained in an internal Dell spreadsheet as evidence of the longer time horizon (presented in the 26 July 2007 SO at paragraphs 433-436). This spreadsheet generally applies a four year time horizon and also attempts to assess the relative financial merits of different options in that time frame. But the lack of realistic long term visibility is also readily apparent from these calculations. For instance, the baseline in these calculations appears to be that Intel is assumed to keep its MCP rebate to Dell at [...]% in the four calendar

(1035) In light of the above analysis, it is concluded that when examining the proportion of an OEM's supplies which is contestable, the relevant period is at most one year.

c) Relevant measure of viable cost

(1036) The final parameter to carry out the assessment is that of the relevant measure of viable cost for an as efficient competitor. To be viable in the long run, a company must cover at least the total cost of producing its output. In the presence of high fixed costs, as in the x86 CPU industry, this implies that prices on average must be significantly above marginal costs for a company to cover its total costs and, thus, to remain viable.

(1037) In order to base its assessment on a conservative cost measure, that is to say a cost measure which is more favourable to Intel, the Commission for the purposes of the present procedure uses average avoidable costs (AAC) as a benchmark to assess the exclusionary effect of Intel's rebate schemes.[1355] If an as efficient competitor is forced to price below AAC, this clearly means that competition is foreclosed because the as efficient competitor incurs losses by making (incremental) sales to customers covered by the dominant firm's conduct.[1356]

(1038) This approach appears also to be endorsed by Professor [...], who in the course of the Commission's investigation prior to the issue of the 26 July 2007 SO submitted a report on behalf of Intel. In this report, he states that: "*[i]n my opinion, using a cost-based test is an effective way to establish a screen, which is the first step in identifying prices or rebates systems that may be anticompetitive, without stifling legitimate pricing competition. (...) I agree with the basic principle (...) if a dominant firm makes sales at a price in excess of its AVC,*[1357] *that firm is earning a*

---

years 2004-2007. Another scenario is that it is raised and then kept constant at [...]%. Neither of these is close to the MCP levels that were actually provided to Dell in this time horizon: as is clear in the table in paragraph (216), the rate of the [...] and [...] MCP categories alone of the Intel rebates to Dell reached [...]% by the end of 2005.

1355 Other cost benchmarks which also take into account fixed costs elements may be more appropriate. However because ability to foreclose as efficient competitors can in this instance be shown already using AAC, it is not necessary to further look into what the correct cost benchmark is for the case.

1356 In most cases, the AAC benchmark will coincide with the average variable cost (AVC) benchmark. Nevertheless, in some cases, certain (fixed) costs are directly attributable to the particular (marginal) sales in question, and the AAC will be above the AVC. In those circumstances, pricing below AAC will indeed involve a sacrifice and generate a loss, because the AAC accurately captures the costs that would be avoided absent the sale.

1357 Professor [...] also "*evaluate[s] whether Intel's rebates involve prices that are less than its AVC, which in this case appears to be approximately the same as its AAC.*". It should be noted that one of the most important reasons why Professor [...] reaches a finding contrary to that of the Commission regarding Intel's rebates to Dell (the Commission concludes in section VII.4.2.3.2.i) below that they are capable of foreclosing) appears to be that he does not rely on the same findings as the

positive margin, and the sales in question contribute to the firm's profits, so there is no general basis for presuming that the firm is incurring short-term losses, or foregoing short-term profits, on those sales as part of a strategy to eliminate rivals and boost future profits at the expense of consumers."[1358] Although a price in excess of AAC may be considered to be capable of foreclosing under certain circumstances, a price below AAC, as indicated by Professor [...] and shown here, clearly points towards capability of foreclosure.

(1039) The remainder of this section assesses the value of the ratio between AAC and ASP for Intel, based on the Commission's analysis as outlined in the 26 July 2007 SO and Intel's Reply to the 26 July 2007 SO.

(a) Background

(1040) In his report submitted during the course of the Commission's investigation prior to the issue of the 26 July 2007 SO, Professor [...] carried out his own first calculations of whether Intel's rebates were capable of foreclosing an as efficient competitor. While he used the same methodology for conducting the as efficient competitor analysis as the Commission did in the 26 July 2007 SO, he relied on different data with respect in particular to the conditional rebates and the cost.

(1041) The approximation of AAC in the said report included "*spending that can be attributed directly to the production of microprocessors*" but did not include "*R&D, marketing, and general and administrative expenses. They also do not include other costs of sales that cannot directly be attributed to specific parts*".[1359] The cost measure proposed by Professor [...] amounted to [...]%-[...]% of Average Selling Price.[1360]

(1042) In the 26 July 2007 SO, the Commission noted that this measure of cost clearly underestimated the avoidable cost in as much as it did not include types of cost that are avoidable.[1361] As an example, the Commission noted the Intel Inside programme, which is a marketing subsidy that Intel offers its customers to promote Intel-based products (the funding is paid out under certain conditions).[1362] The Intel

---

Commission regarding the conditions of exclusivity attached to the rebates. '*Report by Professor [...] on behalf of Intel Corporation*', pp. 4-5. Intel submission of 20 March 2006.

1358 '*Report by Professor [...] on behalf of Intel Corporation*', pp. 4-5. Intel submission of 20 March 2006.

1359 '*Report by Professor [...] on behalf of Intel Corporation*', appendix B, p. 7. Intel submission of 20 March 2006.

1360 26 July 2007 SO, paragraph 411.

1361 26 July 2007 SO, paragraph 412.

1362 26 July 2007 SO, paragraph 423.

Inside funding is directly proportional to the amount of purchases; consequently, a reduction in sales to an OEM would thus lead to a direct proportional saving in Intel Inside funding. This cost is thus avoidable.

(1043) Since the Commission had not been successful in obtaining adequate cost data from Intel and since the numbers from Professor [...] were not verifiable,[1363] the Commission instead put forward as a *prima facie* measure the Cost of Goods Sold (CoGS), which was directly available from Intel's audited accounts. The 26 July 2007 SO thus contained estimates of the minimum required share on the basis of an assumption of costs comprising 35% of the average selling price.[1364] The 26 July 2007 SO indicated that any arguments by Intel that its accounting CoGS included items that were fixed for the purposes of short-run pricing decisions would have to be evaluated on an item-by-item basis. Conversely, the Commission indicated that some elements of variable (and thus avoidable) cost elements might be included in Intel's Marketing, General & Administrative expenses, which Professor [...] had treated as non avoidable.[1365]

(1044) In its reply to the 26 July 2007 SO, Intel enclosed an expert report by [...], Professor of Management at the Graduate School of Business at Stanford University. This report makes corrections to the Cost of Goods Sold and *"[b]ased on a detailed analysis of Intel's cost structure, determine[s] which cost were avoidable with respect to production or sales of x86-compatible Central Processing Units ("CPUs") over a one-year time horizon during 2002 to 2005."*[1366]

(b) Professor [...]'s criticism of Cost of Goods Sold

(1045) Professor [...] identifies three main reasons why, in his opinion, the CoGS value which the Commission used in the 26 July 2007 SO is not an appropriate reflection of Intel's AAC for the products covered by the relevant as efficient competitor tests.

(1046) Firstly, the consolidated accounts of Intel include other products than x86 CPUs. These other products have a lower margin than x86 CPUs and thus higher cost share. While CoGS on a company-wide basis was 34,4% of gross revenue (in 2005), it was only [...]% for the x86 CPUs.[1367]

1363 26 July 2007 SO, paragraph 412 ff.

1364 26 July 2007 SO, paragraph 422.

1365 26 July 2007 SO, paragraph 423.

1366 Intel Reply to the 26 July 2007 SO. Report of Professor [...], p. 1.

1367 Intel Reply to the 26 July 2007 SO. Report of Professor [...], paragraph 19.

(1047) Secondly, the CoGS of x86 CPUs can be split into two broad cost categories: Product Cost of Sales ("PCOS") and Other Costs of Sales ("OCOS"). According to Professor [...], *"[t]he cost classified in PCOS reflect the resources used to manufacture products"*[1368] while OCOS *"are primarily recategorizations of manufacturing costs that occur in times of unusually low production"*.[1369] According to the descriptions in the report of Professor [...], manufacturing costs are reallocated to the OCOS category in instances where output is unusually low, as would be the case during a start-up phase. Similarly, if production equipment is taken out of use within its normal lifetime, the cost of depreciation will be allocated to the OCOS category.[1370] [1371]

(1048) According to Professor [...], only PCOS contain avoidable items. All OCOS are unavoidable. The PCOS category of cost amounts to [...]% of gross revenue.[1372]

(1049) Thirdly, only [...]% of PCOS are avoidable according to Professor [...].[1373] Within the PCOS category, Professor [...] distinguishes between what is called *"the manufacturing overhead portion"* and costs attributable to the two production stages, Fabrication & Sort (Fab/Sort) and Assembly & Testing (A/T).[1374] The avoidable costs, according to Professor [...], mainly consist of some, but not all, the direct and indirect materials used in the two production stages, some maintenance costs in Fab/Sort and some freight cost. This brings the avoidable part of PCOS down to only [...]% of x86 CPU gross revenue.[1375]

(1050) Professor [...] recognises, as the Commission asserted in the 26 July 2007 SO, that some marketing expenditures, mainly the Intel Inside program but also some sales bonuses and commissions, are avoidable. These items represent [...]% of x86 CPU gross revenue, which brings the total amount of avoidable cost to [...]%[1376]

1368 Intel Reply to the 26 July 2007 SO. Report of Professor [...], paragraph 26.

1369 Intel Reply to the 26 July 2007 SO. Report of Professor [...], paragraph 24.

1370 Intel Reply to the 26 July 2007 SO. Report of Professor [...], paragraph 24.

1371 In this respect, the PCOS can thus be perceived as a 'best case' measure of cost - that is to say the average manufacturing cost when production is running optimally, whereas the combined PCOS+OCOS measure captures the average production cost taking into account that sometimes, the factory is not running at full capacity and sometimes the equipment is not used to its fullest.

1372 Intel Reply to the 26 July 2007 SO. Report of Professor [...], exhibit IV.1.

1373 Intel Reply to the 26 July 2007 SO. Report of Professor [...], paragraph 27.

1374 Intel Reply to the 26 July 2007 SO. Report of Professor [...], paragraph 26.

1375 Intel Reply to the 26 July 2007 SO. Report of Professor [...], exhibit IV.2.

1376 Intel Reply to the 26 July 2007 SO. Report of Professor [...], paragraph 30 and exhibit IV.1.

(1051) The Commission has analysed the report of Professor [...] and found that, on a number of issues, it understates the avoidable costs. Before describing these findings in more detail, it is appropriate to point out a number of initial observations.

(1052) Firstly, to quote only a few categories of costs which Professor [...] finds to be entirely unavoidable, it is manifestly not the case, as Professor [...] argues, that a decision by, for instance HP and Dell, to switch a substantial amount of x86 CPU purchases away from Intel (within a one year time horizon) would not have any influence whatsoever on the amount of staff necessary within Intel to service HP and Dell, or on the number of workers needed to produce x86 CPUs, on the need to reduce outsourcing, or on savings in equipment.

(1053) Secondly, Intel argues that *"[a]n above-cost discount should always be deemed justifiable. It confers benefits on customers and, by definition, is incapable of foreclosing an as efficient competitor"* and that *"discounts that pass muster under the Commission's required share methodology must be deemed both justifiable and incapable of harming competition."*[1377] The validity of this statement must be seen in context with the cost measure that is actually applied when conducting the analysis.

(1054) It is worth noting the consequences that would ensue if the Commission took the measure of cost proposed by Professor [...] as the input to its as efficient competitor test and concluded on this basis, as Intel suggests, that conditional rebates were not capable of foreclosing an as efficient competitor if they passed the test. In that hypothetical scenario, Intel could design conditional rebate schemes to all OEMs on a permanent basis such that AMD, no matter which of Intel's customers it approached, could only win over business if it priced all its x86 CPUs at a level that roughly only covered the costs of the raw materials. It is manifestly incorrect to conclude that such a pricing scheme would "*by definition*" be "*incapable of foreclosing an as efficient competitor*". In such circumstances, conditional rebates could foreclose an as efficient competitor even with a cost benchmark higher than AAC.

(c) The dynamic aspect

(1055) In its submissions to the Commission, Intel has explained how it strives to run its plants [...] capacity: "[...]"[1378]

1377 Intel Reply to the 26 July 2007 SO, paragraph 94.

1378 Intel submission of 17 May 2005, p. 4.

(1056) During the period covered by this Decision, Intel was indeed running its production facilities [...] capacity. As it states in a submission to the Commission: *"During the first two quarters of the relevant period (the third and fourth quarters of 2002), which were in the middle of the technology industry's last recession, Intel's capacity utilisation rate for its most advanced manufacturing process at the time, the P860 process, was* [...]*% and* [...]*%, respectively. By the first quarter of 2003, however, the utilisation rate increased to* [...]*%, and it stayed at or slightly above this level for the remainder of the relevant period."*[1379]

(1057) Intel states that part of the reason for its discount policy[1380] is to ensure that demand corresponds to [...] capacity utilisation: *"Intel's discounts and grants of marketing funds to its customers (...) are designed, among other things, to increase demand for Intel's microprocessors and thereby attain the capacity utilisation levels that minimise costs."*[1381]

(1058) An important issue with respect to the appropriate measure of cost is thus whether a hypothetical loss of sales to one OEM would have led Intel to decrease its production or maintain the production at full capacity (possibly changing production mix) and then instead sell the same units to other OEMs - possibly at a discount.

(1059) Professor [...]'s analysis is based on the premise that most of Intel's costs of production are fixed and for that reason, a decrease in demand due to lost sales to AMD would not allow it to make any savings with respect to personnel and equipment. This seems to assume that a decline in demand from some OEMs would lead Intel to abandon its declared ambition of running [...] capacity and instead to leave expensive capacity idle. The report does not explore whether Intel could resort to an alternative strategy.

(1060) A correct measure of average avoidable cost should in principle take into account the most profitable alternative use of the production inputs Intel (or an as efficient competitor) uses to produce the units in question. If an employee dedicated to producing x86 CPUs can be redeployed to another type of production (for instance chipsets or flash memory), it would not be correct to treat his salary as unavoidable. It is highly unlikely that a company of Intel's size and scope with

---

1379 Intel submission of 17 May 2005, pp. 3-4. The 'relevant period' referred to here is 8 quarters beginning in the third quarter of 2002.

1380 It should be noted that this does not justify the need for offering conditional rebates wherein the discount is not linked to the volume purchased from Intel, but inversely to the purchase from AMD (HP for instance would lose its rebate from Intel if it increased its purchase from AMD without decreasing its purchase from Intel).

1381 Intel submission of 17 May 2005, footnote 5.

many factories and different products has no scope for flexibility in the deployment of its staff and assets.

(1061) It should be noted in this context that Intel has one plant, named [...], which is used both for commercial production and for development activities. "[...]"[1382]

(1062) In addition, factories initially used for x86 CPU production are redeployed to produce x86 CPUs. *"As production of CPUs tapers off, the fab ramps up production of closely related chipset"*[1383] From this, it follows that a decline in demand for x86 CPUs could allow Intel to phase out x86 CPU production faster and thus increase production of chipsets. The earnings associated with increased production of chipsets are not included in Professor [...]'s analysis, and no data are available to make informed estimates of the magnitude of this effect.

(1063) In December 2005, when Intel's capacity was strained, [Intel executive], stated publicly: *"Demand for PCs and servers has been stronger than originally expected this year and Intel's factories have been running almost flat-out the entire year, forcing the company to temporarily pull back from building low-margin products such as low-end desktop chipsets."*[1384] In such a situation, there is likely to be a significant opportunity cost of winning demand from AMD with respect to one OEM in the sense that it forces Intel to forego revenues from alternative sources such as those that could accrue from lower margin products that could have been produced had they not been forced to temporarily "pull back".[1385]

(1064) Finally, even if it were true that almost all the resources needed to produce x86 CPUs are fixed in the sense that they cannot be avoided and cannot be redeployed to other uses, it is highly unlikely that it would not be profitable to keep producing at full capacity and find alternative customers to the x86 CPUs. If Intel is foregoing profitable sales to other customers due to the capacity constraints, then a correct measure of avoidable cost in that context should include the opportunity

---

1382 Intel submission of 17 May 2005, footnote 8.

1383 Intel submission of 17 May 2005, p. 28, paragraph 77.

1384 http://www.infoworld.com/article/05/12/01/HNintelconstraints_1.html, printed and downloaded on 14 January 2009.

1385 Though these alternative products may have lower margins than CPUs, they could still provide a net positive contribution to Intel's earnings. From exhibit IV.2 of the Report of Professor [...], it is apparent that the revenues from non-CPU related activities in 2005 were [...] and that Costs of Goods Sold for those activities were [...]leading to a margin on top of Cost of Goods Sold of [...]%.

costs of not selling the x86 CPUs to another customer (perhaps at a discounted rate).[1386]

(d) The use of regression analysis

(1065) Professor [...] describes how he follows a *"structured method"*[1387] which relies on his economic judgment, Intel sources and a quantitative analysis, in order to determine whether a given cost component is to be considered avoidable or unavoidable:

> *"I consider a cost to be avoidable or unavoidable if: This is indicated by my economic judgment; The qualitative evidence indicates the cost is avoidable or unavoidable; The quantitative evidence does not provide a contradictory indication. In cases in which a coefficient is statistically significant but very small and both the economic analysis and the qualitative evidence suggest a cost is unavoidable, I consider the cost unavoidable. If the coefficient on the independent variable (e.g., production volume) is negative and statistically significant, indicating an inverse relationship between two variables, I consider the cost to be unavoidable. In cases in which the qualitative evidence suggests a cost is avoidable, I reconsider this preliminary conclusion if regression results consistently indicate a lack of a statistically significant coefficient."*[1388]

(1066) Professor [...] claims that by using regression analysis, he is "*assessing the extent to which changes in output affect changes in cost.*"[1389]

(1067) Regression analysis is intended to show conditional correlation between variables. It is the relevance of the statistical assumptions that allows an interpretation of the estimated coefficients in terms of their correspondence to economic parameters. In particular, wrong assumptions will lead to spurious results. Well known issues for empirical work are, for instance, the risk that certain relevant variables are omitted, the risk that the apparent conditional link or lack thereof is hidden by a higher level process simultaneously conditioning the two variables, and the risk of wrongly specifying the temporal dependence between the variables.

1386 Indeed, Professor [...] in a different context makes the point that *"[i]f Dell were to shift towards AMD, Intel would naturally try to sell more microprocessors to other OEMs to maintain the utilization of its fabs."* Intel Reply to the 26 July 2007 SO. Report of Professor [...], paragraph 120.

1387 Intel Reply to the 26 July 2007 SO. Report of Professor [...], paragraph 45.

1388 Intel Reply to the 26 July 2007 SO. Report of Professor [...], paragraph 51.

1389 Intel Reply to the 26 July 2007 SO. Report of Professor [...], paragraph 46.

(1068) An omitted variable is a variable that is not present in the regression calculation, but is nevertheless correlated with the variables which are assessed for a conditional link. In such a case, it is not possible to delineate the variations which are due solely to the variation of the examined parameters from the effect due to the potential simultaneous variations of the correlated omitted variable. A low number of regressors generally increases the probability that an important variable has been omitted.

(1069) In this case, Professor [...] performs successive regressions with only one independent variable each time. His calculations are therefore prone to the issue of omitted variables. To take a hypothetical example, let it be assumed that intermediate goods are substitutable to labour, that is, that it is possible to be more efficient in the use of intermediate goods by dedicating part of the labour force to this task. Let it also be assumed that, as a reaction to a sudden increase in demand, some labour force is reallocated from this task to direct production tasks. Then, in the short term, a sudden increase of demand would lead to a very significant increase in the use of direct materials and to a low increase of labour. The regression calculation as performed by Intel would lead to the conclusion that labour is not significantly correlated with demand, and that therefore, labour costs are not avoidable, which is incorrect. The inaccuracy is the result of the omission of the intermediate goods variable.[1390]

(1070) The issue of "simultaneity" refers to the fact that the two variables the correlation of which is assessed may be jointly determined in a common process. Typically, for instance, supply and demand are generally jointly determined with prices as the result of competition between different firms. In the present case, it is likely that prices, costs and quantities are also jointly determined. It is then not possible to infer from the raw correlations what share of each part of the cost can be avoided after a fall in demand, as a fall in output might for instance partly be the consequence of the increase of the price of a raw material that jointly determined the supply and the direct costs. Generally speaking, firms will react strategically in order to limit the negative consequences of an increase in their costs. For instance, they would not transfer the increase into price to the full extent in order to limit the subsequent fall in demand. Then, the real direct influence of the change in demand would be underestimated due to simultaneous actions by the firm.

(1071) In the present case, an increase in the market price of a raw material, for example silicon, is likely to have several simultaneous consequences. First, if possible, the process should be optimised to use less silicon for the fabrication of

---

1390 In certain cases, in particular the present one, the addition of the level of intermediate goods in a linear model might not be sufficient either to solve the issue, as the mis-specification is likely to be even more fundamental.

the same number of chips. However, it is likely that the overall cost of the silicon per chip will increase, even though by a smaller proportion than holding technology constant. Typically, only a part of this increase in cost will be translated into price, as the manufacturer has market power. This increase in price will decrease demand, creating a conditional negative correlation between sales and the use of silicon. Thus, the overall correlation will be underestimated if the change in the use of intermediate materials is linked to price variations of raw materials, which is likely in this instance. This underestimation in itself is polluted by the strategic reaction of the firm in terms of process and pricing. Overall, it is therefore inappropriate for Professor [...] to interpret this correlation as the impact of sales on the use of raw materials all other things being equal.

(1072) Finally, Professor [...] based his analysis on time series. The use of time series generally provides useful information but requires special care. It is well known that rigidities exist for the variations of some variables, such as labour for instance.

(1073) The importance of this issue can be illustrated by a hypothetical example in which labour cost is avoidable, in the sense that output capacity is directly proportional to the number of employees. In this example, it is assumed that a contract with an employee can only be cancelled with three months' notice in the sense that from the moment an employee is laid off, he will no longer be productive but will continue to represent a cost to the company for three months. It is also assumed that a new employee will not be able to contribute positively to production until after three months of training, and that during that first period, another employee has to train the newcomer and hence reduce his own output by 50%. It is also assumed that normal production is 100 units with 100 employees. At the beginning of January, the factory is informed that it should only produce 99 units per quarter. The factory reduces its workforce to 99, but in terms of cost, this only takes effect in the second quarter. Finally, it is also assumed for the purpose of illustration that on 1 July, the factory is asked to increase production to 101 and thus has to hire another two employees. As a consequence of the training effort, production will temporarily be reduced. The cost and output profile of the factory would then look as follows:

Table 15 - Cost and output profile of the factory

Production	99	99	98	101
Change	-1	0	-1	+3
Cost	100	99	101	101
Change	0	-1	+2	0

Hypothetical example

(1074) As can be seen from table 15, the change in cost occurs in different quarters than the change in output.[1391] The methodology applied by Professor [...] would in the example of recital (1073) find a negative correlation which could in some circumstances even be significant.[1392] Professor [...]'s method applied to the simplified example of recital (1073) would falsely conclude that costs which are indeed avoidable (although with a time lag) were unavoidable.[1393]

(1075) In view of the above, the regression analysis method used by Intel has many methodological shortfalls which cast serious doubt on its capability to serve as a reliable tool to distinguish avoidable and unavoidable costs.

(1076) The shortfalls of the regression analysis outlined in recital (1067) are compounded by the fact that, as Professor [...] states, he conducts the regression analysis for those instances where *"it is plausible that cost must be incurred to produce or sell x86-compatible CPUs within a one-year period, and in which it is plausible that these costs vary with production levels."*[1394] As such, the - unreliable - method is mainly applied to further exclude cost components, but not to include components otherwise ignored (for instance, the report does not contain any quantitative analysis of OCOS).

(1077) This indicates that the method is biased towards finding cost to be unavoidable: a lack of a statistically significant positive correlation[1395] (including a negative correlation) can be used to overturn other evidence suggesting that a cost is avoidable. But a statistically significant positive correlation will not be used to overturn other evidence suggesting that the cost is unavoidable (if the coefficient is small).

[1391] Professor [...] recognises a similar timing-related source of error with respect to "data inconsistencies" in paragraph 102 of his report. For instance, purchases are registered in the month that they are purchased, and not in the month that they are used.

[1392] Intel Reply to the 26 July 2007 SO. Report of Professor [...], p. 17, paragraph 49.

[1393] *"If the coefficient on the independent variable (for example production volume) is negative and statistically significant, indicating an inverse relationship between two variables, I consider the cost to be unavoidable."* (Intel Reply to the 26 July 2007 SO. Report of Professor [...], paragraph 52.)

[1394] Intel Reply to the 26 July 2007 SO. Report of Professor [...], paragraph 45.3.

[1395] A lack of a statistically significant positive correlation does not necessarily mean that a relationship does not exist. Such a result can either be due to a lack of any actual relationship or to a lack of a sufficiently rich dataset necessary to allow the relationship to be conclusively identified. Similarly, a statistically significant coefficient does not exclude the possibility that no relationship exists in reality. But when a result is very significant statistically, this probability is very small.

(1078) Furthermore, Professor [...]'s description above mentions that a significantly negative coefficient in a regression analysis between output level and a cost component will lead him to conclude that the cost is unavoidable.

(1079) As a matter of fact, in the present type of analysis, the presence of a negative coefficient in the regression analysis is unexpected. Should it occur as a result, it is likely to indicate important biases in the estimation, which may be the cause of one or several of the misspecifications of the statistical model presented in recital (1067).

(1080) When such an unexpected result occurs for one cost category, common scientific sense should have led Intel to question the validity of its model, rather than unquestioningly decide that the cost category is unavoidable, which is to its benefit.

(1081) On the basis of the above, the Commission finds that the regression analysis on its own cannot be used to overrule the presumption regarding cost avoidability, in particular in relation to cost types where the adaption time may be slow compared to the quarterly data (but sufficiently fast compared to the one year time horizon applied in this case). This is likely to be the case for instance for payroll cost.

(e) PCOS

(1082) Professor [...] concludes that only [...]% of the PCOS relating to Fab/Sort facilities and none of the PCOS relating to A/T facilities[1396] is avoidable. As will be explained below, this is based on what appears to be a conscious omission of cost components that reasonably could be expected to be avoidable. Table 16 summarises Professor [...]'s findings with respects to PCOS.

Table 16 - Professor [...]'s results with respect to PCOS

	Average Annual Cost	Average Annual units	Cost per unit	Share avoidable	Avoidable cost	Share Contribution[1397]
	Million USD	Million units	USD per unit	%	USD per units	
Fab/Sort	[...]	[...]	[...]	[...]	[...]	[...]%

1396 Excluding Direct packaging.

1397 Of [...] gross ASP.

Assembly/Test – Facilities	[...]	[...]	[...]	[...]	[...]	[...]%
Assembly/Test – Packaging	[...]	[...]	[...]	[...]	[...]	[...]%
EMG – Overhead (excluding freight costs)	[...]	[...]	[...]	[...]	[...]	[...]%
Freight Costs	[...]	[...]	[...]	[...]	[...]	[...]%
TOTAL RCOS	[...]	[...]	[...]		[...]	[...]%

Source: Intel[1398]

a. Materials

(1083) While Professor [...] considers materials (both direct and indirect) avoidable with respect to Fab/Sort, they are not considered avoidable with respect to A/T facilities.[1399]

(1084) With respect to A/T facilities, Professor [...] states that *"[i]ndirect materials include testing equipment such as burn-in ovens and test interface units"*.[1400] The reason given for the unavoidability is that *"[t]hese tend to be specific to a given product and are therefore purchased each time a new type of product is manufactured."*[1401]

(1085) Contrary to his general method described above in recital (1065), Professor [...] does not indicate his prior expectations about this cost category. He simply notes that Intel personnel has indicated that these costs do not vary with output and that there is no observed correlation.[1402]

(1086) As already indicated in recitals (1072) to (1074), a lack of correlation may be due simply to the fact that the cost of the material may occur in a different quarter than when it is used. Furthermore, the fact that new material is being purchased when a new product is being produced is not sufficient to justify why its usage could not be avoided if production was avoided. The fact that these costs are

---

1398 Intel Reply to the 26 July 2007 SO. Report of Professor [...], exhibit XI.1. *"Per unit AAC as percent of CPU Gross ASP 2002-2005"*.

1399 Professor [...] distinguishes between packaging materials that are considered avoidable and all other materials (both direct and indirect) which are not considered avoidable. (Intel Reply to the 26 July 2007 SO, Report of Professor [...], paragraph 152 ff).

1400 Intel Reply to the 26 July 2007 SO. Report of Professor [...], paragraph 157.

1401 Intel Reply to the 26 July 2007 SO. Report of Professor [...], paragraph 143.

1402 Intel Reply to the 26 July 2007 SO. Report of Professor [...], paragraphs 153-189.

categorised as materials rather than equipment suggests that they are not of the type that last for the entire lifetime of the production process.

(1087) For this reason, the Commission considers that direct and indirect material should not be treated as unavoidable, in particular given the fact that Professor [...] in the context of Fab/Sort activities noted that he expected those types of cost to vary with output.[1403]

b. P ayroll cost

(1088) Professor [...] reaches the conclusion that payroll costs with respect to both Fab/Sort and A/T are unavoidable.

(1089) Professor [...] notes with respect to Fab/Sort that *"[d]ecisions related to the staffing levels of both types of employees are generally made on a three to five year time horizon."* [1404]

(1090) It is also stated that direct employees are given [...]before starting to work and being paid [...][1405]

(1091) This is based in part on *"Intel sources"* as mentioned above, as well as on the fact that the regression analysis only finds a statistically significant correlation between output and payroll in some fabs (and sometimes this relationship is not very large).[1406]

(1092) With respect to Assembly and Testing fabs, the employees are [...] and it takes [...][1407]

(1093) First, it should be noted that Professor [...]'s qualitative assessment of whether labour costs are avoidable disregards a number of issues which would indicate that they are avoidable:

a. general turnover of staff means that there should be some flexibility in staff levels, even if new staff need 9 months of training; for instance, this can be achieved by increasing or decreasing efforts to retain staff; or by being more or less strict with who passes the initial training programme etc;

b. overtime pay presumably varies with overall workload;

1403 Intel Reply to the 26 July 2007 SO. Report of Professor [...], paragraphs 106 and 110.

1404 Intel Reply to the 26 July 2007 SO. Report of Professor [...], paragraph 87.

1405 Intel Reply to the 26 July 2007 SO. Report of Professor [...], paragraph 88.

1406 Intel Reply to the 26 July 2007 SO. Report of Professor [...], paragraph 116.

1407 Intel Reply to the 26 July 2007 SO. Report of Professor [...], paragraph 144.

c. an alternative use of staff time has value to the firm (retraining or pilot production etc.).

(1094) Secondly, it should be noted that conclusions which rely on interviews with Intel staff are wholly unverifiable by the Commission. Intel did not provide any document describing the context of these interviews, not even the list of the persons interviewed and/or the subjects raised with them. This makes it impossible for the Commission to make any judgement on the accuracy of Professor [...]'s conclusions based on the interviews.

(1095) This is significant in the light of the fact that the submissions from Intel's experts seem to vary. While Professor [...] thus concludes that labour costs are unavoidable, Professor [...], who included labour costs in his first report to the Commission stated: *"I understand that direct labor, for example, would not be materially reduced unless Intel projected redundant labor for a period of nine months to one year or more."*[1408]

(1096) Professor [...]'s regression analysis does show that payroll varies with production in a [...] for [...] wafers (which is based on 78 data points),[1409] [...] wafers (which is based on only 36 data points).[1410] The [...] wafers is dismissed by Professor [...] *inter alia* on the grounds that the coefficient is very small (suggesting that a [...]% increase in output would lead to only a [...]% increase in payroll within the same quarter).[1411]

It should be noted that the payroll cost data that Professor [...] relies on for fabrication and sort activities include training cost.[1412] Training activities are undertaken at the expense of production in the sense that these staff do not produce when they train. In circumstances where a factory is running at full capacity, a decline in production could free up resources to launch retraining. In this case, labour cost should be treated as avoidable because there is an alternative use of staff, which benefits Intel in the sense that the training could increase productivity subsequently. When analysing the cost category *"travel and entertainment"*,[1413] Professor [...] recognises that *"travel and relocation costs may be higher in lower production*

1408 'Report of Professor [...] on behalf of Intel corporation', appendix B, p. 8. Intel submission of 20 March 2006.

1409 Intel Reply to the 26 July 2007 SO. Report of Professor [...], exhibit VIII.4.

1410 Intel Reply to the 26 July 2007 SO. Report of Professor [...], exhibit VIII.5.

1411 Intel Reply to the 26 July 2007 SO. Report of Professor [...], paragraph 115 ff.

1412 Intel Reply to the 26 July 2007 SO. Report of Professor [...], paragraph 113.

1413 This category appears to also include some training cost (Intel Reply to the 26 July 2007 SO. Report of Professor [...], paragraph 129).

months as employees are sent to other Fab locations for training on a new process and new tools."[1414] This is also recognised in the section on A/T fabs, where it is stated that *"Maintenance and training of staff may even increase during periods of lower production."*[1415]

(1098) Under such circumstances, the regression analysis by Professor [...] would be misleading because it would not show any correlation between output and payroll cost because the latter includes countercyclical training cost.[1416]

(1099) For this reason, the Commission cannot accept the contention that payroll cost related to the production of x86 CPUs should be treated as unavoidable. This is the case in particular in the light of the fact that Professor [...] noted that direct labour could be reduced if production was expected to decline for nine months or more, and that some of the regression results suggest that some adaptation is possible even within a given quarter.

c. Period cost

(1100) Professor [...] concludes that period costs are unavoidable since equipment is ordered more than a year before it is used and because equipment depreciates due to technological obsolescence. The regression analysis does not show any correlation between output and period cost.[1417]

(1101) Firstly, it should be noted that period costs that are used for the correlation analysis are based on the accounting conventions inside Intel with respect to how different types of equipment are depreciated. This is done on the basis on *"their projected useful lives."*[1418] As is stated in the report of Professor [...], *"[d]epreciation is never suspended once it commences."*[1419] The period cost data thus only contain information about how much equipment is in place in the factory in any given quarter, not how intensely it is used. To the extent that the actual lifetime of an asset depends on its usage, it would not be picked up in the correlation analysis.

1414 Intel Reply to the 26 July 2007 SO. Report of Professor [...], paragraph 130.

1415 Intel Reply to the 26 July 2007 SO. Report of Professor [...], paragraph 161.

1416 Technically, this means that there is a downward bias in Professor [...]'s estimate in the sense that the regression analysis would produce smaller and less significant coefficients than what would be correct. Professor [...] does not discuss this issue but dismisses the analysis on the basis that the results are either insignificant or coefficients too small.

1417 Intel Reply to the 26 July 2007 SO. Report of Professor [...], paragraphs 117-119 and 164-167.

1418 Intel Reply to the 26 July 2007 SO. Report of Professor [...], paragraph 96.

1419 Intel Reply to the 26 July 2007 SO. Report of Professor [...], paragraph 97.

(1102) The correlation analysis could thus potentially pick up only an overall relationship between the value of equipment in a factory that is currently being depreciated (hence the period costs) and the output. During the ramp-up phase when equipment is being deployed, depreciation appears to commence *"four months after the day it is received by Intel",*[1420] which presumably may or may not be in the same quarter as it begins to contribute to output. So, even during the ramp-up phase, the correlation analysis would not be informative.

(1103) Due to these observations, the correlation analysis cannot be expected to be informative one way or the other as to whether period costs are avoidable.

(1104) The key question is thus whether usage of the equipment has a negative effect on its expected lifetime or resale value. Professor [...] mentions that "*Intel sources corroborate that equipment depreciates primarily due to technological obsolescence and therefore does not vary with output.*"[1421]

(1105) However, Professor [...] also mentions that when "*a Fab is slated for a process change, wafer size change, or capacity change, the 'reuse' portion of all installed equipment is evaluated. Intel routinely evaluates its entire worldwide inventory of Fab equipment to determine what the optimal deployment of that equipment is and where the deployment should occur. If there is no production reuse for a piece of equipment, Intel determines whether the best return is to sell the tool, harvest it for spare parts, or donate it, and pursues the financially optimal disposition path.*"[1422] The very existence of such a deployment strategy is inconsistent with a claim that all equipment remains installed until obsolescence.

(1106) Intel has also in a submission to the Commission described the importance of reusing tools. *"Tool Reuse: Another common source* [...] *for Intel is the* [...] "[1423]

(1107) It may be the case that part of the equipment loses its economic value independently of whether it is used or not, but this will not be the case for *all* parts of the equipment. Rather, it must be expected that wear and tear (or lack thereof) has some influence on the economic value.

(1108) One example is burn-in ovens, which are used for testing of the x86 CPUs.[1424] According to Professor [...], these ovens *"can be used for multiple products and*

1420 Intel Reply to the 26 July 2007 SO. Report of Professor [...], paragraph 97.

1421 Intel Reply to the 26 July 2007 SO. Report of Professor [...], paragraph 118.

1422 Intel Reply to the 26 July 2007 SO. Report of Professor [...], paragraph 98.

1423 Intel submission of 17 May 2005, p. 28.

1424 Intel Reply to the 26 July 2007 SO. Report of Professor [...], paragraph 138.

processes"[1425] and "*degrade with use*".[1426] Yet the cost of usage of these ovens is treated as unavoidable. As such, Professor [...] significantly underestimates the true avoidable cost by treating all equipment cost as unavoidable.

(1109) In addition to flexibility related to ramping down production of x86 CPUs on a given facility, there appears also to be some flexibility with respect to ramping up of new facilities. Professor [...] notes that the ramp-up phase *"begins with relatively low volumes and typically lasts three to five quarters. Equipment is added based on projected and actual demand, and volume steadily increases".*[1427] From this, it follows that a hypothetical slowdown in demand could result in a slower ramp-up of a factory. Presumably, Intel adapts the speed of the ramp-up to actual demand because that is cost-effective strategy. The savings associated with a slower ramp-up are not addressed by Professor [...], and no data are available to make informed estimates of the magnitude of this effect.

(1110) Professor [...]'s report does contain some observations that indicate a certain limitation to the flexibility available to Intel. Equipment needs to be ordered 6 to 12 months in advance and cancellation fees may become quite high. However, a firm of Intel's size with many factories in operation simultaneously is likely to have a significant degree of flexibility with its stream of purchase of equipment. A decision to delay the introduction of new equipment for a certain period during which demand is low could presumably be made without incurring cancellation fees.[1428]

(1111) This is even more likely in view of Intel strategy of copying exactly the design from one factory to another. According to Intel's own explanation, the 'copy exactly' strategy entails *inter alia* that "*everything at the development plant - the process flow, equipment set, suppliers, plumbing, manufacturing clean room, and training methodologies - is selected to meet high volume needs, recorded, and then copied exactly to the high-volume plant. (...) The 'Copy Exactly' strategy creates great flexibility for Intel's factory network. Because each fab is nearly identical, wafers can be partially completed in one fab and finished in another, yet yield at the same level as if the wafer were built in only one factory.*"[1429]

1425 Intel Reply to the 26 July 2007 SO. Report of Professor [...], paragraph 138.

1426 Intel Reply to the 26 July 2007 SO. Report of Professor [...], paragraph 77.

1427 Intel Reply to the 26 July 2007 SO. Report of Professor [...], paragraph 148.

1428 Intel Reply to the 26 July 2007 SO. Report of Professor [...], paragraphs 91-92.

1429 http://www.intel.com/pressroom/kits/manufacturing/copy_exactly_bkgrnd.htm, downloaded and printed on 14 January 2009.

(1112) Due to Intel's size, with many factories being phased in and retooled on a continuous basis, it is therefore likely that there are some costs that could be saved by exploiting this flexibility, either with respect to allowing a slower ramp-up or faster phase-out of a facility should demand decline. In this process, some of the equipment cost may be avoidable without that showing up in Professor [...]'s regressions for the reasons specified in recital (1067).

(1113) For these reasons, the Commission considers that period costs should not be treated as completely unavoidable.

(1114) However, the data necessary to make a more informed estimation of what proportion of these costs are actually avoidable are not available to the Commission. The Commission estimate of the avoidable cost presented in recital (1119) therefore does not include any contribution from period cost. This contributes significantly to the Commission's assessment of its own estimate being very favourable to Intel.[1430]

d. Office Operations

(1115) Office operations include maintenance and repair costs, as well as spare part costs. With respect to Fab/Sort, Professor [...] states that he would expect these costs to vary with production. This is confirmed by the correlation analysis showing that these vary with output.

(1116) With respect to Assembly and Test facilities, Professor [...] argues that these costs are unavoidable in part because maintenance *"is often preventive and, as such, is scheduled for regular intervals that do not depend on production. Spare parts in Assembly/Test facilities are stockpiled and therefore, are not necessarily purchased based on the level of production."*[1431] The fact that spare parts are stockpiled is not a good reason to treat them as unavoidable. The effect of having spare parts stockpiled is that the costs may not be registered in the same period that the part is used. The effect of this delay is that no immediate correlation appears between the costs incurred in a given quarter and the actual output in that same quarter. Stockpiling can thus contribute to explaining why there is no correlation observed in the data, but this cannot be used to reject the reasonable assumption

---

1430 Period costs comprise [...]% of Fab/Sort cost (Intel Reply to the 26 July 2007 SO. Report of Professor [...], exhibit VIII.2) and [...]% of A/T cost (Intel Reply to the 26 July 2007 SO. Report of Professor [...], exhibit VIII.25). It is reasonable to accept that those costs related to the depreciation of the buildings should not be considered avoidable. These comprise approximately [...] of total depreciation (Intel Reply to the 26 July 2007 SO. Report of Professor [...], paragraph 96). From this, it follows that even if only [...]% of the equipment-related period costs were assumed to be avoidable, the avoidable share of the production cost would increase by [...]%.

1431 Intel Reply to the 26 July 2007 SO. Report of Professor [...], paragraph 173.

that the actual use of spare parts is proportional to the production undertaken. Similarly, it should be expected that reduced demand for output would allow for a less aggressive deployment of preventive maintenance.

(1117) For these reasons, the Commission does not consider that Office Operations should be treated as an unavoidable cost both for Fab/Sort and for A/T.

e. Conclusion on PCOS

(1118) As mentioned in recital (1082), Professor [...] reaches the conclusion that [...]% of PCOS on Fab/Sort facilities were avoidable (average of the 2002-2005 period).[1432] The avoidable components in Professor [...]'s estimate (direct material; indirect material and office operations) respectively comprise [...] and [...]% of the average of PCOS.[1433] As explained in recital (1099), the Commission does not accept the claim that payroll costs are unavoidable. These comprise [...]% of the average PCOS on Fab/sort facilities,[1434] bringing the avoidable share up to [...]%.

(1119) For A/T facilities, Professor [...] argues that none of the costs are avoidable (save the packaging cost, which is treated as a separate category). As explained in recitals (1087), (1099) and (1117), the Commission does not accept the claims that direct material, indirect materials, labour costs and office operations are unavoidable. These four categories comprise [...]%, [...]%, [...]% and [...]% respectively of the average of PCOS. These adjustments bring the avoidable share of the PCOS in A/T facilities to [...]%.

Table 17 - Commission's adjusted table for PCOS

	Average Annual Cost	Average Annual units	Cost per unit	Share avoidable	Avoidable cost	Share contribution [1435]
	Million USD	Million Units	USD per unit	%	USD per unit	% of ASP
Fab/Sort	[...]	[...]	[...]	[...]	[...]	[...]
Assembly/Tes	[...]	[...]	[...]	[...]	[...]	[...]

1432 See recital (1082).

1433 Intel Reply to the 26 July 2007 SO. Report of Professor [...], exhibit XI.1, panel F. This is after correcting for the role of TMG cf. endnote [10].

1434 Intel Reply to the 26 July 2007 SO. Report of Professor [...], exhibit XI.1, panel E. This is after correcting for the role of TMG cf. endnote [10].

1435 Of [...] gross ASP.

Facilities						
Assembly/Test & Packaging	[...]	[...]	[...]	[...]	[...]	[...]
TMG Overhead (excluding freight costs)	[...]	[...]	[...]	[...]	[...]	[...]
Freight Costs	[...]	[...]	[...]	[...]	[...]	[...]
TOTAL PCOS	[...]	[...]	[...]		[...]	[...]

(1120) These corrections therefore increase the contribution from PCOS to the avoidable cost estimate as carried out by Professor [...] by [...] percentage points ([...]% to [...]%).

(f) Sales and Marketing

(1121) Sales and Marketing expenditures are part of the overall costs which fall outside production costs, which were not included in Professor [...]'s original cost calculations, and which the Commission had stated in the 26 July 2007 SO likely included avoidable elements (see recital (1043)).

(1122) According to Professor [...], Sales and Marketing expenditures can be regrouped into non-merchandise spending and merchandise spending. The latter category can be subdivided into direct marketing and the Intel Inside program.[1436] Direct marketing includes media spending.[1437] Non-merchandise spending primarily relates to Intel's worldwide sales force. The main cost factor is employee compensation, which can be split into Payroll (excluding bonuses), Commissions, and Bonuses.[1438]

(1123) Professor [...] concludes that the Intel Inside program as well as certain bonuses and commissions are avoidable whereas all other sales and marketing costs are unavoidable. For direct marketing, there is no economic analysis presented in this regard. The conclusion that these costs are unavoidable appears to be based on the observation that "*these costs are largely determined in advance through a combination of long-term budgeting and contracts with ad agencies.*"[1439]

1436 Intel Reply to the 26 July 2007 SO. Report of Professor [...], paragraph 205.

1437 Intel Reply to the 26 July 2007 SO. Report of Professor [...], paragraph 222.

1438 Intel Reply to the 26 July 2007 SO. Report of Professor [...], paragraph 210 ff.

1439 Intel Reply to the 26 July 2007 SO. Report of Professor [...], paragraph 222.

(1124) This leads Professor [...] to conclude that over the period 2002-2005, Sales and Marketing costs contributed [...]% to the avoidable share of gross average selling price.

Table 18 - Professor [...]'s results with respect to sales and marketing costs

	Average Annual Cost	Average Annual units	Cost per unit	Share Avoid	Avoid cost	Share contribution[1440]
	Million USD	Million Units	USD Per unit	%	USD Per unit	
Sales and Marketing (Ex HP, Bonuses and Comm.)	[...]	[...]	[...]	[...]	[...]	[...]
Intel Inside Program	[...]	[...]	[...]	[...]	[...]	[...]
Sales and Marketing Bonuses	[...]	[...]	[...]	[...]	[...]	[...]
Commissions	[...]	[...]	[...]	[...]	[...]	[...]
	[...]	[...]	[...]		[...]	[...]

Source: Intel[1441]

a. Non-merchandise spending

(1125) Professor [...] concludes that non-merchandise spending is not avoidable except for commission and bonuses. Professor [...] notes that *"Intel's sales force is allocated across different channels and certain sales people are dedicated to work with specific OEMs. Intel's sales and marketing controller personnel indicate that an increase in sales of the same product to a given OEM would not result in an increase in headcount dedicated to that account."*[1442]

(1126) Professor [...] also conducts a correlation analysis between the headcount in the sales teams for HP and Dell with the x86 CPU unit sales and finds no correlation on a quarterly basis.[1443]

(1127) As mentioned in recital (1067), a correlation analysis of this sort cannot adequately capture potential avoidable costs, *inter alia* because changes in sales

---

1440 [...] gross ASP.

1441 Intel Reply to the 26 July 2007 SO. Report of Professor [...], exhibit XI.1. *"Per Unit AAC as percent of CPU Gross ASP 2002-2005"*.

1442 Intel Reply to the 26 July 2007 SO. Report of Professor [...], paragraph 212.

1443 Intel Reply to the 26 July 2007 SO. Report of Professor [...], paragraph 213.

volume and adjustments in sales force do not necessarily take place within the same quarter. More importantly, it may indeed be that the number of people involved in selling to a given OEM remains the same, but if total payouts to those employees fall in proportion to the decline in sales, it would not be correct to consider the payroll cost unavoidable.

(1128) The data on which Professor [...] relies allow for a simple study of what happened with Intel's cost when Dell in 2006 for the first time decided to shift part of its demand to AMD.

(1129) The graph below shows that salaries[1444] to the Dell sales force had [...].[1445] [...] just as the sales volume from Dell [...] due to Dell's decision to start partially sourcing from AMD.[1446] The change in the paid out bonuses was [...]. The combined effect was such that the total costs attributed to the Dell cost centre (which also include other expenditures) [...]. This shows that it is possible that the cost of the sales force may evolve in proportion to actual sales on an annual basis.[1447]

[chart]

Source: Commission computations based on files '*Dell and HP HC Spending History.pdf*' and '*OEM gartner MSS (q4'07).xls*' attached the Report of Professor [...]

(1130) Professor [...] also conducts a number of regression analyses between total sales of x86 CPUs and individual cost items such as payroll (excluding bonuses), bonuses, indirect materials, Intel Inside expenses, period costs etc.[1448] The only significant positive correlation established in the analysis is between sales and the Intel Inside expenses, and between sales and bonuses.[1449] These findings contribute to Professor [...]'s conclusion that bonuses and commissions[1450] and Intel Inside

---

1444 The category "exempt salaries" from the file "Dell and HP HC Spending History.pdf" enclosed with the Report of Professor [...].

1445 Based on annual aggregation of the Gartner data provided in "OEM gartner MSS (q4'07).xls" enclosed with the Report of Professor [...].

1446 The data set from Professor [...] also contains information about part of 2007, but since data for the whole year are not available, they have been omitted from the calculations.

1447 Other examples may in principle show a lack of such a covariance for reasons that have nothing to do with whether or not costs are avoidable. For instance, Intel may of its own volition in a given year increase its sales-force dedicated to a given OEM with the hope of increasing its sales in the future. Such events have no bearing on whether or not the costs should be treated as avoidable.

1448 Intel Reply to the 26 July 2007 SO. Report of Professor [...], Exhibit IX.6.

1449 Though only for one out of two specifications.

1450 No data are available for Commissions.

funding are the only avoidable components of the Marketing and Sales expenditures.

(1131) Firstly, it should be noted that the data analysis is conducted on the basis of aggregated costs for the whole firm compared to the aggregated sales for all customers, and is thus not informative as to whether costs attributable to a particular customer correlate with sales to that particular customer (the number of observations is thus limited to only 15). This is despite the fact that annual data appear to exist for the costs attributable to each individual customer.

(1132) The inability of the aggregated data to accurately capture whether costs are avoidable can be illustrated by how poorly they perform with respect to the item where it is *a priori* known that there is an almost perfect co-variation between sales and cost. Since the Intel Inside program is designed to ensure that costs are directly proportionate to sales, this should show up clearly in the data. The data should show that if sales increase by 1%, Intel Inside costs should also increase by approximately 1%. However, the estimations show that Intel Inside funding [...]%. The nature of the data and Professor [...]'s analysis are such that they allow the hypothesis that Intel Inside funding would increase by 1% when sales increase by 1% to be rejected.[1451]

(1133) If an estimation was conducted using the same methodology, but using simply the eight data points regarding Dell's Intel Inside program reported in section b, an estimate which is very close [...] would be found.[1452] This shows that the aggregated data-set used by Professor [...] is not reliable.

(1134) The purpose of bonuses and commissions is to *"encourage sales and marketing staff to facilitate the sale of CPUs".*[1453] It should be expected that the incentive programmes of the sales staff is directed towards rewarding in particular incremental sales. This is recognised by Professor [...] when he states that the commissions are paid *"on an accelerated schedule."*[1454] In this respect, a loss in sales of for instance, 5% could lead to a decrease in commission of for instance,

---

1451 Based on the t-test provided in the exhibit, it is possible to conclude that the estimate of [...] standard deviations away from 1, which would result in the conclusion that the coefficient is significantly different from 1.

1452 The analysis of only 8 data points would allow the conclusion that the coefficient with a [...] probability would be between [...] and [...] with the "best guess" being [...]%.

1453 Intel Reply to the 26 July 2007 SO. Report of Professor [...], paragraph 239.

1454 Intel Reply to the 26 July 2007 SO. Report of Professor [...], paragraph 234.

10%. Bonuses are also paid out with reference to personal performance targets.[1455] As can be seen from the chart in recital (1127), the decline in sales to Dell in 2006 led to a [...] (that is to say the total sum of salaries, bonuses and other costs).

(1135) Professor [...] proposes to exclude the basic salaries from the avoidable costs and then to treat only commissions and bonuses as avoidable. In order to achieve a measure of average avoidable cost, Professor [...]'s method results in these costs being divided by total sales rather than incremental sales, thereby ignoring the accelerated structure. This is manifestly incorrect. To illustrate, it should first be assumed that a loss of 5% in sales would result in a reduction in bonuses of 10%. Rather than 10% of the bonuses being considered avoided, Professor [...]'s measure of average avoidable cost would assume that only 5% was being avoided. The data provided by Professor [...] do not allow for a more detailed analysis of how precisely to improve the measure of avoidable cost.

(1136) One way to attempt to correct for this issue could be to allocate the bonuses exclusively to the contestable share of sales, which would reflect the assumption that Intel designs the bonuses to reward its sales staff precisely when it wins sales that are at risk.[1456] Whether or not this is appropriate depends on how closely the design of the bonuses actually reflects performance with respect to contestable sales.

(1137) An alternative method would be to include all salary costs (that is to say payroll, bonuses and commissions) in the avoidable cost calculation and average them equally across all sales. This would correspond to the assumption that a loss in sales of 5% would result in an accelerated loss of bonuses to such an extent that all salary costs combined would decline by 5%. This would be in line with the finding in the example of Dell mentioned above, where the total cost of salaries varies in proportion to sales.

(1138) Including all salary costs in the calculations leads to an increase in the avoidable cost as a share of ASP of [...]%.[1457] Since the latter is also the most favourable to Intel, the Commission's has proceeded on the basis of this method.

1455 Intel Reply to the 26 July 2007 SO. Report of Professor [...], paragraph 215. Professor [...] reproduces the formula according to which bonuses are paid out. This formula contains a number of factors including a [...].

1456 On average, sales and marketing bonuses constitute [...]% of the gross ASP of CPUs (Intel's Reply to the 26 July 2007 SSO. Report of Professor [...], exhibit XI.I, panel A). Assuming the contestable share is 10%, the avoidable bonuses would thus represent [...]% of gross ASP for the marginal units.

1457 The cost category Sales and Marketing (Ex. IIP, Bonuses and Comm.) amounted to [...] on average in 2002-2005 (Intel Reply to the 26 July 2007 SO. Report of Professor [...], Exhibit XI.1 panel A). [...]% of these are payroll (excluding bonuses) (Intel Reply to the 26 July 2007 SO. Report of

b. Intel Inside

(1139) According to Professor [...]'s report, the Intel Inside program contributes to the avoidable cost by [...]%[1458] of gross ASP of x86 CPU (average for 2002-2005). While this may be true on an average basis for all sales of x86 CPUs,[1459] it significantly undervalues the contribution to the costs of selling to the major OEMs. As is apparent from *inter alia* the standard conditions for the Intel Inside program in the version signed with Dell, Intel Inside funding accrues at a rate equal to [...]% of net x86 CPU spending ([...]% for print advertising and [...]% for broadcast advertising).[1460] Professor [...]'s report mentions that the accrual rate was reduced from [...]% to [...]% in the autumn of 2005,[1461] and that [...].[1462]

(1140) Since the [...]% is a maximum contribution available to the buyer, it may be that the actual payout is lower. An internal Dell spreadsheet allows a direct calculation of the Intel Inside funding as share of gross x86 CPU spending:

Table 19 - Intel inside data

	Q1FY03	Q2FY03	Q3FY03	Q3FY03
Intel Gross CPU spend	[...]	[...]	[...]	[...]
Intel Inside	[...]	[...]	[...]	[...]
Share	[...]%	[...]%	[...]%	[...]%

	Q1FY04	Q2FY04	Q3FY04	Q3FY04	Whole period
Intel Gross CPU spend	[...]	[...]	[...]	[...]	[...]
Intel Inside	[...]	[...]	[...]	[...]	[...]
Share	[...]	[...]%	[...]%	[...]%	[...]%

Source: Dell[1463]

Professor [...], Exhibit XI.1 panel K). Since revenues from CPUs constitute [...]% of Intel's total net revenue, [...]% ([...]) of the [...] can be assigned as avoidable for CPU production. This corresponds to [...] per unit ([...] x [...]% / [...]) which is equal to [...]% of the gross ASP [...].

1458 Intel Reply to the 26 July 2007 SO. Report of Professor [...], exhibit XI.1.

1459 Presumably a share of Intel's production is sold through other channels than what is covered by the Intel Inside program.

1460 Dell submission of 9 May 2006. Document 0059-Dell-Intel-Contract.pdf , p. 7.

1461 Intel Reply to the 26 July 2007 SO. Report of Professor [...], paragraph 226.

1462 Intel Reply to the 26 July 2007 SO. Report of Professor [...], paragraph 228.

1463 Dell chart entitled *'Intel spend'*. F073-L00029985.

(1141) Based on this, the Commission concludes that the Intel Inside program itself contributes [...]% to the gross ASP of Dell.[1464] There is no reason to assume that the figure would be different for HP or other large OEMs.

(1142) While Professor [...] does not address this issue, he states that *"[b]ecause some portion of the IIP* [Intel Inside Program] *expense results in strengthening Intel's long-term brand value, considering the IIP expense to be avoidable within a one-year period may overstate avoidable costs."*[1465] Professor [...] does not mention that the internal Intel staff used to verify that marketing expenditures paid by the OEMs qualify for reimbursement are not included in the analysis. This omission leads the estimated avoidable cost to be understated.

c. Conclusion on Sales and Marketing

(1143) The Commission has analysed the arguments in Professor [...]'s report and concludes that they understate the avoidable costs. This is mainly due to the fact that the Intel Inside program contributes more to the avoidable costs to large OEMs than is captured by Professor [...]'s analysis, and because Professor [...] does not take into account that bonuses paid out are linked mainly to marginal sales and not paid out in proportion to overall sales. Correcting these two issues leads the Commission to conclude that Sales and Marketing expenditures contribute to avoidable cost as outlined in the table 20:

Table 20 - Commission's adjusted table for sales and marketing costs

	Average Annual Cost	Average Annual Units	Cost per unit	Share Avoid.	Avoid. cost	Share contribution[1466]
	Million USD	Million Units	USD per unit	%	USD per unit	
Sales and Marketing (Ex. IIP, Bonuses and Comm.)	[...]	[...]	[...]	[...]	[...]	[...]%
Intel Inside Program	[...]	[...]	[...]	[...][1467]	[...]	[...]%

1464 The correct number may even be closer to [...] if the payouts in the table actually relate to payouts related to sales in a previous quarter.

1465 Intel Reply to the 26 July 2007 SO. Report of Professor [...], paragraph 230.

1466 Of USD [...]gross ASP.

1467 The percentage greater than [...]% is explained by the fact that the average [...] per unit is calculated over all Intel sales. As explained above, this average underestimates the actual average Intel Inside funding for large OEMs. The percentage of [...]% therefore means that the average Intel Inside funding per unit for large OEMs, which is entirely avoidable, corresponds to about [...]% of the average Intel Inside funding per unit over the entire Intel sales.

Sales and Marketing Bonuses	[...]	[...]	[...]	[...]	[...]	[...]%
Commissions	[...]	[...]	[...]	[...]	[...]	[...]%
	[...]	[...]	[...]		[...]	[...]%

(1144) These corrections increase the contributions from Sales and Marketing expenditures to average avoidable cost by [...]percentage points (from [...]% to [...]%).

(g) Conclusion on cost

(1145) As Professor [...]'s report correctly states, AAC are "*the average of the costs that could have been avoided if the company had not produced a discrete amount of (extra) output, in this case, the amount allegedly subject to abusive conduct.*"[1468]

(1146) Professor [...] found that on average over the period 2002-2005, the avoidable costs constituted [...]% of gross ASP.[1469]

(1147) Based on corrections of some of the omissions from Professor [...]'s report, the Commission concludes that the correct share is at least [...] percentage point higher[1470] ([...]% +[...]%). The Commission applies in the remainder of this Decision that correction to all cost figures provided by Professor [...] which have been used by Intel in specific computations.

(1148) The correction of the [...]% average cost figure provided by Professor [...] is therefore [...]% of gross ASP.[1471]

(1149) The correct measure is likely to be significantly higher. This is because the estimate does not take into account *inter alia* the potential avoidable costs from savings in equipment usage and the potential opportunity cost of production facilities.

(1150) In addition, the cost estimate is to be understood as a "best case" scenario and not Intel's actual average production costs, since it leaves out all the costs that Intel in reality has to incur when ramping up and ramping down its production (which

---

1468 Intel Reply to the 26 July 2007 SO. Report of Professor [...], paragraph 8.

1469 Intel Reply to the 26 July 2007 SO. Report of Professor [...], paragraph 14.

1470 [...]% added from PCOS and [...]% added from Sales and Marketing.

1471 The Commission would again point out that a number of elements from Professor [...]'s report, such as interviews with Intel staff, are unverifiable.

are accounted for in the OCOS category). A competitor with equal efficiency in ramping up and down facilities would have to incur those costs as well.

(1151) Finally, it should be recalled that this cost estimate is for CPUs only. In the arrangement between Intel and Dell, the latter was awarded a percentage discount on all its purchases from Intel, including chipsets. The prospect of a reduced rebate to Dell was not limited only to the x86 CPUs purchased from Intel but also to the chipsets (Dell was sourcing exclusively from Intel). Furthermore, if Dell were to switch to AMD, this would result in a reduced output from Intel of both x86 CPUs and chipsets, since Dell would no longer procure the chipsets to work with AMD x86 CPUs from Intel.

(1152) This can be seen directly from slide 9 of the presentation "Dell [project] status review", which the Commission relied on to establish the amount of business Intel would lose and which it compares with the amount of rebates it offered to defend that business.[1472] Here, Intel was offering [...] worth of rebates in order to protect [...] worth of business. While the largest share of this business was x86 CPUs, chipsets and other business comprised [...] .

(1153) It would not be correct to omit the costs relating to production of the chipsets that form part of the revenues that Intel's rebates were intended to protect. According to those slides, the Intel offer would be below cost as soon as cost exceeded [...]%. Since it is already established that the avoidable costs are above [...]% of gross ASP, it is not necessary to establish with precision how much higher the avoidable cost would be for the combination of x86 CPUs, chipsets and other products that were at risk with Dell. This is illustrated in more detail in section 4.2.3.2.h) below.

d) Conclusion

(1154) Given all the relevant parameters (namely *de facto* conditions for the rebates applied by the dominant undertaking, contestable share, reference period and cost measure), the as efficient competitor analysis as applied in this case examines what price an as efficient competitor would have to offer an Intel trading partner in order to compensate it for the loss of any Intel rebate. If Intel's rebate scheme means that in order to compensate an Intel trading partner for the loss of the Intel rebate, an as efficient competitor has to offer its products below a viable measure of Intel's cost, then it means that the rebate was capable of reducing access to Intel trading partners which could offer products from the as efficient competitor, or in other words capable of foreclosing a hypothetical as efficient competitor. This would thereby deprive final consumers of the choice between different products which the

---

1472 26 July 2007 SO, see in particular paragraph 443.

Intel trading partner would otherwise have chosen to offer were it to make its decision solely on the basis of the relative merit of the products and unit prices offered by Intel and its competitors.[1473]

(1155) It should also be highlighted that the as efficient competitor analysis is one way of examining the capability to harm competition in the present context. However, it should not be regarded as a necessary or absolute test. Moreover, as the Commission will point out in sections 4.2.3.2, 4.2.3.3, 4.2.3.4, 4.2.3.5 and 4.2.3.6, the modelling of the rebates that the Intel trading partners (Dell, HP, NEC, Lenovo and MSH) would respectively lose is either based on conservative assumptions (that is to say in favour of Intel), or does not take into account other exacerbating factors that would aggravate the effects of the rebates.[1474] Furthermore, entry may still be prevented or exit may occur even if prices are not below cost. What may matter is the profitability of a particular activity and the fact that exit may become more attractive if a certain minimum return on investment is not feasible. This may actually be the case even at prices above the relevant measure of cost.

4.2.3.2. Dell

a) Methodology for assessing the rebates

(1156) In the 26 July 2007 SO, the Commission presented the mathematical formula derived by Professor [...] to calculate the "required share" that an entrant with a unit cost of *AVC* must obtain in order to compete against an incumbent offering a rebate of size *R* conditional upon the OEM buying *V* units at a unit price of *ASP*.[1475] The Commission then noted that this formula was derived for the case in which a [...] rebate is triggered by reaching a given target volume, and [...][1476]

(1157) The Commission therefore adapted the mathematical derivation of the formula to the specific context of the Dell rebate. It arrived at the conclusion that the "required share" that an entrant with a unit cost of *AAC* must obtain in order to compete against an incumbent offering a rebate of size *R* conditional upon the OEM buying *V* units at a average sales price per unit of *ASP* is:

1473 It should be noted that what is examined in the analysis in this section is not whether or not AMD was indeed an "as efficient competitor", nor whether or not the offers that AMD provided had prices equal to the relevant measure of cost, or whether it is in an OEM's interest only to source from one single CPU supplier. The foreclosing nature of Intel's conduct does not depend as such on the quality of the competition that it actually encountered, but rather whether it *in abstracto* had the capacity of excluding an equally efficient competitor by distorting the choices made by the OEMs.

1474 Such as possible reallocation of lost rebates by Intel to OEM competitors.

1475 26 July 2007 SO, paragraph 396.

1476 26 July 2007 SO, paragraph 397.

$$S = \frac{r\alpha}{1 - r(1-\alpha) - \frac{AAC}{ASP}}.$$

(1158) This formula is based on the hypothesis that the conditional share of the rebate is fixed at α.[1477] Intel agrees with this formula.[1478] Based on the assumption that Dell would lose half of its rebates if it did not stay Intel exclusive, the 26 July 2007 SO took for α a value of $\frac{1}{2}$.[1479] The formula above could then be written as follows:

$$S = \frac{\frac{r}{2}}{1 - \frac{r}{2} - \frac{AAC}{ASP}}.$$

(1159) On the basis of this formula, it is possible to derive the minimum required share that an OEM must switch to an equally efficient competitor that offered the x86 CPUs at AAC in order to overcome the loss in rebate. As can be seen, this requires an assessment only of the rebate percentage and the ratio between the AAC and the ASP of Intel.

(1160) Intel disputes the Commission assumption that Dell would lose half of its rebates if it switched the contestable part of its supply away from Intel. The Intel arguments on this assumption will be discussed separately in section b) below. However, Intel argues that, even if the Commission's assumption on the loss of half of the rebates were accepted, the use of a value of $\frac{1}{2}$ for parameter α would be inadequate.[1480]

(1161) According to Intel, "*[t]he SO relies on Dell "what if" analyses that hypothesise a potential loss of Intel discounts and takes the reduction in the absolute dollar value of the discounts shown in these analyses as the conjectured percentage discount loss on a per-unit basis.*"[1481]

(1162) In other words, Intel claims that, when Dell projects a loss of 50% of Intel rebates if it switched the contestable part of its supply away from Intel, it actually

---

1477 26 July 2007 SO, footnote 475.

1478 Intel Reply to the 26 July 2007 SO. Report of Professor [...], Appendix C, p. 2, equation (C-3) and paragraph 5.

1479 26 July 2007 SO, paragraph 400.

1480 Intel Reply to the 26 July 2007 SO. Report of Processor [...], paragraph 102.

1481 Intel Reply to the 26 July 2007 SO, paragraph 204. See also Report of Professor [...], paragraph 103.

means that it expects to retain 50% of the value of the Intel rebates in USD that it would receive if it stayed Intel exclusive. For instance, assuming that the rebate under the exclusivity condition would be USD 200 million, if Dell switched, it would receive 50% of USD 200 million, that is, USD 100 million.

(1163) Intel notes that in this case, the drop of the rebate expressed in percentage terms would not be 50%, because as a consequence of the switch to AMD, Intel's total revenue out of units sold to Dell after the switch would decrease (AMD taking over units from Intel), and thus the retained 50% of the overall rebate would be spread over a smaller number of units. For instance, if it is assumed that the USD 200 million corresponded to 10% of a revenue of USD 2 000 million, and that, after the switch, AMD would take over 20% of this revenue from Intel, Intel's revenue after the switch would be down to 2 000 million minus 20% of 2 000 million, that is, 1 600 million. Expressed as a percentage of the 1 600 million remaining revenue, the USD 100 million remaining rebate would be 100 / 1 600 = 6,25%. In terms of percentage therefore, the rebate would have dropped from 10% to 6,25%, that is, by (10-6,25)/10=37,5%. In these circumstances, whilst the drop of the rebate expressed in total USD is 50%, the drop of the rebate expressed in percentage is lower than 50%. In this example, the parameter α mentioned in recital (1157) should therefore not be equal to 0,5 but to 0,375.

(1164) As will be explained below, the basic assumption of Intel's reasoning outlined in recitals (1161) to (1163) is incorrect. There is no ground to state that the documents which support the Commission's findings that 50% of the Intel rebate would be lost express a 50% rebate loss in terms of USD rather than in percentage terms. In particular, it would be unrealistic for Dell to expect Intel to continue to grant rebates - be they decreased by 50% - also on units which Dell would now purchase from AMD. However, in order to verify the robustness of its computations, the Commission will present in section d) below a calculation of the required share based on Intel's assumption that 50% of the amount of the MCP rebates expressed in dollars would be lost, as opposed to 50% of the amount expressed in percentage terms. The conclusion of the calculations conducted under this assumption using the full set of data available to the Commission is even less favourable to Intel (see recital (1200)).

(1165) Intel substantiates its reasoning on the fact that rebates would fall by 50% expressed in dollars rather than in percentage terms by making reference to a Dell presentation of 17 March 2003.[1482] On slide 5 of this presentation, Dell foresees a future rebate from Intel of [...] and on slide 4 estimates a loss of [...] which corresponds to 50% of [...]. Professor [...] argues that this would mean that Intel

---

[1482] Dell presentation of 17 March 2003 entitled *'AMD Update'*. F073-L00088354.

would continue to pay [...] to Dell if it switched to AMD and that these [...] would represent a higher percentage than 50% compared to the remaining value of business left with Intel.

(1166) However, Professor [...]'s assumption would only be correct if the amount of [...] would be calculated on the basis of a scenario in which there is Intel exclusivity. As explained in section VI.2.3.3, at least certain parts of the MCP rebates are understood by Dell as a [...] with Intel. In the presentation in which [...] are estimated, Dell makes an estimate about its future potential volume with Intel. It remains unclear whether these estimates are based on an Intel exclusive or an Intel/AMD-mix scenario. The Commission notes, however, that it would be unrealistic for Dell to expect Intel to continue to grant rebates - be they decreased by 50% - also on units which Dell would now purchase from AMD.

b) Size and nature of the rebates

(1167) This section will first discuss the size of the rebates. Then, it will discuss their nature, that is, the assumptions on the loss of rebates under the scenario where Dell were to switch the contestable part of its supply away from Intel.

(a) Size of the rebates

(1168) The tables in recital (216) gives the total amounts of MCP rebates in the period ranging from Q4FY03 to Q4FY06.

(1169) The second line of each table is the total amount of MCP rebates expressed in USD. For this amount, figures are directly available from Dell and/or Intel.[1483]

(1170) The third line of each table is the total amount of MCP rebates expressed as a percentage of Dell's total spending with Intel. This is the input parameter r in the formula in recital (1157).

(1171) Because this parameter is not directly available either from Dell or Intel, the Commission has calculated it on the basis of Dell and Intel submissions for the period ranging from Q4FY03 to Q2FY05. The results of these computations were explained and used in the 26 July 2007 SO.[1484] The Commission notes that in its own calculations as set out by its economic consultant, Professor [...], Intel used the

---

1483 The Intel series of data from its submission of 13 May 2005 stops in Q2FY05. It should be noted that before this date, the two sets of figures provided by Intel and Dell largely coincide.

1484 26 July 2007 SO, paragraph 425.

same rates for this period.[1485] The Commission therefore assumes that, for this period, these rates are not contested.

(1172) Because the figures in the Intel submissions do not cover the period following Q2FY05, the Commission could not conduct the same computations of the total amount of MCP rebate expressed as a percentage of Dell's total spending with Intel after Q2FY05. For this reason, for the period ranging from Q3FY05 to Q4FY06, in the 26 July 2007 SO, instead of using the percentage rate of the total MCP rebates, the Commission used a fixed percentage rate of [...]%, which is the lowest percentage of the [...] and [...] MCP items alone during the period.

(1173) As paragraph 428 of the 26 July 2007 SO indicates, this represented a very conservative assumption. This is because (i) the rate of the [...] and [...] MCP items alone was itself above [...]% in the last quarter (Q4FY06) and (ii) this assumed that no other MCP rebates than the [...] and [...] MCP rebates had been granted, which is incorrect as total MCP contains other items, such as for instance the [...] (see section VI.2.3.3.3) which was awarded from Q4FY05 to Q4FY06. Annex 2 to the 26 July 2007 SO showed that even if a precise quantification of the rate in percentage terms was not possible on the basis of the data available to the Commission, the rate of total MCP rebates for this period has in fact significantly increased above the [...]% threshold.

(1174) In its reply to the 26 July 2007 SO, Intel did not provide the Commission with more precise calculations of the rates of total MCP rebates for the entire period of Q3FY05 to Q4FY06. However, recognising that Intel's [...],[1486] Intel used in its computations rates slightly increased for certain quarters as compared to the fixed [...]rate, based on various types of estimations and extrapolations. For the purpose of its computations based on percentage rates, the Commission will use the same rates as those used by Intel. They are summarised in table 21.

Table 21 - Total MCP rates as used by Intel in its calculations for period Q3FY05-Q4FY06

Dell Financial Year	Q3 FY05	Q4 FY05	Q1 FY06	Q2 FY06	Q3 FY06	Q4 FY06
[...] MCP including [...] and [...] MCP (%)	[...]	[...]	[...]	[...]	[...]	[...]

1485 Intel Reply to the 26 July 2007 SO. Report of Professor [...], Exhibit 12.

1486 Intel Reply to the 26 July 2007 SO. Report of Professor [...], paragraph 101.

Source: Intel[1487]

(b) Nature of the rebates

(1175) As outlined in Section VI.2.3.4, the MCP rebates, or at least a large part of them, were granted in return for Dell's exclusivity to Intel: a significant part of those would be foregone if Dell were to shift a part of its x86 CPU supplies to AMD. As stated by Dell in a submission to the Commission: "*there was a general consensus* [within Dell] *that such a change would result in a reduction in MCP, which would have a negative financial impact on Dell, and that this would need to be taken into account in evaluating the benefits of such a fundamental change in strategy.*"[1488]

(1176) Dell has confirmed that throughout the period in question, it made calculations based on assumptions about how much MCP rebate it would lose if it were to change its single sourcing strategy and also start procuring from AMD. Dell had to make its assessment without complete knowledge of the likely consequences: "*Dell assumed that shifting some purchases to AMD would result in a reduction of MCP. But Dell did not know precisely how much MCP would decline, in what manner and over what time period.*"[1489]

(1177) In an internal Dell presentation of 23 December 2002, Dell notes that the "*Intel Competitive Response*" of an AMD engagement would mean that "[[rebate][1490]] *$ drop to zero, other than the limited* […]*programs* […] – *Intel will give* [rebate] *$ to others to ensure no TAM* [Total Available Market] *shift to Dell/AMD*".[1491] Dell therefore assumed nearly a […] loss of Intel funding.

(1178) An internal Dell presentation entitled "*AMD Update* [product line] *LOB*" and dated 26 February 2003 considers different scenarios.[1492] In one of the scenarios, it is assumed that the Intel funding loss would be around […] of Intel funding.[1493]

(1179) A slightly later internal Dell presentation of 17 March 2003, entitled "*AMD Update*", provides estimates of the likely effect on Dell if it were to choose to

---

1487 Intel Reply to the 26 July 2007 SO. Report of Professor [...], Exhibit 12.

1488 Dell submission of 17 April 2007, p. 2.

1489 Dell submission of 17 April 2007, p. 2.

1490 See recital (196).

1491 Dell presentation of 23 December 2002 entitled *'AMD Analysis'*. Deposition of [Dell executive] before the US FTC on 26 March 2003, exhibit 18. Dell submission of 12 July 2006, annex 3.

1492 Dell presentation of 26 February 2003 entitled *'AMD Update – Dimension* LOB'. F073-00008333.

1493 Idem, p. 11. The loss assumption for scenario 2 ("[...]") is […] out of a total of […] (p. 17), that is, […]%. For scenarios 1 ("[...]"), 3 ("[...]") and 4 ("[...]"), the loss assumption is […], that is, […]%.

source partly from AMD in the [...] segment.[1494] The presentation considers two scenarios: one in which the AMD switch would be limited to only the low-end of the [...]segment ([first strategy]), and another in which Dell would launch a broader portfolio of [segment] products with AMD x86 CPUs ([second strategy]). The presentation assumes that the [first] strategy, in which Dell would switch to AMD only on a limited segment of its needs[...], would jeopardise 25% of the Intel funding, while the [second] strategy, where the AMD switch would be broader, would jeopardise 50% of it.

(1180) The 50% assumption appears to be a quite conservative estimate if compared with the assessment by [Dell executive][1495] in an internal e-mail to [Dell executive] of 26 February 2004. This contains the following statement (where [...] and [...] refer to [Intel senior executive], Intel [...]and [Intel senior executive], Intel [...]respectively): "[...] *are prepared for* [all-out war] *if Dell joins the AMD exodus. We get ZERO MCP for at least one quarter while Intel 'investigates the details'*- [...]. *We'll also have to bite and scratch to even hold 50%, including a commitment to NOT ship in Corporate. If we go in Opti, they cut it to <20% and use the added MCP to compete against us.*"[1496]

(1181) Furthermore, the estimate of a 50% cut also ignores the fact that in practice, Dell faced a trade-off where the consequence of starting to source from AMD would not only be to suffer a reduction in its current MCP rebate, but also to forego an imminent increase in its level: "[...] *The sum total of these will be* [...] *higher than current MCP – Intel was pretty adamant that they won't go any higher than this, and I believe them*".[1497] [1498]

(1182) Based on an overall assessment of the internal documents from Dell described in recitals (1175) to (1181), the Commission will for the purposes of the assessment in this Decision assume that the rebates to Dell would have been reduced by 50% if Dell had switched to AMD in the [...] segment. This was also the preliminary conclusion in the 26 July 2007 SO.[1499]

1494 Dell presentation of 17 March 2003 entitled *'AMD Update'*. F073-L00088354. See slide 13.

1495 See Dell submission of 19 July 2006, "FTC documents - Dell executive testimony", pp. 5-6.

1496 Email from [Dell executive] to [Dell executive] of 26 February 2004 entitled *'OUTLINE'*. F073-L00009321. Opti refers to Optiplex which is Dell's desktop product line for corporate customers.

1497 Idem.

1498 Though Dell did receive a substantial increase in its MCP, it is the Commission's understanding that a particular [...]model was never implemented.

1499 26 July 2007 SO, paragraph 406.

(1183) In this respect, the Commission notes that, in its Reply to the 26 July 2007 SO, Intel has claimed that "*the SO describes as a "conservative" assumption that Dell's MCP discounts in 2004 would have decreased by 50% if Dell began buying microprocessors from AMD*".[1500] Indeed, Intel makes much of the claim that the 26 July 2007 SO considers the 50% drop a "conservative" estimate, and argues that this is be contradicted by documents where Dell envisaged a smaller drop, including documents relied on by the Commission. In this respect, Intel refers to the following documents:

(1) a presentation of 17 February 2004, [1501] in which Intel claims that 50% would be seen as a "maximum" potential reduction for MCP rebates;[1502]

(2) a presentation with an Excel model calculation from January 2004;[1503] Professor [...] conducts calculations based on this presentation and arrives at the conclusion that the loss of rebates would have been at most [...]%;[1504]

(3) a presentation of 23 December 2002[1505] (referred to in recital (1177)) in which it is speculated that the MCP rebate would drop to [...] in case Dell would introduce AMD products; Intel claims that [Dell executive] in his testimony before the US FTC has testified that that presentation was a "*worst case scenario*".[1506]

(1184) Intel therefore argues that there is "*no basis for the* [26 July 2007] *SO's claim that Dell stood to lose 50% of its Intel discounts if it started using AMD microprocessors.*"[1507]

(1185) As concluded in section VI.2.3.4, Dell assumed that its MCP payments indeed would significantly diminish if it would introduce AMD products in its portfolio. In this regard, Intel also contends that there was no executive agreement within Dell on what Intel's precise response to a partial switch to AMD would have been.[1508]As regards the precise amount of that loss, it can be left open whether within Dell, there was full executive agreement about what the precise response

---

1500 Intel Reply to the 26 July 2007 SO, paragraph 164.

1501 Dell presentation of 17 February 2004 entitled '[project] *Status Review*'. F073-L00000318. Also in Intel Reply to the 26 July 2007 SO, annex 113. See p. 5.

1502 Intel Reply to the 26 July 2007 SO, paragraph 164.

1503 Untitled Dell presentation of January 2004. Annex to Dell submission of 18 April 2007.

1504 Intel Reply to the 26 July 2007 SO. Report of Professor [...], paragraph 117.

1505 Dell presentation of 23 December 2002 entitled *'AMD Analysis'*. Deposition of [Dell executive] before the US FTC on 26 March 2003, exhibit 18. Dell submission of 12 July 2006, annex 3.

1506 Intel Reply to the 26 July 2007 SO, paragraph 163.

1507 Intel Reply to the 26 July 2007 SO, paragraphs 162.

1508 Intel Reply to the 26 July 2007 SO, paragraph 165 and footnote 306.

from Intel would be. However, Dell presented the Commission with a number of scenarios that were most commonly and over the entire relevant investigation period based on the premise of a loss of 50% of the rebates. This was therefore the assumption that the Commission used.

(1186) Against this backdrop, the Commission's assertion that the 50% estimated drop is a conservative value does not mean that there is no Dell document which foresees a smaller drop. The 50% loss figure is an assumption, based on an examination of a broad range of evidence, which does not rely on the estimates which are the most unfavourable to Intel. There are many such estimates, either envisaging a drop of over 50% or envisaging an increase in Intel rebates if Dell were to stay Intel-exclusive.[1509]

(1187) A number of specific points are also in order as regards the documents which Intel has cited, and which are referred to in recital (1183).

(1188) Firstly, as regards the 17 February 2004 presentation referred to in (1183) above, it should be noted that the Commission also used the scenarios contained in this document as a basis for an alternative method of calculation of the foreclosing capability of the rebate arrangement on an as efficient competitor.[1510] This alternative method of calculation, which is explained in detail in section h), shows that the MCP rebates were capable of foreclosing an as efficient competitor based on the raw information contained in the presentation, without using the loss assumption of 50%. This is a further indication that, even if it were to be considered that the presentation does not truly rely on a 50% rebate loss assumption, the information it carries still confirms the Commission's conclusion about the capability to foreclose of Intel's rebates.

(1189) Furthermore, the alleged qualification as "maximum loss" on slide 12 of the presentation does not relate to all the rebates that are qualified as MCP in the sense of the abbreviation given by the present Decision. In fact, the qualification "maximum" relates only to the part of the Intel rebates which represents [...], that is, the "[...] MCP" in the sense of section VI.2.3.3.1. The presentation also addresses other categories of Intel rebates and assumes that those rebates could be entirely lost.[1511] The Commission recalls that, on the basis of figures provided by Intel and Dell, it could compute that the total MCP rebate in the quarter preceding

---

1509 In this context, when examining the totality of the evidence, the existence of documents showing a loss of rebates of less than 50% does not suffice to invalidate the Commission's finding. Intel has not shown that these precise documents carry more weight than the significant amount of documents which indicate that the rebate loss would be 50% or more.

1510 26 July 2007 SO, paragraphs 442 to 448.

1511 See slide 10 of the presentation, line "rebates".

the presentation amounted to [...]% (see tables in recital (216). As was stated in recital (1171), Intel did not contest these figures.[1512]

(1190) As regards the Excel calculation referred to in recital (1183), it should be noted that this calculation bases itself on a document that, unlike all other internal Dell presentations used by the Commission and Intel to assess the subject of rebate loss, does not contain any obvious indication of Dell making an assumption about a loss of rebates that it is currently receiving from Intel. The assumption Professor [...] makes when he calculates the [...]% figure is that Dell expects to lose the amount that corresponds to the proportionate reduction in Intel sales due to the switch and the incremental rebates Dell was expecting to receive in the next quarter. However, Professor [...] does not explain on what basis he makes this assumption and nothing in the Excel sheet indicates that Dell intended to juxtapose a loss of Intel rebate to an increase in AMD price advantage. In fact, the entire Excel sheet only contains a collection of data under the presumption that Dell would switch [...]% of its demand to AMD without any assessment of the financial advantages and disadvantages of switching.

(1191) Finally, as regards [Dell executive]'s testimony referred to in recital (1183) that an MCP rebate drop to [...] was a worst case scenario, this only serves to confirm that in its consideration of all the relevant evidence, the Commission's conclusion that 50% of the rebate would be lost constitutes a reasonable and conservative assumption.

(1192) In view of the above, it is concluded that Intel's arguments do not carry sufficient weight to invalidate the Commission's conclusion that a 50% loss of rebates is a reasonable and conservative assumption for the purpose of the calculation in the as efficient competitor analysis.

c) Average Avoidable Costs and Average Selling Prices

(1193) In section 4.2.3.1.c), it was concluded that Intel's assessment of its Average Avoidable Costs to Averages Sales Prices ratio was significantly underestimated. It was concluded that, on average, the ratio is at least [...] percentage points higher than the value asserted by Intel.[1513] For the purpose of the assessment of the Dell rebates, the Commission will therefore use a value for *AAC/ASP* equal to that asserted by Intel for the relevant computations (from [...]% to [...]% depending on

---

1512 See recital (1171).

1513 See recital (1147).

the quarter)[1514] plus [...] percentage points (that is, from [...]% to [...]% depending on the quarter).

d) Calculation of the required share

(1194) On the basis of all the parameters described in sections b) and c) above, the calculation of the required share S can be carried out. The parameters, as well as the results of the calculation, are outlined in table 22. As in the 26 July 2007 SO,[1515] the Commission conducted its computations using two values for costs: on the one hand, the value which was derived by the Commission, and on the other hand, the cost data asserted by Intel (see section 4.2.3.1.c)).[1516] As already explained, the Commission considers that Intel's own cost data significantly underestimate the correct figure. The Commission nevertheless also conducted the computations with these values (which are favourable to Intel) in order to test the robustness of the conclusion of its as efficient competitor analysis.

Table 22 - Required share

Dell accounting period	Total estimated MCP rebate (%)	AAC/ASP as per Intel (%)	AAC/ASP as per Commission (%)	Required share S (%)	
				AAC/ASP as per Intel	AAC/ASP as per Commission
Q4FY03	[...]				
Q1FY04					
Q2FY04					
Q3FY04					
Q4FY04					
Q1FY05					
Q2FY05					
Q3FY05					
Q4FY05					
Q1FY06					
Q2FY06					
Q3FY06					
Q4FY06					

1514 Intel Reply to the 26 July 2007 SO. Report of Professor [...]. Exhibits 9A and 9B.

1515 26 July 2007 SO, table in paragraph 425 and paragraph 426.

1516 Intel Reply to the 26 July 2007 SO. Report of Professor [...]. These values are also used in the calculations in the report of Professor [...], exhibits 9A and 10A.

Sources:
For Total MCP, tables in recital (216) and (1174)
Intel for AAC/ASP in first column[1517]
Commission computation for AAC/ASP in second column

(1195) As was specified in recitals (1160) to (1164), Intel has argued that the basic hypothesis which the Commission used to establish the formula which it uses in table 22 is incorrect. Intel argues that, on the basis of the examination of the documents used by the Commission to reach its conclusion on the 50% rebate loss, it should be concluded that the 50% loss in question is expressed in terms of USD as opposed to in terms of percentage.

(1196) In his report attached to Intel's Reply to the 26 July 2007 SO, Professor [...] has sought to establish a modified formula which seeks to take into account this Intel argument.[1518] In order to do so, Professor [...] starts from a formula which he derived and which computes the required share on the basis of a rebate drop expressed in USD rather than percentages:[1519]

$$S = \frac{R}{(ASP - AAC)V}$$

(1197) This formula is also used by Intel and the Commission for the assessment of the capability to foreclose an as efficient competitor of the HPA rebates (see section 4.2.3.3).

(1198) Professor [...] seeks to update the formula in recital (1196) in order to compute an alternative version of the formula based on percentages which takes account of Intel's criticisms. However, this is not necessary. Indeed, the formula in recital (1196) can be readily used as soon as the following parameters are available: the amount of lost rebates R, expressed in USD, the gross average sales price ASP of the products (also called P), the average avoidable costs AAC, and the total volumes purchased V. All these parameters are readily available in the Commission file:

– the parameter R can be computed by taking 50% of the total MCP rebates as expressed in USD in the second line of the tables in recital (216);

1517 Intel Reply to the 26 July 2007 SO. Report of Professor [...]. Exhibit 9A. Intel does not provide an estimate for Dell's AAC/ASP for quarter Q4FY06. The Commission used the figure which is the most favourable to Intel among the figures for the quarters available ([...]%).

1518 Intel Reply to the 26 July 2007 SO. Report of Professor [...]. Appendix C.

1519 Intel Reply to the 26 July 2007 SO. Report of Professor [...]. Appendix C, p. 1, last line.

– the parameters *ASP* and *V* have been provided by Dell;[1520]

– the parameters *AAC* can be obtained by multiplying the parameter *ASP* by the ratio for *AAC/ASP* as expressed in the third and fourth columns of the table in recital (1194) (corresponding respectively to Intel's underestimated own assertion of this value and the Commission's rectified figure).

(1199) Table 23 summarises the result of the computation.

Table 23 - Required share under Intel's assumption

	Volume (units)	ASP of Intel CPUs (USD)	Lost rebates (USD million)	Required share S_1	
				AAC as per Intel (%)	AAC as per the Commission (%)
Q4FY03					
Q1FY04					
Q2FY04					
Q3FY04					
Q4FY04					
Q1FY05					
Q2FY05					
Q3FY05					
Q4FY05					
Q1FY06					
Q2FY06					
Q3FY06					
Q4FY06			[...]		

(1200) The comparison of the table in recital (1194) with that in (1199) shows that the required share computed under the hypothesis that the loss is expressed in USD is always larger than the required share computed under the hypothesis that the loss is expressed in percentage terms, with the only exception of Q2FY05. This comes from the fact that although the change from the formula in percentages to the formula in absolute rebates in USD would result in a slight decrease in the required share, this slight decrease is offset by the fact that the figures for rebate value in USD are more accurate than the figures in percentage. As explained in particular in recital (1172), the rebates percentages which were used in the computations in

1520 Dell submission of 3 April 2007, paragraphs (6) and (7).

table 22 underestimate the actual value of the MCP rebates, as they do not properly include certain categories of MCP rebates.[1521] The use of the MCP rebate figures in USD, which include all categories of rebates, therefore leads to a more accurate value for rebates, which is higher than the approximated value in percentage terms. This increase in the rebates results in an increase of the minimum required share which more than offsets the slight decrease due to the change in formula.

(1201) As larger required shares mean that the as efficient competitor would have to take larger business shares from Intel to compensate for the effect of the loss of rebates, the figures in the table in recital (1199) are therefore nearly always less favourable to Intel than the ones obtained using the Commission's assumption. The Commission therefore concludes that it can legitimately rely on the formula deriving from its own assumption for the purpose of this Decision, as this formula cannot result in the penalisation of Intel.

e) Contestable share

(1202) Evidence on the Commission's case file indicates that the minimum required share as calculated in section d) was sufficiently high to prevent Dell from profitably beginning to source from AMD under realistic penetration scenarios.

(1203) In this regard, the presentation of 17 March 2003 entitled "AMD update" analyses the impact of introducing AMD to Dell's [...] products ([...] and [...]).[1522] It contains two scenarios, one in which the introduction of AMD is limited to the [...]segment only, and one in which AMD is introduced in both the [...]& [...]segments. The Commission will analyse the latter scenario, which leads to the largest contestable share. This is in Intel's favour, as larger contestable shares are more likely to exceed the required share. Furthermore, the Commission notes that the loss of rebate assumption in relation to the [...]& [...]scenario is that "*Intel funding hit targeted to be 50% due to AMD encroachment into* [product segment]",[1523] which is consistent with the loss of rebates assumption outlined in section b). Table 24 represents the assumptions on which Dell relied when assessing what portion of its x86 CPU requirements AMD would represent.

Table 24 - Dell assumptions for contestable share

1521 The Commission notes that the total MCP rebate figure in USD may include also certain rebates on chipsets. The inclusion of these rebates in the computation of the minimum required share following Professor [...]'s assumption is appropriate since the document to which Professor [...] refers to justify his assumption that calculations should be conducted on the basis of rebates in USD (See recital (1165)) does not make a distinction between rebates for chipsets and CPUs, and includes all MCP rebates in its 50% rebate loss assumption in USD.

1522 Dell presentation of 17 March 2003 entitled *'AMD Update'*. F073-L00088354.

1523 Idem, slide 13.

	Desktop		Notebook	
	[...]only	[...]& [...]	[...]only	[...]& [...]
AMD cannibalisation - total LOB	[...]	[...]	[...]	[...]
Incremental volume - total LOB	[...]	[...]	[...]	[...]
Resulting AMD mix - total LOB	[...]	[...]	[...]	[...]

Source: Dell[1524]

(1204) The "cannibalisation" estimates in table 24 refer to the part of that particular line of business (LOB) that AMD would achieve. The presentation does not contain an estimate of how big a share AMD would represent of Dell's overall purchases. This calculation requires information about how big a share of Dell's overall purchases the [...]and [...]Lines of Business constitute. According to information from Dell, [...]represented [...]% of x86 CPU units purchased in Fiscal Year 2003 and [...]% in Fiscal Year 2004. [...]represented [...]% of x86 CPU units purchased in Fiscal Year 2003 and [...]% in Fiscal Year 2004.[1525]

(1205) A penetration of [...]% in a segment representing [...]% of overall purchases and [...]% in a segment representing [...]% of overall purchases produces a total share of Dells purchases of [...]%. This number does not take into account the transition timing. As is apparent from the presentation, an important question was "*How much and how quickly would we transition from Intel to AMD?*"[1526]

(1206) In response to a Commission question in an Article 18 request regarding what transition timing Dell might have had in mind at that point in time, Dell stated: *"There was no specific date targeted at this time, but when considering the hypothetical of transitioning some CPU requirements to AMD, Dell typically considered a transition in the* [product line]*of anywhere from 6 months to 9 or 12 months to ramp up to sufficient volumes to make the transition worthwhile."*[1527]

(1207) It is not possible to take account of the transition timing on the basis of the information available in the presentation mentioned in recital (1203). Professor [...]

1524 Idem, slide 5.

1525 Dell submission of 18 April 2007, annexed spreadsheet, p. 5. [...]and [...]mix is calculated based on the unit figures at the top of the spreadsheet. The presentation is dated 17 March 2003 which due to Dell's financial calendar corresponds to early Fiscal Year 2004.

1526 Dell presentation of 17 March 2003 entitled *'AMD Update'*, slide 14. F073-L00088354.

1527 Dell submission of 29 March 2007, paragraph (2) (a).

argues that *"this conclusion is not warranted."*[1528] He refers to the fact that an earlier presentation, dated 26 February 2003,[1529] considered the effects of a shift in Dell's fiscal year 2004 and since the two presentations use data that are similar, it should be concluded that the latter presentation *"considers a comparable period."*[1530] The Commission cannot agree with this conclusion, since it is apparent that the question *"Transition timing – How much and how quickly would we transition from Intel to AMD?"* was also outstanding in this earlier presentation.[1531] It is thus clear that neither of these two presentations have taken the transition timing into account.

(1208) Later presentations on the matter include more specific analysis of the time profile that a shift to AMD would entail.

(1209) Dell has provided the Commission with an internal spreadsheet which represents its internal analysis of a potential shift.[1532] This spreadsheet is a tool that, according to Dell, was *"a working document developed over a period of months by Dell employees for internal purposes only."*[1533] The version that is provided to the Commission dates from January 2004. The structure of the spreadsheet is very similar to a number of the tables which are used in the presentation entitled "[project] *Status Review*".[1534] The numbers in the spreadsheet do not correspond exactly to those in the presentation. The Commission attributes this to the fact that the model evolved over time.

(1210) The spreadsheet contains an indication of the AMD penetration over time that Dell assumed in the different Lines of Business. This is set out in table 25:[1535]

Table 25 - AMD penetration over time

	FY05	FY06	FY07	FY08
[...]	[...]	[...]	[...]	[...]
[...]	[...]	[...]	[...]	[...]

1528 Intel Reply to the 26 July 2007 SO. Report of Professor [...]. Appendix B, p. 2, paragraph 4.

1529 Dell presentation of 26 February 2003 entitled *'AMD Update* – [...]LOB'. F073-00008333.

1530 Intel Reply to the 26 July 2007 SO. Report of Professor [...]. Appendix B, p. 3, paragraph 3.

1531 Dell presentation of 26 February 2003 entitled *'AMD Update* – [...]LOB'. F073-00008333. Slide 8.

1532 Annex to Dell submission of 18 April 2007.

1533 Dell submission of 18 April 2007. Cover letter, paragraph 2.

1534 Dell presentation of 17 February 2004 entitled '[project] *Status Review*'. F073-L00000318.

1535 Below the table, it is noted that *"[t]his section assumes 100% coverage in the* [...]*product. For planning purposes we should not expect a greater than 50% mix on any* [...]*product - work mix percentages back as necessary."*

[...]	[...]	[...]	[...]	[...]
[...]	[...]	[...]	[...]	[...]

Source: *Dell*[1536]

(1211) As is apparent from the spreadsheet, at the time, the contemplated shift not only involved [...]and [...], but also [...].[1537] Since the scenario did not involve [...], the overall AMD mix would be lower - this is reflected by another section in the same spreadsheet:[1538]

Table 26 - Overall AMD mix including [...]

AMD mix	FY05	FY06	FY07	FY08
[...]	[...]	[...]	[...]	[...]
[...]	[...]	[...]	[...]	[...]
[...]	[...]	[...]	[...]	[...]
[...][1539]	[...]	[...]	[...]	[...]

Source: *Dell*[1540]

(1212) Given the estimated overall volumes that these different segments constitute - which are also available in the same spreadsheet - it is possible to calculate that the overall AMD mix in the four years would constitute [...]in the first year and [...] and [...][1541] in the three subsequent years.

(1213) In the view of the above, it is concluded that it is appropriate to use a contestable share of [...]for the purpose of the as efficient competitor analysis.

(1214) Intel puts forward a number of counterarguments against the Commission's reasoning in recitals (1202) to (1213) on contestable share which are addressed in the subsections e)(a) to e)(e).

(a) When to start the clock

1536 Annex to Dell submission of 18 April 2007.

1537 [...].

1538 [...].

1539 The row contains an attached comment: "*Assumes a successful value 4-way at launch*".

1540 Annex to Dell submission of 18 April 2007.

1541 These numbers follow Professor [...]'s methodology in Exhibit 3 of his report containing a refinement of the calculations originally proposed. Professor [...]'s method takes into account the fact that workstations and servers contain several CPUs. In its submission of 18 April 2007, Dell provided the slightly lower (and hence less favourable to Intel) figures of [...], [...], [...]and [...] (p. 2, paragraph 4 of the submission).

(1215) Intel argues that the contestable share should cover the *"first full year of usage and not (...) the fiscal year covered by the Dell spreadsheet"*.[1542] It states that the one year time-horizon should not begin until the ramp-up of AMD x86 CPUs begins, and since *"there is a lag of several months between a decision to use AMD microprocessors and the actual deployment of such microprocessors"*,[1543] one year ramp-up rates in the internal Dell spreadsheets cannot be relied upon. Starting the one-year time horizon 4 months later would, according to Professor [...]'s estimates, lead to a contestable share of at least [...]%.[1544]

(1216) In a further analysis of the timing aspect, that is to say when to start the one-year time horizon, Professor [...] mentions how the timing of different events interacts. These factors essentially affect on the one hand the time lag between Dell's decision to shift and Dell's ability to ramp AMD-based systems, and on the other hand, the time lag between Dell's decision to switch and Intel's ability to implement cuts in the rebates. The latter time lag is decided by when Intel would learn about Dell's decision as well as when Intel could use this information in negotiations with Dell.[1545] In two hypothetical scenarios, Professor [...] illustrates how these factors interact. In the first scenario, Intel learns about Dell's shift so late that it cannot begin cutting the rebates until after Dell would start buying AMD x86 CPUs. In this scenario, Professor [...] concludes that *"the one-year time horizon should begin (...) when Dell begins buying from AMD."*[1546] In the second scenario, Intel learns about the shift early enough that it can start cutting the rebate before Dell starts shipping AMD x86 CPUs. Here, Professor [...] concludes that *"the one-year time horizon should begin (...) when Intel's discount to Dell falls."*[1547]

(1217) The Commission agrees with the basic tenet of the two illustrations, which is that the one-year time horizon should not begin later than when the shift starts to have consequences. As the second scenario illustrates, it would not be correct to start the one-year time horizon only at the time AMD ramp-up begins if the decision to switch starts to have negative financial consequences for Dell even earlier.

1542 Intel Reply to the 26 July 2007 SO, paragraph 179.

1543 Intel Reply to the 26 July 2007 SO, paragraph 180.

1544 Intel Reply to the 26 July 2007 SO. Report of Professor [...], paragraph 85.

1545 Intel Reply to the 26 July 2007 SO. Report of Professor [...], paragraphs 122-123.

1546 Intel Reply to the 26 July 2007 SO. Report of Professor [...], paragraph 125.

1547 Intel Reply to the 26 July 2007 SO. Report of Professor [...], paragraph 128.

(1218) The Commission also agrees that there is likely a significant lag between the decision to switch to AMD and the point in time at which Dell can start selling AMD-based products. The Commission, however, cannot agree that this should lead to a postponement of the starting point for the one-year time horizon since it relies on the implicit assumption that Intel would not be in a position to withdraw rebates until even later.

(1219) Firstly, it should be noted that the very presentation that Intel relies on in this context shows that even if Dell would not be in a position to launch AMD-based products until several months into its fiscal year, it foresaw a reaction from Intel that would cover the entire Financial Year 2005. The expectation to lose 50% of the MCP rebates is calculated for each year and relates to the MCP of that entire year, as is apparent from table 27:

Table 27 - Response of Intel as foreseen by Dell[1548]

	FY05	FY06	FY07	FY08
Current MCP	[...]	[...]	[...]	[...]
Intel Response	[...]	[...]	[...]	[...]

Source: Dell[1549]

(1220) If Dell's assumption was that the reduction in rebates would only have an effect in a part of FY05, it would have resulted in a reduction of less than 50% for that year.

(1221) Secondly, the expectation that the cut in MCP could be implemented a long time before Dell would be in a position to ship AMD-based computers is consistent with the timing of events in 2006 when Dell decided to switch to AMD. According to Intel, *"Dell began using AMD microprocessors in September 2006."*[1550] The decision was made public on 18 May 2006.[1551] The new Dell desktops with AMD processors were announced for sale in September 2006.[1552]

(1222) As regards the schedule of the determination of MCP between Dell and Intel based on Dell's fiscal quarters, as Professor [...] notes: *"Dell concludes negotiations with Intel* [...]"[1553] He then argues that, when Dell switched to AMD

1548 Figures are in million USD. Figures in parentheses are negative figures.

1549 Dell presentation of 17 February 2004 entitled '[project] *Status Review*'. F073-L00000318. Slide 3.

1550 Intel Reply to the 26 July 2007 SO, footnote 342.

1551 String of Emails dated 18 May 2006. Intel submission of 2 June 2008, annex 1, document 2.

1552 See for instance Annex 339 to Intel Reply to the 26 July 2007 SO.

1553 Intel Reply to the 26 July 2007 SO. Report of Professor [...], paragraph 127.

in 2006, the reduction of the MCP rebate could take effect only in August 2006, since "*Dell would have had a strategic incentive to refrain from announcing its upcoming AMD-based systems until after it negotiated an MCP discount with Intel for the quarter beginning May 2004*".[1554]

(1223) Whatever incentives Dell might have had, it is apparent from an internal Intel email from [Intel senior executive] that Dell's decision to shift partially to AMD was a central part of the negotiations of the MCP rebates already at the beginning of May 2006. In this email, [Intel senior executive]informs four Intel colleagues[1555] that *"[t]he deal fell apart... I suspect it never had a chance..."*[1556] As is apparent from the following quote, the potential negative consequences with respect to the rebates were communicated immediately to Dell: *"He* [Intel executive] *will tell them we will have to now review all our meet comp positions, since we simply do not know what we are bidding against and where."*[1557]

(1224) When Dell shortly thereafter announced publicly that it was going to start sourcing AMD,[1558] an internal debate took place within Intel as to whether an internal announcement should be made to the staff. [Intel executive] who was arguing in favour of a public announcement states: *"This is scary for a lot of people. Me included."*[1559] [Intel executive]'s reply is: *"Shouldn't be.* [...]".[1560] He then goes on to note *"this war is not over. Announcing an intent is not launching revenue products....."*[1561]

(1225) As is clear from the above emails, Intel was aware of the shift already in May 2006. It is also clear that [Intel executive] noted that there was still an important period of *"war"* remaining until Dell could start shipping the AMD-based products.

1554 Intel Reply to the 26 July 2007 SO. Report of Professor [...], paragraph 129.

1555 [...].

1556 Email from [Intel senior executive] to [Intel executive] and others of 3 May 2006 entitled [...]. Intel submission of 2 June 2008. Annex 2, document 80, p. 2.

1557 Idem.

1558 In a press release on May 18, 2006 Dell states: *"Dell will also introduce new AMD Opteron processors in our multi-processor servers by the end of the year offering a great new technology to our customers at the high-end of our server line."* (http://www.dell.com/content/topics/global.aspx/corp/pressoffice/en/2006/2006_05_18_rr_000, downloaded and printed on 26 March 2009).

1559 Email chain between [Intel executive] and [Intel executive] of 18 May 2006 entitled '*RE:* [...] *on dell/amd*'. Intel submission of 2 June 2008. Annex 1, document 2, p. 1.

1560 Email chain between [Intel executive] and [Intel executive] of 18 May 2006 entitled '*RE:* [...]*on dell/amd*'. Intel submission of 2 June 2008. Annex 1, document 2, p. 1.

1561 Email chain between [Intel executive] and [Intel executive] of 18 May 2006 entitled '*RE:* [...] *on dell/amd*'. Intel submission of 2 June 2008. Annex 1, document 2, p. 1.

This should be seen in the context of the description [Dell executive] from Dell provided to his superior [Dell executive] on an earlier occasion of the likely response from Intel: *"We get ZERO MCP for at least one quarter while Intel 'Investigates the details'* [...]"[1562]

(1226) The table in recital (272), which is based on data obtained from Dell, shows that there was indeed a sharp decline in the rebates offered by Intel between the first and second fiscal quarter of 2007.[1563]

(1227) The flexibility that Intel had with respect to changing the rebates was also reinforced by the absence of any written contract between Intel and Dell which would have made it clear that Dell was formally entitled to receive a certain amount of rebates.[1564] Dell has explained to the Commission that "*there is no written agreement between Intel and Dell concerning the MCP discount, rather, the discount is the subject of constant oral negotiations and agreement.*"[1565]

(1228) For the above reasons, the Commission cannot accept that "*[t]he required share analysis is designed to calculate the contestable share over the SO's relevant time horizon, and that period is the twelve months starting from when Dell would begin buying from AMD.*"[1566]

(b) Information from the 17 February 2004 presentation

(1229) Professor [...] argues that the presentation of 17 February 2004,[1567] which contains information as to how much revenue Intel would lose as a result of a switch, should be included in the analysis of the contestable share.[1568] In order to translate the loss of Intel revenue of [...] in the presentation resulting from the Dell partial switch to AMD into a loss of units, it is necessary to apply Intel's average selling prices (ASPs). Since these are not available in the same presentation, Professor [...] suggests to rely on the ASPs that are available in the spreadsheet that the Commission relied on above[1569] to reach the estimate of [...]%. Juxtaposing the

---

1562 Email from [Dell executive] to [Dell executive] of 26 February 2004 entitled '*OUTLINE*'. F073-L00009321.

1563 This sharp decline continued at least until Dell fourth fiscal quarter 2007.

1564 In the context of HP, such a written contract existed, but with an express option for Intel to cancel it with only one month notice.

1565 Dell submission of 19 December 2005, p. 20.

1566 Intel Reply to the 26 July 2007 SO, paragraph 184.

1567 Dell presentation of 17 February 2004 entitled '[project] *Status Review*'. F073-L00000318.

1568 Intel Reply to the 26 July 2007 SO. Report of Professor [...], appendix B, p. 1.

1569 See recitals (1209) to (1212).

two data-sources would, according to Professor [...], lead to an estimate of a loss of [...]% of the units.[1570]

(1230) The Commission cannot agree to this method. All the information necessary to estimate the contestable share is contained in the spreadsheet relied on by the Commission. These data formed the basis of the estimate of [...]%. There is no reason to believe that a mix of data from two different sources will give a better estimate of the contestable share. Taking the revenue loss to Intel from the 17 February 2004 presentation is particularly unnecessary given the fact that the spreadsheet on which the Commission relies itself contains Dell's own estimate of the revenue loss (which is estimated to be [...]).[1571]

(c) Intel's internal estimates

(1231) Intel also argues that the contestable share estimate should take into account *"Intel's reasonable belief of the contestable share of Dell's purchases. No business can make pricing decisions that have legal consequences on the basis of information that is not available to it, such as an internal spreadsheet of one of its customers."*[1572]

(1232) Intel proposes instead to rely on a declaration of [...] [the Intel executive [...]] written in the context of Intel's Reply to the 26 July 2007 SO where [Intel executive] declares: *"To justify the additional costs and complexity that would be required, I believed that if Dell were to add AMD as a second source, it would likely source* [...] *of its microprocessors from AMD in the first year and* [...] *of its microprocessors by the third year of a ramp."*[1573]

(1233) In the context of Dell, it is noteworthy that while Intel has been free to supply the Commission with any internal contemporaneous documents regarding Intel's assessments of the likely contestable share, it has restricted itself to producing a declaration which appears to have been prepared for the purposes of these proceedings. Furthermore, the declaration does not indicate anything other than [Intel executive]'s own personal beliefs[1574] about the amount Dell would likely source from AMD.

1570 Intel Reply to the 26 July 2007 SO. Report of Professor [...]. Appendix B, p. 1, paragraph 3.

1571 Annex to Dell submission of 18 April 2007.

1572 Intel Reply to the 26 July 2007 SO, paragraph 187.

1573 Declaration of [Intel executive], paragraph 5. Intel Reply to the 26 July 2007 SO. Annex 89.

1574 According to the declaration, [Intel executive] was the [...] (paragraph 1 of the declaration).

(1234) As described in section VI.2.3.4.3.a)0, the declaration by [Intel executive] is contradicted by contemporaneous evidence, and can thus not be accepted as credible evidence in relation to Intel's internal expectations about the likely contestable share.

(1235) In this regard, [Intel executive] in the same declaration states: *"I am not aware of Intel ever conditioning all or a portion of the MCP or other discounts that Intel provided to Dell on Dell's agreement to purchase microprocessors exclusively from Intel. I am also not aware of any threat being made by Intel to significantly reduce Dell's MCP discounts or otherwise cause Dell to suffer repercussions if Dell were to begin purchasing microprocessors from AMD."*[1575]

(1236) This is in contrast with the wording contained in a presentation authored by [Intel executive] dated 10 January 2003 which states: *"Get* [...], then [...]*OOC* [Office Of the Chair] *clearly understand our meet-comp process and how it applies to DELL- I.e. if they have AMD in their arsenal they'll have less meet-comp exposure – hence less meet-comp dollars avail to them –even the possibility that meet-comp dollars that we're* [sic] *applied to DELL could go somewhere else..."*[1576]

(1237) In a letter to the Commission dated 2 June 2008 in relation to the presentation by [Intel executive] quoted in recital (1236), Intel seeks to provide context to that quote, bringing to the Commission's attention that "[Dell executive] *testified that Dell had no viable AMD option in early 2003, when this Intel document is dated, because it had concluded that AMD's Hammer was 'not performing as advertised.'"*[1577] Intel would therefore have the Commission simultaneously conclude that Dell had no viable AMD option in early 2003, and that Dell would be likely to source [...]% from AMD in the first year on the basis of two non-contemporaneous statements by [Intel executive] and [Dell executive].

(1238) For the above reasons, the Commission sees no merit in attaching weight to the testimony of [Intel executive] with respect to the likely contestable share.

(1239) In a written submission of 5 February 2009, Intel argued that an internal AMD document "*confirm[s] that AMD itself considered that the contestable amount at Dell was significantly higher than the* [...]*% relied on by the Commission in the* [26 July 2007] *SO.*"[1578] Intel states that *"[t]he document, an*

1575 Idem, paragraph 4.

1576 Presentation by [Intel executive] of 10 January 2003, entitled '*Dell F1H '04 MCP*'. Intel submission of 2 June 2008, annex 2, document 21, p. 24.

1577 Intel submission of 2 June 2008, p. 3.

1578 Intel submission of 5 February 2009 related to the 17 July 2008 SSO, paragraph 633.

October 2002 email message authored by [AMD executive], *estimated that AMD would achieve a 20% share of Dell's commercial client business within two quarters of launch: "Objective: Penetrate the Clients Products Business with Hammer (Launch Q303 with 20% SoM [share of market] by Q104)."*"[1579]

(1240) However, this document does not in fact support Intel's contention. Firstly, although they may be informative, expectations from AMD cannot have a higher probative value as regards the contestable share than contemporaneous analysis from Dell itself, which was the basis for the Commission's conclusion on the [...]% contestable share. Secondly, once again, the relevant point to start the examination of the one year period to be considered in the as efficient competitor analysis is not the date of the launch of the product but that at which Intel can start cutting the relevant Dell rebates. Finally, contrary to what Intel argues, the document does not show that AMD expected the contestable share of Dell's supply needs to be around [...]%. As a matter of fact, the [...]% in question refer only to a subsegment of Dell's total business: the subsegment named "*commercial client business*". The [...]% therefore has to be understood as [...]% of a fraction of the total sales, and is thus in no way incompatible with a total contestable share of [...]%. Intel did not provide any information which would allow an assessment of what share of the Dell business the "commercial client business" represented at the time, but the Commission notes that the AMD document indicates that the products concerned were "*a 1P* [one processor] *Sledgehammer/nVidia Dimension Desktop & Precision Workstation as well as a 2P* [two processors] *Sledgehammer/nVidia Precision Workstation.*"[1580] Workstations are a subset of the server segment. It would therefore seem that "*commercial client business*" at most refers to the server segment of Dell. As a point a reference, in the year ranging from the fourth quarter of 2006 and the third quarter of year 2007, servers represented [...]% of Dell's total volume and workstations represented [...]% of Dell's total volume.[1581] There is no reason to believe that these shares would have significantly varied over recent years. [...]% of these subsegments therefore represents respectively [...]% and [...]% of Dell's total volume, which is well below [...]%.

(d) Dell's actual switching

(1241) In addition, Intel argues that the actual switching rate for Dell when it decided to switch partially to AMD after 2006 *"is directly relevant for assessing the*

1579 Idem.

1580 Email from [...] to [...] and others of 10 October 2002 entitled '*RE: Dell Weekly Update - w/c 10/07/02*'. Intel submission of 5 February 2009 related to the 17 July 2008 SSO, annex 654.

1581 Commission computations based on quarterly volumes from Intel Reply to the 26 July 2007 SO, annex 255, p. 5.

contestable share at Dell during the 2003-2005 time-period."[1582] Professor [...] notes that *"[i]n the four quarters starting October 1, 2006, AMD was supplying* [...]%, [...]%, [...]% *and* [...]% *of Dell's needs, respectively, according to Gartner, and* [...]%, [...]%, [...]% *and* [...]% *according to Intel's internal estimates."*[1583]

(1242) Firstly, it should be noted that the foreclosing capability of Intel's rebates depends on contemporaneous expectations about the contestable share during the period examined (December 2002 to December 2005). It is thus not correct to claim that the actual switching rate from a period subsequent to the period examined is directly relevant. While subsequent switching can be informative as such, it should not be given greater weight than the documents showing contemporaneous estimates.

(1243) Secondly, it should be noted that the MCP rebates offered to Dell increased significantly over the period covered by this Decision, as is set out in the tables in recital (216). It is possible that this increase in the rebates reflected the increasing competitive pressure from AMD. It is therefore possible that the contestable share increased somewhat over time as consumers became increasingly aware of the viability of the AMD alternative.

(1244) Thirdly, as already discussed in recitals (1215) to (1228), it is inappropriate to start the one year time period for the calculation of the contestable share from a date on which Dell was already shipping AMD-based products. The one year period should start from May 2006, which is when Intel could start cutting Dell's MCP rebates.

(1245) The AMD share of Dell's supply in the three quarters beginning October 2006 and ending June 2007 suggests an average AMD share of [...]% of Dell's total number of x86 CPUs.[1584] In order to take the transition timing (from the time when Intel could start cutting Dell's rebate to the time of the actual shipping of the first AMD-based Dell product on the market) into account, it is necessary to correct this share for the 4 initial months in which Dell was not yet in a position to ship AMD-based products. This reduces the overall AMD mix for the first year to [...]%[1585]

1582 Intel Reply to the 26 July 2007 SO. Report of Professor [...], paragraph 138.

1583 Intel Reply to the 26 July 2007 SO. Report of Professor [...], paragraph 135.

1584 According to exhibit A of annex 255 of Intel Reply to the 26 July 2007 SO, Dell sold [...];[...] and [...] AMD-based computers in Q4 2006, Q1 2007 and Q2 2007 respectively. In the same quarters, Dell sold [...]; [...]and [...]Intel-based computers (no information is given for Q3 2006). Over the three quarters combined, Dell sold [...]AMD CPUs and [...]Intel CPUs. AMD CPUs represent [...]out of a total of [...], that is, [...]%.

1585 ([...] x 8/12).

for the Gartner data and to between [...]% and [...]% for Intel's internal estimates, depending on how the correction is made for the months without supply.[1586]

(1246) While these estimates are slightly higher than those made by Dell during the period covered by the present Decision, they are not at a level at which they can be invoked to reduce the accuracy of the Commission's analysis.

(e) Intel argument included in its submission of 2 March 2009 based on depositions by Dell executives in the private litigation between AMD and Intel in the US State of Delaware.

(1247) In its submission of 2 March 2009 based on depositions from Dell executives in the private litigation between Intel and AMD in the US State of Delaware (see section VI.2.3.4.3.f)), Intel has again argued that the figure of [...]% used by the Commission for the purpose of the as efficient competitor analysis was underestimated.

(1248) The Commission already outlined in section VI.2.3.4.3.f) its general considerations on this Intel submission (see recitals (298) to (302)).

(1249) In any event, only quantitative evidence quoted by Intel in its submission of 2 March 2009 is an email message authored by [Dell executive], which according to Intel, is "*stating that Dell had been prepared to source approximately* [...]*% of its total microprocessor volume from AMD in "the first six to 12 months" of the contemplated* [project] *transaction referenced in the* [26 July 2007] *SO.*"[1587]

(1250) Intel's quotation of the email by [Dell executive] is a misrepresentation.

(1251) It is clear from an examination of the exhibits of the deposition by [Dell executive], that the [...]% volume shift figure was one that was devised in the context of a discussion on what should be represented to AMD. Inside Dell, this

---

1586 According to Intel (contained in the file *Intel MSS by Customer Q105-Q307* included in Intel's Reply to the 26 July 2007 SO), Intel estimated Dell's total purchase to be [...]units in the five quarters Q2 2006 - Q2 2007. Intel estimated AMD to have taken [...]of those. AMD's sales in the period Q2 2006 – Q1 2007 were thus [...]units which is [...]of the total sales in those four quarters. This may underestimate slightly the AMD share in the 12 months following the announcement of the shift which was one month after the beginning of Q2 2006. Yet the Intel estimate suggests that Dell in Q2 2006 sold [...]AMD units despite the fact that it only launched the new products 18 days before the quarter ended (on 12 September 2006). An approximate attempt to correct for the one month time lag could be to attach a 2/3 weighting to Q1 2006 and include Q2 2008 with a weighting of 1/3. This would lead to an estimated AMD share of [...]%.

1587 Intel submission of 2 March 2009, p. 9, paragraph 1.

figure was considered to be a high number, or an "*aspiration*", more than an actual reasonable estimate.[1588]

(1252) Furthermore, the Dell emails in question do not make it possible to determine exactly the starting point of the ramp up that was being discussed. As was already described in section (a) above, the relevant starting point for the one year period assessed in the as efficient competitor analysis is the date when Intel could start to react to the Dell shift. This date predates the actual date of the first sales by Dell of AMD-based computers.

(1253) The Commission reached the conclusion that the contestable share to be used in the context of the as efficient competitor analysis was [...]% on the basis of the analysis of a detailed Dell spreadsheet which is "*a working document developed over a period of months by Dell employees for internal purposes only*"[1589] (see recital (1209)). The version that was provided to the Commission dates from January 2004.[1590] By its nature, this internal technical and very detailed document has more probative value than an exchange of emails on an aspirational target to be represented to AMD, without any concrete technical background attached. The Commission also notes that the Dell spreadsheet was submitted by Dell, and that its structure and the figures it includes, including figures on the size of potential purchase from AMD, are very similar to a number of the tables which are used in the 17 February 2004 internal Dell presentation on the [project] project entitled "[project] *Status Review*".[1591]

(1254) It cannot therefore be argued that the detailed document on which the Commission relied reflected Dell's consideration in another context or another period than the email from [Dell executive] mentioned by Intel.

f) Comparison of required share and contestable share

(1255) As stated in recital (1213), the relevant applicable figure for the contestable share is [...]%. The table in recital (1194) gives the required share to which it must be compared.

(1256) In most of the quarters (9 out of 13), the required share is higher than the contestable share. The Commission notes that the use of Intel's own assessment of

---

1588 Email exchange between [Dell executive] and [Dell executive] of 9 March 2004. Intel submission of 17 March 2009, deposition of [Dell executive], exhibit 9045.

1589 Dell submission of 18 April 2007. Cover letter , paragraph 2.

1590 Idem.

1591 Dell presentation of 17 February 2004 entitled '[project] *Status Review*'. F073-L00000318. See also paragraphs.

AAC/ASP, even if it is underestimated, does not affect this conclusion by the Commission. As is shown in the table in recital (1199), this conclusion is not affected either by the use of Intel's interpretation as to the meaning of the 50% rebate loss (expressed in USD as opposed to percentage). In fact, with this interpretation, and using the Commission's more realistic assessment of *AAC/ASP*, the required share is above the contestable share in one more quarter (so in total, 10 out of 13).

(1257) The contestable share figure of [...]% was established using Dell's internal estimates realised in January 2004, that is, in preparation for a switch which could have taken place at the earliest in Dell's Q1FY05. The required share in Q1FY05 was [...]%.[1592]

(1258) As was stated in recital (1243), it is possible that the contestable share increased somewhat over time as consumers became increasingly aware of the viability of the AMD alternative. In this respect, it is important to note that, in all calculation hypotheses, the required share increases steadily over the period covered by this Decision. It ends up at [...]% in Q4FY06.[1593] It is noteworthy that this required share figure is above the share of Dell business which AMD actually captured in the subsequent year, where Dell partially switched to AMD (as explained in recital (1245), this share is [...]% using figures provided by the independent market reporting company Gartner, and between [...]% to [...]% using figures provided by Intel).

(1259) Conversely, for the same reasons, before Q1FY05, it is possible that the contestable share was lower than [...]%. The difference between the required share and the contestable share in the first quarters of the relevant period may therefore be lower than the figures from the table in recital (1194) would suggest at first sight.

g) Reinforcing factors

(1260) A number of factors have not been fully taken into account in the analysis above, but if included, would reinforce the assessed capability to foreclose of the rebates.

(1261) Firstly, Dell clearly perceived that any loss of rebate from Intel would also be complemented by increased rebates from Intel to Dell's OEM competitors (see

---

1592 Using the calculation hypotheses which the Commission considers are best founded. Using other hypotheses, the required share in Q1FY05 ranges from [...]% to [...]%.

1593 Using the calculation hypotheses which the Commission considers are best founded. Using other hypotheses, the required share in Q4FY06 ranges from [...]% to [...]%.

recitals (235)-(237)). The effect on Dell of redistributing such a fraction of the lost rebate to competitors is potentially substantial as input costs of direct Dell competitors decrease, to the detriment of Dell, even if Dell is fully compensated for direct effects (that is to say it maintains the same input cost as it previously had while sourcing exclusively from Intel). In other words, in order for Dell to be at least indifferent between sourcing exclusively from Intel or switching a fraction of its input to AMD, AMD has to compensate Dell for the direct effect on input cost *and* the indirect effect on reduced input cost for competitors if the lost rebate is reallocated to competitors. Fully assessing the importance of this reinforcing factor would require additional assumptions about how the rebate would be reallocated to competitors as well as how more aggressive competition would affect Dell's revenues.

(1262) Intel alleges that such reallocations of rebates "*reflect perfectly normal and legitimate forms of competition: a supplier lowering its prices to some major customers in response to a significant sales win by its rival at another major customer. This is not retaliation; it is competition.*"[1594]

(1263) Even if it were true that the transfer of the conditional rebates from Dell to one of its competitors was a normal business practice, it would not remove the financial effect of the practice on Dell. Dell would therefore still have to take account of it in the assessment of a shift to AMD. The reinforcing effect of the transfer would still be relevant for this exercise.

(1264) Furthermore, and without prejudice to the assessment in recital (1263), the Commission cannot subscribe to the notion that in the context of this Decision, such a "transfer" of conditional rebates is a normal business practice. Indeed, if this were the case, [Dell Senior executive], would have been well aware of this. It would therefore not have been necessary for [Intel senior executive]to explain it to him, and Intel would not have had to take particular care to "*[g]et* [Dell Senior executive]*/OOC* [abbreviation used by Dell meaning Office Of the Chair and specifying a certain group of Dell executives, usually [Dell Senior executive]and [Dell Senior executive]] *clearly understand our meet-comp process and how it applies to DELL- I.e. if they have AMD in their arsenal they'll have less meet comp exposure-hence less meet comp dollars avail to them—even the possibility that meet-comp dollars that we're* [sic] *applied to DELL go somewhere else...*"[1595]

1594 Intel submission of 28 March 2008 "*Submission of Intel Corporation following the Oral Hearing*". Appendix I, p. 6, last paragraph.

1595 Presentation by [Intel executive] of 10 January 2003, entitled "*Dell F1H '04 MCP*". Intel submission of 2 June 2008, annex 2, document 21, p. 24.

(1265) A second reinforcing factor is that the estimate of the contestable share is based solely on a calculation of the share of Dell's x86 CPU purchase that would originate from AMD in the scenario under consideration. It does not take into account that Dell also purchases non-x86 CPU products - such as chipsets - from Intel, on which it would also lose half of its MCP rebate (see recital (1151)). Taking non-x86 CPU purchases into account would further diminish the contestable share which could be reached by AMD. Intel did not address this reinforcing factor, which was discussed in paragraph 441 of the 26 July 2007 SO.

h) An alternative method of calculation

(1266) The assessment described in sections a)-g) above examined whether an as efficient competitor would be required to sell its products below the avoidable cost associated with producing these units. As such, the method is equivalent to asking whether Intel is selling the units which a competitor could replace below cost.

(1267) The internal Dell presentation of 17 February 2004 entitled "[project] *Status Review*" already referred to above[1596] also contains an analysis of the likely financial "Impact to Intel" if Dell were to switch a part of its supplies to AMD. This analysis contains the components necessary to assess in a different way whether Intel's offers - as perceived by Dell - entailed the sale below cost of units which a competitor could replace.

(1268) One slide (slide 3) contains Dell's estimates of the likely levels of rebates and Intel support in two different scenarios, one in which Dell starts to source also from AMD and one where continues to source exclusively from Intel. The differences in support from Intel in the two scenarios are reproduced in table 28:

Table 28 - Dell's estimates of the likely level of rebates and Intel support

	FY05	FY06	FY07	FY08
Intel response (USD million)	[...]	[...]	[...]	[...]
Rebates (USD million)	[...]			
Upside (USD million)	[...]	[...]	[...]	[...]
Total (USD million)	[...]	[...]	[...]	[...]

1596 Dell presentation of 17 February 2004 entitled '[project] *Status Review*'. Dell submission of 6 February 2006, response to request items 1 and 2, F073-L00000318.

Source: Dell[1597]

(1269) The Intel response appears to refer to a loss of 50% of Dell's current MCP which in the presentation is assumed to correspond to [...] in Dell's fiscal year 2005.[1598] The "Upside", that is to say the additional rebates in case of keeping the Intel exclusivity, indicates a projected outcome of negotiations with Intel (at slide 7, it is noted: "*Estimate an additional* [...] *of MCP per year under this approach; Unlikely to reach higher numbers due to Intel Legal concerns*".[1599])

(1270) In another slide (slide 9), Dell assesses the likely impact to Intel if it were to choose to start sourcing from AMD. The impact is split into two components - direct loss of x86 CPU purchases, and losses relating to chipsets (CS) and other purchases that would be directed away from Intel. This is reproduced in table 29:

Table 29 - Likely impact as assessed by Dell

	FY05	FY06	FY07	FY08
Lost Intel CPU spend (USD million)	[...]	[...]	[...]	[...]
Lost CS & Other spend (USD million)	[...]	[...]	[...]	[...]
Total (USD million)	[...]	[...]	[...]	[...]

Source: Dell[1600]

(1271) At the bottom of the slide, it is stated that the calculation "*Assumes lost units are at average CPU revenue for LOB - not entry bin*". This indicates that the losses would likely be even smaller if the fact that AMD would be more likely to take share from Intel at the entry level is taken into account.

(1272) If the information from the two slides is combined, it can be concluded that in fiscal year 2005, Intel was implicitly offering a conditional package of incentives of [...] in order to keep [...] worth of business. This would entail the sale below cost of units which a competitor could replace if the AAC of supplying these units is less than [...], which corresponds to [...]% of the average selling price.

(1273) The fourth column of the table in recital (1194) shows that, during fiscal year 2005, Intel's AAC ranged at least between [...]% and [...]% of its ASP, which is above [...]%.

1597 Dell presentation of 17 February 2004 entitled '[project] *Status Review*'. F073-L00000318. Slide 3.

1598 Idem, slide 5.

1599 Idem, slide 7.

1600 Idem, slide 9. Totals may not match due to rounding.

(1274) These slides therefore lead to the conclusion that Intel's behaviour is capable of foreclosing an as efficient competitor.

(1275) Intel analyses this alternative method of computation in paragraphs 216 to 220 of its Reply to the 26 July 2007 SO.

(1276) In this regard, Intel makes two preliminary remarks, and two arguments.

- the alternative method of computation is based solely on a misinterpretation of Dell's 17 February 2004 presentation, which represents a "what if" scenario rather than the terms of an actual Intel offer;[1601]

- the Commission overstates the conjectured difference in discounts under the two scenarios by [...] since the document stated Dell's expectation that Intel would honour existing commitments, which appear to include the [...] in discounts;[1602]

- Professor [...] has calculated that Intel's actual *AAC/ASP* ratio was approximately [...]% in February 2004, which is well below the [...]% threshold that the Commission asserts that Intel could not exceed without being below cost;[1603]

- the scenario on which the Commission bases its alternative method of computation contains only eight months of AMD sales to Dell; where assessed over one full year of AMD sales to Dell, the conclusion is different, and even more so if the scenario is assessed beyond one full year.[1604]

The Commission does not find any of these arguments convincing.

(1277) Firstly, the fact that the Dell scenario is based on an Intel offer which may or may not eventually have materialised is irrelevant. The relevant point is that, when considering switching to AMD, Dell considered, on a reasonable basis, that Intel would indeed provide terms similar to the ones under consideration if Dell did not switch to AMD. The fact that Dell was at the very least not unreasonable to think that Intel would award it increased rebates if it stayed Intel-exclusive is confirmed by the tables in recital (216) which shows the clear trend of increase in Intel rebates during the period of the Dell exclusivity. This confirms the scenario underlying the Dell forecasts.

1601 Intel Reply to the 26 July 2007 SO, paragraph 216.

1602 Intel Reply to the 26 July 2007 SO, paragraph 217.

1603 Intel Reply to the 26 July 2007 SO, paragraph 218.

1604 Intel Reply to the 26 July 2007 SO, paragraphs 219 and 220.

(1278) Secondly, the Intel remark on the [...] is misconceived. The Commission was correct to consider the [...] in question in the computations. Indeed, slide 3 of the presentation, which is relied upon for the alternative computation, makes it clear what the difference between the two scenarios (maintaining Intel exclusivity or going for AMD) would be for Dell.[1605] This difference ("Delta" in colloquial mathematical language) is equal to [...] in the fiscal year 2005. This is the difference between [...] , which corresponds to keeping the Intel exclusivity and [...] , which corresponds to switching partially to AMD. The [...] include the [...] , and the [...] do not. This shows that Dell did not expect to retain the [...] in question if it did not stay Intel-exclusive. In practice, this means two things: (i) the Commission was right to include these [...] in the assessment of the difference of financial incentives between the two Dell scenarios, and (ii) Dell expected to lose not only half of the MCP rebates (from [...] per year to [...] per year), but also expected to lose the entirety of non MCP rebates (the entire [...] per year). The Commission's analysis of 50% MCP being lost is therefore favourable to Intel because it does not factor in the expected 100% loss of non MCP rebates.

(1279) Thirdly, section 4.2.3.1.c) sets out the Commission's analysis of Intel's own assessment of its *AAC*. The Commission came to the conclusion that Intel significantly underestimated its costs. The conclusion outlined in recital 1273 is based on the Commission's analysis of Intel's cost data.

(1280) Fourthly, as already discussed in recitals (1215) to (1228), it is inappropriate to start the one year time period for the calculation of the contestable share from a date where Dell was already shipping AMD-based products. The Commission's assessment is therefore based on the proper reference period. Furthermore, section 4.2.3.1.b) explained why the Commission considers that the time horizon for an as efficient competitor analysis in this case should be no longer than one year.

i) Conclusion

(1281) On the basis of the comparison of the contestable share and the required share conducted in section f), the reinforcing factors outlined in section g), and the confirmation brought by the alternative method of computation in section h), it is concluded that over the period from December 2002 to December 2005, the Intel rebate was capable of having or likely to have anticompetitive foreclosure effects, since even an as efficient competitor would have been prevented from supplying Dell's x86 CPU requirements.

1605 Dell presentation of 17 February 2004 entitled '[project] *Status Review*'. F073-L00000318. Slide 3.

(1282) It should also be recalled that cost figures which are most favourable to Intel have been used.[1606]

4.2.3.3. HP

a) Methodology for assessing the rebates

(1283) For the analysis of the HP rebates within the context of the as efficient competitor analysis, the 26 July 2007 SO uses a formula which was proposed by Intel's economic consultant, Professor [...].[1607]

(1284) Intel did not formulate objections to the use of that formula for the assessment of HP's rebates. In its Reply to the 26 July 2007 SO, it used the same formula for its own calculations. That formula will therefore be used for the computations of the present section.

(1285) The formula computes the "required share" S which it would be necessary for an entrant with an average avoidable cost per unit of AAC to obtain, in order to compete against an incumbent which offers a conditional rebate of size R (which is conditional on the OEM buying V units at a unit price of ASP based on the assumption that the potentially lost rebate is not distributed to competitors). The "required share" can be calculated as:

$$S = \frac{R}{(ASP - AAC)V}$$

(1286) The precise meaning of each of the parameters in this formula is described in recitals (1287) to (1289).

(1287) As Professor [...] explains, S has to be understood as a fraction of the total volume V of units which the customer would buy from the dominant company if it fulfilled the conditions of the rebate. That total volume does not include the units which the customer is allowed to purchase from the as efficient competitor even under the conditions of the rebate. Indeed, those units do not impact the amount of the rebate and are therefore not relevant to the choice of the customer. In practical terms, for the case at stake, this means that S should be understood as a fraction of 95% of the total HP corporate desktop x86 CPU needs. Indeed, even under the

---

1606 See section VII.4.2.3.1.c).

1607 26 July 2007 SO, paragraph 452.

HPA conditions, HP is allowed to purchase 5% of those needs from Intel competition.[1608]

(1288) R is the amount of the conditional rebate, that is, the amount of rebate which is conditional upon the customer fulfilling the exclusivity or quasi-exclusivity condition. R is an absolute amount, in monetary units. It is to be noted that, in certain instances, part of the rebates may not be subject to conditions. That unconditional part of the rebates should not be counted in the amount R. That part of the rebates would be immaterial for the decision of the customer as the customer would receive it irrespective of the scope of its purchase from the as efficient competitor. It is important to understand, however, that such unconditional rebates not to be accounted for in R have to be genuinely non conditional, in the sense that they are not only not subject to the conditions of the rebates under scrutiny, but also not subject to other conditions which would maintain some restrictions over the as efficient competitor's access to the customer's contestable share of supply.

(1289) *ASP* is the average sales price of Intel x86 CPUs to HP.[1609] That parameter is the average sales price in the absence of the conditional rebate R.

(1290) As explained in section VI.2.4.4, the HPA1 and HPA2 rebates were conditional upon HP keeping an Intel market share of 95% in the corporate desktop segment and ensuring that the 5% non-Intel-based HP corporate desktops be distributed under restricted distribution conditions. Throughout the period in which the two agreements were in force, HP respected the conditions.

(1291) As can be seen from the formula outlined in recital (1285), it is necessary to assess the volume purchased and the conditional rebate obtained, as well as the difference between the average selling price and the average avoidable cost associated with the delivery to HP. A description of those parameters and how they have been applied in the context of the model described in this section is set out in sub-sections b) to f).

b) Size and nature of the rebate

(1292) As set out in section VI.2.4.4, the HPA1 and HPA2 agreements were subject to a condition that HP source at least 95% of its corporate desktop x86 CPUs from Intel.

(1293) The first parameter of the as efficient competitor analysis is the amount of the rebate concerned that is conditional. The Commission considers that the entirety of

---

1608 Intel Reply to the 26 July 2007 SO. Report of Professor [...], paragraph 181.

1609 Intel Reply to the 26 July 2007 SO. Report of Professor [...], paragraph 176.

the HPA1 and HPA2 rebate amount was subject to the 95% MSS condition. In essence, under the agreements, HP obtained a guarantee that it would receive the relevant rebates (see recital (346) for their amount) as long as it complied with all the relevant conditions. The fact that the conditions were not in writing is irrelevant in that regard. Indeed, Intel made clear statements to HP to that effect, including at the highest level.[1610]

(1294) Therefore, substantively, the conditions mean, on Intel's part, the payment of the HPA rebates, and on HP's part, the fulfilment of the conditions, including the 95% MSS condition. There was no element of the agreement - written or unwritten - that some of the rebates would still be paid even if HP breached the 95% MSS condition. Therefore, it must be concluded that all payments were conditional upon the 95% MSS condition. Indeed, had the 95% MSS condition been written down, the normal legal consequence of the breach of the condition would be the loss of all payments.

(1295) That conclusion is reinforced by the fact that the rebate agreement which was negotiated between Intel and HP during the summer of 2002 included a provision stating that failure to comply in particular with the 95% MSS condition would mean the termination of all rebates: "*If Intel can reasonably demonstrate that HP is not fulfilling the above commitments then a joint-HP Intel executive escalation session will be held to review and discuss this disagreement. If the HP and Intel executives agree that HP has not met its requirements, HP will be given a reasonable time period to cure the problem. If HP fails to remedy the problem then Intel has the option to terminate the agreement. If this termination occurs, no further payment will be due to HP beyond the quarter prior to which the unremedied problem occurred. Payments made to HP for quarters after this point will be refunded to Intel.*"[1611] In this respect, the Commission notes that HP submitted that piece of evidence to the Commission precisely in support of its submission on the existence and nature of the unwritten condition and explained that the HPA1 agreement was a substitute for the summer 2002 agreement in which all conditions were carried over.[1612]

(1296) The background situation of the Intel rebates to HP at the time of the conclusion of the HPA1 agreement was also significant, and could only reasonably lead HP to conclude that all payments were conditional. In that regard, HP negotiated the HPA1 agreement between June and December 2002, just after its

---

1610 See for instance recital (349).

1611 E-mail from [HP executive] to [HP executive]of 14 July 2002 entitled "*Intel Deal Summary*". HP submission of 23 December 2005, Appendix 10.

1612 HP submission of 23 December 2005, paragraph 2.7, item (a). See also section VI.2.4.4.2.a).

merger with Compaq. The relevance of that event is outlined in recital (337). [...]. As [HP executive]stated in his testimony to the US FTC: "[...]"[1613] HP was therefore negotiating against that background of a [...]rebate from Intel. As [HP executive]stated, the base case for HP was "[...]".[1614]

(1297) HP could therefore logically consider that the consequence of not meeting the conditions of the HPA agreement would have been the return to [...].

(1298) The Commission also notes that Intel did not outline to HP that part of the payments might have been non-conditional. Had Intel wished to make it clear to HP that a part of the payments were not linked to the conditions, from the outset or in the final version of the agreements, Intel could easily have structured differently its relationship with HP, and indeed, there would likely be contemporaneous evidence to this effect. For instance, Intel could have had different contracts with HP, and/or excluded from the HPA agreements the share of the rebates which Intel intended to make clearly unconditional. Instead, all the HPA moneys were lumped together in a single agreement. The entire rebates were subjected to the 30 days notice condition which allowed Intel to end unilaterally the payments to HP, and which HP viewed as a tool to induce HP's fulfilment of the conditions.[1615]

(1299) In the first instance, Intel denies that there was any conditionality associated with the agreements. Those arguments have been dealt with in section VI.2.4.4. However, under a scenario where there would be conditionality under the arrangements, Intel alleges that the Commission is wrong to consider that 100% of the HPA rebates were conditional.[1616] With reference to certain HP documents, Intel conducts its own analysis of the loss of rebates expected by HP. According to Intel, "*[u]nder* [HP's] *preferred option, (...) HP estimated its discounts from Intel would decline from* [...]*to* [...]*, or by* [...]*%. Under the other scenario, HP estimated its discounts from Intel would decline from* [...]*to* [...]*, or by* [...]*%.*"[1617]

(1300) Recitals (1301) to (1328) show below that the figures in recital (1299) misrepresent HP's expectations and are applied by Intel in a way which is inconsistent with the principles of the as efficient competitor analysis.

(1301) In any case, in support of its argument that less than 100% of the rebate was subject to the MSS condition, Intel argues that HP did not believe that it would lose

---

1613 HP submission of 23 December 2005. Deposition from [HP executive]to the FTC, p. 122.

1614 Idem, p. 123.

1615 See recital (963).

1616 Intel Reply to the 26 July 2007 SO, paragraph 360.

1617 Intel Reply to the 26 July 2007 SO, paragraph 363.

its discounts by increasing the amount of business it conducted with AMD.[1618] According to Intel, certain HP documents show that HP believed it would get increased discounts from Intel if it shipped AMD-based products.[1619] In that respect, Intel makes reference to documents where HP drew a comparison between the rebates per unit it was getting from Intel on its consumer desktop segment (where it had a more significant share of AMD-based products than it did in the business desktop segment) and the rebates it was getting from Intel on its business desktop segment (where it was nearly Intel-exclusive). In these documents, HP indicated that shipping AMD-based systems "*seems to facilitate more aggressive bidding from Intel.*"[1620] Intel also refers to an Intel document where, in the context of the negotiation of the HPA agreements, Intel envisaged as a fallback option to "*investigate commercial dt* [desktop] *meet comp* [rebates] *on a case-by-case basis (similar to consumer environment).*"[1621]

(1302) The comparison between the rebates per unit that HP was getting on its consumer desktop segment and the rebates it was getting from Intel on its business desktop segment does not allow any meaningful conclusion to be drawn as to the correlation within a single segment (in this instance, the business desktop segment) of the level of rebates per unit offered by Intel and the number of AMD-based products sold by HP in that segment. Intel itself made clear to HP that the discounts offered in the consumer segment ("CPC") and the business segment ("BPC") could not be compared: an Intel document prepared in the context of negotiations with HP indicates that *"CPC/BPC Transactional Environments are different"*[1622] and recommends *to "Educate* [HP executive] *that you can not apply Consumer ECAP $/unit (or % rebate to spend) rationale from CPC to BPC*".[1623]

(1303) Intel's quote of an internal document where it envisaged to "*investigate commercial dt* [desktop] *meet comp* [rebates] *on a case-by-case basis (similar to consumer environment)*"[1624] does not support Intel's conclusion either. The

---

1618 Intel Reply to the 26 July 2007 SO, paragraph 360.

1619 Intel Reply to the 26 July 2007 SO, paragraph 364.

1620 Intel Reply to the 26 July 2007 SO, paragraph 360, quoting HP presentation of 13 June 2002 entitled "*Commercial AMD desktop – strategic rationale*" (Intel Reply to the 26 July 2007 SO, Annex 1).

1621 Intel Reply to the 26 July 2007 SO, paragraph 361, quoting email of 9 July 2002 from [Intel executive] to [Intel senior executive]and others, entitled [...]' (Intel Reply to the 26 July 2007 SO, Annex 137).

1622 Intel document of 14 April 2004 entitled *"PSO HPA2 Prep"*, p. 2. Intel Reply to the 26 July 2007 SO, annex 157.

1623 Idem, p. 3.

1624 See recital (1301).

language "*similar to consumer environment*" in that document qualifies the fact that the rebates are offered "*on a case by case basis*", and does not mean that the amount of the rebates is similar. If anything, that document shows that any rebate structure which would have been granted to HP in the absence of the HPA agreements would have been "*on a case by case basis*", that is, subject to uncertainty. Furthermore, any such rebate structure may itself have been subject to specific conditions.

(1304) It should also be noted that Intel's claim is directly contradicted by HP's submission to the Commission stating that: *"HP will take into account the likely reaction of Intel to HP offering a product incorporating a non-Intel x86 microprocessor and how this could impact on HP's business: HP's perception is that the more closely an OEM is 'aligned' with Intel (in terms of not using non-Intel microprocessors with its products or at least not actively promoting such products) the more favourable treatment an OEM is likely to receive from Intel.*"[1625] [1626]

(1305) Finally, even if Intel's contention was correct, the fact that HP might have believed that it would get higher discounts from Intel if it shipped AMD-based systems would not in any logical way show that HP believed that these discounts would not be conditional, or that the consequence of not meeting the conditions would not be a loss of all the discounts. It would only show at most that HP believed that optimal discounts could be achieved under conditions which are not full exclusivity conditions, like for instance the 95% MSS condition of HPA. The consequence of not meeting that condition is a different question from the scope of the condition.

(1306) Intel also bases its arguments that less than 100% of the HPA rebates were conditional on an internal HP document ("the HP Document") dating from the period of negotiation of HPA2.[1627] In that document, HP's BPC [HP Business PC Division] was considering scenarios for the replacement of HPA1.

1625 HP submission of 6 August 2004, section 6.5, p. 6.

1626 The Commission also notes that Intel's argument that HP could believe that it would get more Intel rebates by purchasing more CPUs from AMD is in contradiction with the message which Intel was conveying to large OEMs, as is evidenced by the presentation from Intel to Dell quoted in recital (239) ("*Get* [Dell Senior executive]*/OOC clearly understand our meet-comp process and how it applies to DELL- I.e. if they have AMD in their arsenal they'll have less meet comp exposure-hence less meet comp dollars avail to them—even the possibility that meet-comp dollars that we're* [sic] *applied to DELL go somewhere else...)*".

1627 HP presentation entitled "*Managing Intel and AMD to maximise value to BPC*". Intel Reply to the 26 July 2007 SO, annex 8. See also HP submission of 23 December 2005, appendix 15. It should be noted that although the exact date of this presentation is not certain, on the basis of its content - in particular that HP was considering its strategy for the second half of 2004 and beyond - it can be established that it was prepared sometime during the first half of 2004 and before the conclusion of HPA2 in July 2004.

(1307) HP envisaged three scenarios. In the first scenario (labelled "Status quo" by HP), HP and Intel would simply prolong HPA1. As a result, HP would continue to limit its sales of AMD-based corporate desktops. In the next two scenarios, (hereafter "the Alternative Scenarios"), HP envisaged to widen the distribution of HP AMD-based corporate desktops.

(1308) The widening of the distribution under the Alternative Scenarios would have concerned only the [...] subsegment of HP's corporate desktop business. In that subsegment, under the Alternative Scenarios, HP considered no longer accepting conditions limiting its sales of AMD-based desktops to direct sales to customers in its next generation agreement with Intel.[1628] Instead, for the [...]subsegment, HP would have started to sell AMD-based desktops also through the indirect channel.[1629]

(1309) In the first Alternative Scenario, that change would have taken place as from the [...]. In the second Alternative Scenario, HP considered prolonging the Status quo for 6 months and implementing a new distribution policy only [...].

(1310) In both Alternative Scenarios, the widening of distribution channels in the [...]subsegment would have resulted in an increase of HP's total sales of AMD-based corporate desktops above the 5% MSS cap of HPA1.

(1311) On the [...]subsegment ([...]), which represents about [an important part] of HP's relevant corporate desktop sales,[1630] HP did not envisage changing the distribution practice which was in place as a result of HPA. Therefore, the HPA restrictions would have continued to apply to that subsegment in all three scenarios.

(1312) The business figures included in the Alternative Scenarios show that HP projected a loss of HPA rebates as a result of its change of distribution policy. At the same time, HP also projected an increase of ECAP rebates. Tables 30 to 32 summarise HP's forecasts in each scenario for the one year period immediately following the day on which it would stop fulfilling the HPA conditions in the [...]subsegment, as well as in the Status quo scenario.

Table 30 - Status quo Scenario

Rebate type	Yearly amount (USD million)

1628 See condition b) (ii) in recital (348).

1629 HP Document, p. 12.

1630 Intel Reply to the 26 July 2007 SO, Annex 157, p. 9.

ECAPs	[...]
HPA	[...]
Total	[...]

Source: HP Document

Table 31 - Alternative Scenario 1
HP widening distribution to indirect channels in the [...]subsegment from [...]

Rebate type	Q3-Q4/04 (USD million)	Q1-Q2/05 (USD million)	Total for the Year (USD million)
ECAPs	[...]	[...]	[...]
HPA	[...]	[...]	[...]
Total	[...]	[...]	[...]

Source: HP Document

Table 32 - Alternative Scenario 2
HP widening distribution to indirect channels in the [...]subsegment from [...]

Rebate type	Q1-Q2/05 (USD million)	Q3-Q4/05 (USD million)	Total for the Year (USD million)
ECAPs	[...]	[...]	[...]
HPA	[...]	[...]	[...]
Total	[...]	[...]	[...]

Source: HP Document

(1313) Intel refers to the fact that HP projected only a partial loss of HPA rebates under the Alternative Scenarios (from [...] to [...] per year), and that in conjunction, HP projected an increase of ECAPs (from [...] per year to [...] per year in the Alternative Scenario 1 and [...] per year in Alternative Scenario 2). Intel notes that, according to HP's projections, in Alternative Scenario 1, in the first year following HP's increased distribution policy, HP would have received payments from Intel which, in total, would have been [...] lower than the payments it expected to receive under the Status quo scenario ([...]- [...]= [...]). For Alternative Scenario 2, payments would have been [...] lower than the payments it expected to receive under the Status quo scenario ([...]- [...]= [...]).

(1314) Intel concludes from that analysis that the Commission's assumption that 100% of the rebates should be considered as conditional for the purpose of the as

efficient competitor analysis is incorrect. Instead, in its computations, Intel uses a non-conditional part of the rebates equal to [...]/[...]= [...]%.[1631] [1632]

(1315) This Intel conclusion is flawed for a number of reasons, as is explained in recitals (1316) to (1328).

(1316) First, in its computation of what it alleges to be the non-conditional part of the HPA rebates, Intel not only takes account of the HPA rebates but also of other Intel rebate programmes. Namely, Intel takes account of ECAP rebates granted by Intel to HP and the potential increase thereof in the Alternative Scenarios.

(1317) ECAP rebates are not part of the HPA agreements. ECAPs are awarded by Intel on a case by case basis, based on periodic negotiations with its customers, which may include in particular several types of restrictions or conditions on their application. HP could make the projection that, as a result of future negotiations, Intel ECAPs might increase in the Alternative Scenarios as compared to the Status quo. But HP was by no means legally entitled to that increase in the event of cancellation of the agreements. Nor was HP certain that the increase would take place, whereas conversely, the HPA payments were guaranteed to HP.

(1318) Discounting potential ECAP increases from the loss of HPA rebates is therefore incorrect as it wrongly conflates the assessment of the effects of the HPA agreement with the effect of different agreements. This is inappropriate in a context where those different agreements are only hypothetical, and it is impossible to analyse whether they would themselves be subject to certain conditions.

(1319) Furthermore, the Intel reasoning also incorrectly attributes the same economic value for HP to benefits which are guaranteed (the HPA payments) over a relatively long term and benefits which are only potential (ECAP payments) and valid only for a short term, whereas any reasonable business would give a strong preference to the former. [...].

(1320) Intel's reasoning also shows a misunderstanding of the functioning of the as efficient competitor analysis.

(1321) As explained in recitals (1307) to (1312), both Alternative Scenarios considered by HP envisaged that HP would continue to fulfil the conditions of the HPA agreements in the [...]business PCs subsegment. The [...]subsegment

---

1631 Intel Reply to the 26 July 2007 SO, paragraph 365.

1632 Intel Reply to the 26 July 2007 SO, paragraph 363. In paragraph 364 of the same document, Intel takes a further step and concludes from this that "*HP expected to maintain <u>at least</u> [...]% of the total discounts.*" [Commission's underlining]

represents [an important part] of HP's corporate PC business.[1633] HP considered stopping fulfilling the HPA conditions only in the [...]subsegment, that is, [...] of the relevant segment. As a result, in both Alternative Scenarios, an as efficient competitor would still have been excluded from the contestable share in [an important part] of the relevant sales.[1634]

(1322) However, Intel includes in its assessment of "non-conditional rebates" the [...]% HPA rebates which HP expected to retain as a result of maintaining the conditional arrangement on the [...]subsegment (that is, [...] per year, equal to [...]% of the [...] per year rewarding conditionality over 100% of the segment in HPA1). In other words, Intel counts as "non-conditional rebates" elements of rebates which are as a matter of fact still conditional, albeit linked to a condition of lesser scope.

(1323) Therefore, when Intel uses its flawed value for the non-conditional rebates in the formula in recital (1285),[1635] it counts the benefit to the customer of purchasing at cost price from the as efficient competitor over the entire contestable share. And yet, it also takes account of the payment to the customer of rebates which are still excluding the as efficient competitor from a part of the contestable share. This is inconsistent because it cannot be assumed at the same time that the as efficient competitor has access to the entire contestable share but is still excluded from a part of it. It artificially inflates to a significant degree the value of the Alternative Scenarios for the customer. As a result, this leads the analysis to artificially declare that the customer has an economic interest to opt for the Alternative Scenarios. This therefore biases the analysis in favour of concluding that the Intel rebates are not capable of foreclosing an as efficient competitor.

(1324) One way to limit that bias would be to restrict the analysis of the rebate variations to the [...]subsegment, setting aside those rebates elements which relate to the [...]subsegment where the HPA conditions would remain in full force. Following HP's assumption that [...]% of the HPA rebates would remain as they are attributable to the [...]subsegment, it is reasonable to assume that the other [...]% of the HPA rebates from the Status quo scenario are attributable to the [...]subsegment (that is, [...] per year, equal to [...]% of the [...] per year rewarding conditionality

---

1633 See recital (1311).

1634 The Commission also notes that the HP Document only shows that HP would breach some of the HPA unwritten conditions for the [...]subsegment. It does not state whether HP would be set entirely free of all other Intel constraints even on this subsegment or would accept to be subjected to other, but less strict, constraints. So, on top of remaining barred from the contestable share of the [...]subsegment ([...]% of the relevant segment), it is not certain that the as efficient competitor would have had full unconstrained access to the contestable share on the [...]subsegment ([...]% of the relevant segment).

1635 Intel Reply to the 26 July 2007 SO, paragraph 365.

over 100% of the segment in HPA1). Following Intel's approach that increased ECAPs "compensate" for lost HPA rebates, the foreseen yearly increase in ECAP can be compared with these [...].[1636] Under Intel's methodological approach, the ratio between the increased ECAP and the [...] represents the non-conditional fraction of the HPA rebates for the [...]subsegment.

(1325) Table 33 provides that computation for both Alternative Scenarios. The wording "non-conditional/conditional fraction of HP rebates" in this table has to be understood as the fraction under the Intel methodological approach where ECAPs and HPA rebates are compared like to like. As already explained in recitals (1316) to (1319), this is methodologically inappropriate.

Table 33 - Calculations for both Alternative scenarios

Scenario	Increase in ECAP compared to Status quo (USD million)	Non-conditional fraction of the HPA rebates	Conditional fraction of the HPA rebates
Alternative Scenario 1	[...]	[...]%	[...]%
Alternative Scenario 2	[...]	[...] %	[...]%

Source: Commission computations based on the tables in recital (1312)

(1326) The calculation table 33 provides results which are very favourable to Intel. Firstly, they are based on a computation which mitigates only the flaw in the Intel reasoning addressed in recitals (1321) to (1323). The calculation does not address the flaws mentioned in recitals (1316) to (1319). Secondly, the calculation is based on the assumption that the Alternative Scenarios would provide full access to the contestable share of HP's needs in the [...]subsegment, which cannot in fact be ascertained from the underlying document. On the contrary, slide 12 of the HP Document indicates "[...] *platforms: (...) Institute periodic bidding process between Intel and AMD.*"[1637] It would therefore seem that HP was ready to offer to Intel, against payments, to continue to comply with certain conditions, but for shorter durations and with more frequent renegotiations. The results of those computations will be used to test the robustness of the Commission's conclusions in section i).

1636 This calculation is based on the assumption that the entire increase of ECAPs can be attributed to the [...]subsegment. This assumption is reasonable in a context where the HPA agreement would only be altered in this subsegment. This assumption is also the most favourable to Intel. Indeed, if part of the ECAPs increase was not attributed to the [...]subsegment, a lesser amount of ECAPs would offset the loss of HPA rebates, which would result in a larger calculated conditional fraction of HPA rebates.

1637 HP Document, slide 12.

(1327) In view of the above, it is concluded that Intel's computations are biased in favour of Intel and that, as such, they cannot be used in support of a thesis that the HPA conditional rebates are incapable of foreclosing an as efficient competitor.

(1328) In its reply to the 26 July 2007 SO, Intel conducted an as efficient competitor test for HP using a hypothesis that 50% of the HPA rebates should be considered conditional.[1638] Intel made a parallel with the hypothesis used by the Commission in the case of Dell: "*Professor [...] also notes that with regard to Dell, the SO* [the 26 July 2007 SO] *assumes that only 50% of the discount was conditional, and that there is no reason to assume that HP would have lost a higher percentage of its discounts by increasing its use of AMD processors.*"[1639]

(1329) Recitals (1321) to (1323) have already explained the reasons why it is justified to consider that 100% of the HPA rebates are conditional in the context of the as efficient competitor analysis. In particular, the Commission has already referred to the fact that the HPA agreements are structured in a way which subjects the entirety of the payments to the condition. It has also been explained why the counterfactual scenarios provided by Intel were inappropriate in the context of the analysis. In that respect, Intel's statement referred to in recital (1328) is based on the same misunderstanding of the as efficient competitor analysis as the one discussed with regards to the counterfactual scenarios. The relevant question is not to determine the level of discount which HP may lose if it were to simply "*increase its use of AMD processors*", but the level of discounts which Intel might cancel if HP used the maximum number of AMD processors that it can in the current market context, that is, all the contestable share of its supply.

(1330) The situation of Dell is different from that of HP. The MCP arrangements between Dell and Intel are more complex than the HPA rebates, and have a longer history. As explained in sections VI.2.3 and 4.2.3.2, there was significant uncertainty attached to them, in particular as regards the loss of rebates which would result from Dell switching to AMD. This justifies the use of a different assumptions for Dell, based on the analysis of Dell internal documents. However, the Commission has specified, both in the 26 July 2007 SO and in the present Decision, that the use of an assumption that 50% of the Dell MCP rebates were conditional for the purpose of the as efficient competitor analysis is a conservative hypothesis, which is to the benefit of Intel.[1640]

1638 Intel Reply to the 26 July 2007 SO, paragraph 365.

1639 Intel Reply to the 26 July 2007 SO, paragraph 364.

1640 See in particular paragraph (1183).

(1331) In view of the above, it is concluded that Intel's arguments do not carry sufficient weight to invalidate the Commission's conclusion that 100% of the HPA rebates have to be considered as non-conditional for the purpose of the as efficient competitor analysis.

c) Volume purchased and average selling prices

(1332) For the purpose of the computations in the 26 July 2007 SO, the Commission used HP data to calculate average selling prices and volumes purchased. Intel did not criticise those figures in the Reply to the 26 July 2007 SO, and, for the purpose of the computations in the said Reply, Professor [...] used the same figures.[1641] The Commission therefore considers that these figures are not contested. Those figures will therefore be used for the purposes of the computations in this Decision.

d) Costs

(1333) In section 4.2.3.1.c), it was concluded that Intel's assessment of the AAC to ASP ratio was significantly underestimated. It was concluded that, on average, the ratio is at least [...] percentage points higher than the value claimed by Intel. For the purpose of the assessment of the HP rebates, this Decision will therefore use a value for AAC/ASP equal to that asserted by Intel for the relevant computations (from [...]% to [...]% depending on the quarter)[1642] plus [...] percentage points (that is, from [...]+ [...]= [...]% to [...]+ [...]= [...]% depending on the quarter).

e) Calculation of the required number of units and required share

(1334) On the basis of all the parameters described in sections b) to d), the calculation of the required share S can be carried out. The parameters, as well as the results of the calculation, are outlined in table 34. As in the 26 July 2007 SO,[1643] the Commission conducted its computations using two values for costs: the value which was derived by the Commission, and the cost data asserted by Intel (see section 4.2.3.1.c)).[1644] As has been outlined in section 4.2.3.1.c), the Commission considers that Intel's own cost data significantly underestimate the correct figure. The Commission nevertheless also conducted the calculations with those values (which are favourable to Intel) in order to test the robustness of the conclusion of its as efficient competitor analysis.

1641 Intel Reply to the 26 July 2007 SO. Report of Professor [...], paragraphs 186 and 187, and Exhibits 15 to 18.

1642 Intel Reply to the 26 July 2007 SO. Report of Professor [...]. Exhibit 16A.

1643 26 July 2007 SO, tables in paragraph 462 and paragraph 463.

1644 Intel Reply to the 26 July 2007 SO. Report of Professor [...]. Used in the calculations in the report of Professor [...], Exhibits 16A, 17A and 18A.

Table 34 - Required share

	Volume (units)		ASP of Intel CPUs	Rebates (USD)	Required share S	
	Total	I			AAC as per Intel	AAC as per the Commission
Q4 FY03	[...]					
Q1 FY04						
Q2 FY04						
Q3 FY04						
Q4 FY04						
Q1 FY05						
Q2 FY05						
Q3 FY05						

Sources:
for Volumes, ASPs and Rebates: HP,[1645]
Intel for the AAC used in the first column,[1646]
Commission computations for AAC used in the second column

(1335) Professor [...] argues that since the relevant time horizon for the application of the as efficient competitor analysis is one year (see section 4.2.3.1.b)), it does not give *"accurate results"* to calculate the minimum required share for each quarter.[1647] In this respect, it is important to distinguish between the time horizon the OEM applies when making a decision whether or not to switch with the separate question of how often the OEM gives due consideration to switching. The time horizon for the decision whether or not to switch, which the Commission has determined is one year for the reasons set out in section 4.2.3.1.b), is important for

1645 HP submission of 7 March 2007, Annex 1. For quarters covering the HPA2 period, the amounts can differ slightly from the amounts mentioned in section VI.2.4.3.3. This is because the HPA2 quarters do not coincide fully with HP's fiscal quarters. Furthermore, HP might have spread the [...]additional payment to the basic [...]per quarter (See recital (344)) in a different way than Intel for accounting purposes. The Commission notes that these figures were used in the computations of the 26 July 2007 SO and were not contested by Intel. Intel uses them in its reply to the 26 July 2007 SO (Intel Reply to the 26 July 2007 SO. Report of Professor [...], exhibits 16A to 18B).

1646 Intel Reply to the 26 July 2007 SO. Report of Professor [...], exhibit 16A.

1647 Intel Reply to the 26 July 2007 SO. Report of Professor [...], paragraphs 194-195.

the time horizon of the calculation of the contestable share. The frequency with which OEMs seriously consider switching some of their demand to AMD is relevant for deciding with what historic frequency the analysis should be performed. For the purpose of the presentation of the results of the analysis, the Commission found it appropriate to give quarterly results. In most instances, in particular in the concrete cases analysed by the Commission in this Decision, quarterly figures were provided to the Commission. The Commission considers that this reflects a business practice. Furthermore, because quarterly figures were provided to the Commission, using another frequency to present the result of the analysis would have required the Commission to make assumptions to aggregate and/or disaggregate the figures. This would have introduced an unnecessary inaccuracy in the results of the analysis.

(1336) In the case of HP, the agreements HPA1 and HPA2 had, when they were entered into, a one-year time horizon. At the same time, they allowed both Intel and HP to leave the contract with 30 days notice.[1648] HPA1 was also extended to cover two additional quarters plus one month. Since it cannot automatically be assumed that the same time horizon is applicable both to the question of the time horizon the OEM applies when making a decision whether or not to switch and to the question of how often the OEM gives due consideration to switching, it is not appropriate - as Professor [...] does - to conclude that the time horizon of one year would not give accurate results.

(1337) However, in order to show the robustness of the Commission's conclusions, table 35 sets out a calculation of the required share over the respective time spans of HPA1 and HPA2.[1649]

Table 35 - Global required share for the HPA1 and HPA2 periods

	Volume (units)		ASP of Intel CPUs	Rebates (USD)	Required share *S*	
	Total	*V*			AAC as per Intel	AAC as per the Commission
HPA1	[...]					

1648 The effect of this 30 days notice period on HP's incentive to stay with Intel is examined in section VII.4.2.2.3.c) above.

1649 In order to produce this chart, the Commission used the same reference period for HPA1 and HPA2 as those used by Professor [...]. (Intel Reply to the 26 July 2007 SO, Report of Professor [...], exhibit 16A, note [2]). This reference period may not fully coincide with the actual contractual duration of the agreements because (i) HPA2's quarters do not coincide with HP's fiscal quarters and (ii) certain figures reported by HP do not cover consistently the entire HPA1 period.

Sources:
for Volumes, ASPs and Rebates, ASP and AAC used in the first column: Intel,[1650]
Commission computations for AAC used in the second column

(1338) As explained in section b), in its Reply to the 26 July 2007 SO, Intel used a HP document which contained HP forecasts of the evolution of different categories of rebates in two Alternative Scenarios, one covering the [...]period, and one covering the [...]period plus two subsequent quarters.[1651] It has already been explained in recitals (1316) to (1328) why Intel's calculations of "percentages of non-conditional rebates" based on these Alternative Scenarios did not represent convincing arguments to depart from the Commission's assumption that 100% of the HPA rebates have to be considered as non-conditional for the purpose of the as efficient competitor analysis.[1652] However, in order to test the robustness of its conclusions, the Commission provided a calculation of the percentage considered by Intel, using Intel's core – but flawed - methodological assumption that the evolution of other categories of rebates can be considered in the computation of the share of HPA rebates which have to be considered as non-conditional for the purpose of the as efficient competitor analysis. In that calculation, the Commission rectified an important error made by Intel even under its own methodological assumptions.[1653] Tables 36 and 37 compute the required share *S* for each Alternative Scenario in the relevant period covered by each respective Alternative Scenario, using the results of those calculations.

Table 36 - Required share in Alternative Scenario 1

	Rebates (USD)	Parameter R ([...]% of total rebates) (USD)	Required share S	
			AAC as per Intel	ΔAC as per the Commission
Q4 FY04	[...]			
Q1 FY05				

1650 Intel Reply to the 26 July 2007 SO. Report of Professor [...], exhibit 16A.

1651 See recital (1309).

1652 See recitals (1315) to (1323).

1653 See recital (1324).

Q2 FY05	
Q3 FY05	

Sources:
for Volumes, ASPs and Rebates: HP,[1654]
Percentage for the calculation of *R* from the table in recital (1324),
Intel for the AAC used in the first column,[1655]
Commission computations for AAC used in the second column

Table 37 - Required share in Alternative Scenario 2

	Rebates (USD)	Parameter *R* ([...]% of total rebates) (USD)	Required share *S*	
			AAC as per Intel	AAC as per the Commission
Q2 FY05	[...]			
Q3 FY05[1656]				

Sources:
for Volumes, ASPs and Rebates: HP,[1657]
Percentage for the calculation of *R* from the table in recital (1324),

---

1654 HP submission of 7 March 2007, Annex 1. For quarters covering the HPA2 period, the amounts can differ slightly from the amounts mentioned in section VI.2.4.3.3. This is because the HPA2 quarters do not coincide fully with HP's fiscal quarters. Furthermore, HP might have spread the [...]additional payment to the basic [...]per quarter (See recital (344)) in a different way than Intel for accounting purposes. The Commission notes that these figures were used in the computations of the 26 July 2007 SO and were not contested by Intel. Intel uses them in its reply to the 26 July 2007 SO (Intel Reply to the 26 July 2007 SO. Report of Professor [...], exhibits 16A to 18B).

1655 Intel Reply to the 26 July 2007 SO. Report of Professor [...], exhibit 16A.

1656 Q3FY05 is the last quarter of application of HPA2. Subsequent quarters were considered by HP in Alternative Scenario 2, but are not covered by the findings of the Commission in the present Decision.

1657 HP submission of 7 March 2007, Annex 1. For quarters covering the HPA2 period, the amounts can differ slightly from the amounts mentioned in section VI.2.4.3.3. This is because the HPA2 quarters do not coincide fully with HP's fiscal quarters. Furthermore, HP might have spread the [...]additional payment to the basic [...]per quarter (See recital (344)) in a different way than Intel for accounting purposes. The Commission notes that these figures were used in the computations of the 26 July 2007 SO and were not contested by Intel. Intel uses them in its reply to the 26 July 2007 SO (Intel Reply to the 26 July 2007 SO. Report of Professor [...], exhibits 16A to 18B).

Intel for the AAC used in the first column,[1658]
Commission computations for AAC used in the second column

f) Contestable share

(1339) Evidence on the file indicates that the possible ramp-up rate for HP AMD-based corporate desktop products is significantly less than the minimum required share estimates presented in section e). In the 26 July 2007 SO, the Commission considered that that contestable share did not exceed [...]%.[1659] This section will describe the reasons why the Commission considers that Intel's arguments do not lead it to depart from the [...]% value.

(1340) In April 2002, [HP executive]of HP sent [AMD Executive] of AMD an e-mail with a spreadsheet attached showing the expected "*[w]eighted average* [of] *commercial desktop AMD mix within Compaq/HP*" in two scenarios: an aggressive and a baseline scenario.[1660] Paragraph 469 of the 26 July 2007 SO outlined those scenarios as set out in table 38:

Table 38 - Expected weighted average of commercial desktop AMD mix within Compaq/HP

	2001	2002	2003	2004	2005	2006
Aggressive		[...]	[...]	[...]	[...]	[...]
Baseline		[...]	[...]	[...]	[...]	[...]

Source: AMD[1661]

(1341) From the spreadsheet, it is clear that the projections are not restricted to HP's "D3" line of products but also contain the "D5" product line, though the ramp up of the latter is foreseen to start later and be slower.[1662] [1663]

(1342) While the numbers for 2002 may not cover a full 12-month period, the main text of the email provides a clear indication about the possible ramp up within a 12-

---

1658 Intel Reply to the 26 July 2007 SO. Report of Professor [...], exhibit 16A.

1659 26 July 2007 SO, paragraph 470.

1660 Email of 27 April 2002 from [HP executive] to [AMD Executive], entitled *'RE: Volume projections'*. AMD submission of 15 September 2006, supporting document number 9.

1661 E-mail of 26 April 2002 from [AMD Executive] to HP-Compaq executive entitled 'Volume projections'. AMD submission of 15 September 2006, supporting document 9. Attached spreadsheet.

1662 Idem. Attached spreadsheet, line entitled *'Share of AMD within Compaq/HP'*.

1663 The "'D3" product line contains all HP corporate desktops the name of which is D3 followed by two or more digits. For instance D310, D315, D320. Similarly, the "D5" product line contains products labelled D520, ...

month period: *"I think* [...] *in the first 12 months might be a good aggressive number but I wouldn't go higher than this."*[1664]

(1343) HP has confirmed to the Commission that "[It is generally correct to say that the figures represented HP's then current view of the rate at which Intel could, in optimal circumstances, grow its share of acquisitions of CPUs by HP's commercial desktop business. These figures should be viewed in the context of the commercial negotiations between HP and AMD. HP was aware that other commercial factors, including its relations with Intel were likely to impact on the share of its purchases which was obtained by AMD]"[1665]

(1344) While the exact starting date of the ramp-up is not clear from the table, it can be seen that from 2002 to 2003, the penetration grows by [...]% in the aggressive scenario (from [...]% to [...]%). In the baseline scenario, the AMD penetration grows by [...]% from 2002 to 2003 (from [...]% to [...]%). In the 26 July 2007 SO, the Commission noted that *"even under an aggressive scenario, the annual ramp-up rate for AMD that HP envisaged did not exceed* [...]*%."*[1666]

(1345) Intel argues that the spreadsheet is a Compaq document drawn up 8 months before the entry into force of the HPA1 agreement and prior to the completion of the merger between HP and Compaq.[1667] Instead, Intel proposes to use an HP internal presentation dated 17 October 2002[1668] despite the fact that, as Professor [...] notes, it *"does not contain annual ramp rates"*.[1669]

(1346) While the document on which Intel wishes to rely is dated 17 October 2002, the numbers to which Professor [...] refers appear under the heading *"Background"* and relate to *"the HP-AMD MOU"*, which was entered into already 4 March 2002[1670]. The slide then goes on to mention that *"HP reached agreement at the term-sheet level in mid July with Intel and AMD"* and that *"Intel reacted very negatively to HP-AMD launch and terminated negotiations"*.[1671] As already

---

1664 Idem, p. 1.

1665 HP submission of 7 March 2007, answer to question 6.

1666 26 July 2007 SO, paragraph 470.

1667 Intel Reply to the 26 July 2007 SO, paragraphs 353-354.

1668 HP Document of 17 October 2002 entitled *'Intel Update* '. Intel Reply to the 26 July 2007 SO, annex 11-A.

1669 Intel Reply to the 26 July 2007 SO. Report of Professor [...], paragraph 214.

1670 HP-AMD Memorandum of Understanding of 4 March 2002, HP submission of 23 December 2005, [HP executive]Deposit, Exhibit 12, p. HP0000183.

1671 HP Document of 17 October 2002 entitled *'Intel Update* ', p. 10. Intel Reply to the 26 July 2007 SO, annex 11-A.

explained in section VI.2.4.4.2.a), the HPA agreement was not different from the agreement that had been nearly finalised already in July 2002. It is thus not possible to conclude that those numbers are updated and more accurate than those that were relied on by HP in the direct negotiations with AMD from April 2002. Furthermore, Intel did not provide any concrete explanation why the fact that the April 2002 document was drawn up prior to the completion of the HP/Compaq merger could have had any upward impact on the percentage of AMD-based corporate desktops that the companies could have sold, bearing in mind that neither of them sold AMD-based corporate desktops prior to the merger. The Commission also notes that HP submitted that the document in question reflected HP's view.[1672] It was therefore not restricted to a Compaq view despite the fact that [HP executive] was then employed by Compaq. The document also consistently presents the estimates as "HP/Compaq" estimates, which is a further indication that it already takes full account of the consolidation of the two companies' businesses.

(1347) Due to the lack of actual ramp-up rates in the document on which Intel wishes to rely, Professor [...] proposes a method to compute a contestable share after one year on the basis of the document which only contains estimates after 3 years. To that effect, Professor [...] proposes to *"interpolate"* the ramp-up rates on the basis that the document mentions AMD "*growing to* [...]*% of HP's business*" over 3 years,[1673] while the document relied on in the 26 July 2007 SO mentions a gradual ramp-up to [...]% in the aggressive scenario in the same three year time frame.[1674] Professor [...] then multiplies the [...]% figure specified in the 26 July 2007 SO by the ratio of the two end-points that are claimed to be envisaged over three years ([...]/[...]). This results in an estimate of [...]% contestable share during the first year.[1675]

(1348) It should first be noted that the calculation from Professor [...] can only give very uncertain results. Drawing conclusions on a one year time horizon from figures over a three year period would require knowledge of the actual ramp up curve of HP, which is absent in the document used by Intel. Interpolation can therefore only give very rough results, which can in no way replace documents that contain actual forecasts over the exact relevant time period.

(1349) Furthermore, even if the validity of the interpolation method were to be accepted, the [...]% figure to which Intel makes reference in the document used by

---

1672 See recital (1343).

1673 HP presentation of 17 October 2002 entitled 'intel update', slide 10. HP submission of 23 December 2005. [HP executive]deposit, Exhibit 12.

1674 See table in recital (1340), last line, last column.

1675 Intel Reply to the 26 July 2007 SO. Report of Professor [...], paragraph 214.

Intel is a figure which is a percentage of the total HP x86 CPU supply needs. As already pointed out in recital (1287) and as explained by Professor [...] (see same recital), 5% of the total HP supply needs are available for competition even under the HPA conditions. It is therefore necessary to discount those 5% from all figures obtained on the basis of the [...]%. The same applies to the [...]% AMD share at HP which Professor [...] used in his calculations: indeed, that figure is computed using the same total basis as the [...]% figure, and only interpolated to take account of the fact that the result needed is a figure after one year, rather than after three years. If the AMD share of the HP total supply need is [...]%, then, discounting the 5% which HPA leaves available to competition, AMD represents [...] – [...] = [...]% of the remaining 95%. Expressed as a percentage of the 95%, [...]% / [...]= [...]%.

(1350) For the reasons outlined in recitals (1348) and (1349), Intel's conclusions based on the document mentioned in recital (1345) cannot be accepted, in particular in a context where other documents are available in which the correct numbers can readily be extracted.

(1351) In that respect, it should also be mentioned that an HP presentation dated 13 June 2002 contains a slide about how many AMD units HP thought could be sold. That slide has two scenarios, one based on *"volumes developed with regions prior to AMD 'first-mover "deal being received and disclosed"* which was set at [...]units, and one based on *"market-based estimate based on conservative market opportunity sizing and D500 mini-tower"* which was set at [...] units.[1676] Using a reference basis for the total volume of HP computers at stake of [...] units per year (as Professor [...] did),[1677] [...]units corresponds to [...]% and [...]correspond to [...]% of the relevant volume.

(1352) Intel argues that it is appropriate to base contestable share assessments on information that was knowable to Intel when it made its discount offer to HP. Intel argues that it made reasonable assessments based on specific representations made to it by HP.[1678] Intel then presents a number of documents concerning the size of the contestable share as it claims was represented by HP to Intel in the period running from mid August 2002 to the signature of the HPA agreements. The recitals below will establish that Intel's arguments about its own assessment of the size of the contestable share are not convincing. Indeed, contemporaneous evidence show that what Intel describes as its own reasonable assessment of the size of the contestable share are actually figures which were knowingly overestimated. In

---

1676 HP presentation of 13 June 2002 entitled *'commercial AMD desktop – strategic rationale'*, p. 16. HP submission of 23 December 2005, [HP executive]deposit, Exhibit 14.

1677 Intel Reply to the 26 July 2007 SO. Report of Professor [...], paragraph 218.

1678 Intel Reply to the 26 July 2007 SO, paragraph 357.

view of the fact that the figures quoted by Intel were knowingly overestimated, it is not necessary for the Commission to take a position in this case on what would be its conclusion in a situation where the dominant company had relied *bona fide* on incorrect assessments of the contestable share.

(1353) Intel first makes reference to a string of emails containing an assessment by [Intel executive]of Intel[1679] dated 19 August 2002. In that assessment, [Intel executive]wrote that [HP executive] [one of HP's lead negotiators[1680]] *"stated that amd's best case would be* [...]*% mss in the fourth quarter of their ramp if we*[Intel] *do not meet comp. if we do meet comp, their mss would end up around* [...]*%. so we are talking about* [...] *per quarter at risk (or at most* [...] *per year during the first year)".*[1681]

(1354) The string of emails mentioned above is an indirect report of a telephone conversation with HP. It does not give any element of the context of the telephone conversation with HP which would allow the Commission to determine its relevance. Furthermore, a very large part of the email exchange, which could potentially have given important elements of context, has been redacted by Intel on the ground that it would be legally privileged.[1682] The Commission therefore considers that this piece of evidence has to be examined with particular prudence, in particular in circumstances where it would contradict other more direct evidence, the context of which is clearer.

(1355) It should first be noted that, as is clear from the text of [Intel executive]'s email, the computation only purports to analyse a best case scenario. It is therefore not appropriate for use in Intel's defence in the context of the as efficient competitor analysis.

(1356) Furthermore, in its Reply to the 26 July 2007 SO, Intel mischaracterised the content of the email quoted in recital (1353). Intel wrote that, in the email in question, "*HP represented to Intel that up to* [...]*% of HP's corporate desktop purchases (...) were at risk in the first year but Intel estimated that the more likely at-risk amount was* [...]."[1683] Intel therefore presents Intel's conclusion of the [...]at

---

1679 According to Intel's homep., [Intel executive] is currently an Intel [...]. Prior to 2005 he was "[...]*planning.*" http://www.intel.com/pressroom/kits/bios/[...].htm, downloaded and printed on 14 January 2009.

1680 Intel Reply to the 26 July 2007 SO, paragraph 310.

1681 Email of 19 August 2002 from [Intel executive]to [Intel executive]and others entitled '*talked to* [...]. Intel Reply to the 26 July 2007 SO, Annex 143, p. 2.

1682 However, Intel did not provide any justification of their privileged nature under Community Law.

1683 Intel Reply to the 26 July 2007 SO, paragraph 358.

risk as a reasonable reassessment of an HP representation of up to [...]% units at risk in the first year.

(1357) The email does not state that HP represented that up to [...]% units would be at risk in the first year, but that the percentage of units at risk could ramp up and reach – in AMD's best case - [...]% in the fourth quarter. This means that in the three preceding quarters, the number of units at risk would be below [...]%, progressively climbing to that value. Intel is therefore misrepresenting the nature of its reassessment of the [...]% figure. The reassessment was not the result of a reasonable revaluation of the likely number of unit at risks presented by HP, but only a mathematical computation aimed at calculating the effect of the ramp up during the first year, which was necessary because HP only provided the figures for the fourth quarter of the year.

(1358) Intel also refers to a presentation which HP sent to Intel on 29 October 2002. Intel claims that it used that presentation to conclude that the contestable share amounted to approximately [...]%.[1684]

(1359) The Commission has analysed the context of the HP representations, as well as the way Intel used these figures to reach the [...]% contestable share figure in order to determine whether Intel conducted, as it claims, a reasonable assessment of HP's contestable share based on HP's representations.

(1360) However, that evidence should be viewed in a broader context. As was already mentioned in section VI.2.4.4, after the incident provoked by HP's publicised announcement of the launch of the D315, Intel started to express to HP that it had "*antitrust concerns and business concerns over the deal*".[1685] Those "concerns" were expressed in terms of whether Intel's offer could be deemed to only match AMD's offer, or if it exceeded it.

(1361) An email from an Intel counsel to an HP counsel on the subject confirms that context. The email "*sets out Intel's position regarding its ability to provide a 'meet comp' offer to HP in connection with the sale of microprocessors for use in commercial desktop systems.*"[1686] The first conclusion of the email is that the elements of information Intel had about the offer from AMD to HP: "*do not appear to provide a sufficient basis for Intel to offer HP a commitment for financial support in the magnitude for the duration that HP currently seeks. Because the parties are having ongoing discussions, it may be useful to provide some*

1684 Intel Reply to the 26 July 2007 SO, paragraph 358.

1685 Intel Reply to the 26 July 2007 SO, paragraph 306.

1686 Email from [Intel executive]to [...]of 15 October 2002 entitled "*"Meet Comp" Issues*". Intel Reply to the 26 July 2007 SO, annex 145.

explanation of the principal legal concerns, in order to enable HP to provide the additional information that may support the financial commitment that it is seeking. Because HP has been unable to disclose the prices, products, and volumes that AMD has offered (even within ranges), Intel has had to extrapolate the potential magnitude of AMD's offer, taking into account some reasonable estimate of the relevant processors, prices and volumes. Based on reasonable estimates regarding the contestable volume of microprocessors over the relevant period and the known differences between Intel's and AMD's prices and processors, it appears that the financial support that HP is seeking from Intel would creates a substantial risk that Intel would beat AMD's offering rather than simply meeting it."[1687] The email then goes to explain how the situation could be resolved: "*I expect the parties will have further discussions shortly on these subjects, and certainly hope that those are fruitful in reaching a "win-win" solution that provides HP with substantial financial assistance while avoiding unwarranted legal risk for Intel.*"[1688]

(1362) In other words, Intel was sending strong signals to HP that HP needed to find a way to allow Intel to increase its estimates of the contestable volumes thereby permitting Intel, in its appreciation, to provide the rebates HP was asking for. Indeed, with a larger represented contestable share, the offered rebate is spread over a larger amount of units, which results in an apparent lower rebate per unit, and hence less perceived legal risk that the rebate is seen as going "beyond" AMD's offer.

(1363) It is apparent from evidence in the file that HP presented to Intel only a very optimistic view as to how many units it might switch to AMD. The 24 October 2002 presentation, on which Intel relied in its Reply to the 26 July 2007 SO as described in recital (1357) of this Decision, illustrates this clearly, as set out in recitals (1364) to (1368).

(1364) The first slide of the presentation states that Intel was to bid for a volume of "[...]*units*" over a 12 month period, from 1 August 2002 to 1 August 2003.[1689]

(1365) Subsequent slides indicate, without stating it explicitly, that Intel is competing with an offer from AMD at zero cost.[1690] Finally, on the slide entitled *"HP's*

1687 Idem.

1688 Idem.

1689 HP presentation of 24 October 2002 entitled 'Commercial Desktop', slide 1. Intel Reply to the 26 July 2007 SO, Annex 146.

1690 Slide 4, entitled *"Financial Assumptions"* states, *inter alia*: *"HP average P4 price* - [...]"; *"Additional HP cost of Intel based chip set* -[...]" and *"HP cost delta vs. P4* = [...] ". The cost difference appears to represent the difference ("*cost delta*") between Intel's list price and AMD's

Assessment of Intel Offer", it is stated: *"OK for AMD to price below cost – not the leading supplier"* and *"OK for Intel to match an AMD bid, even if below Intel cost."*[1691] When Intel subsequently won the bid, it could not have been surprised by the fact that its rebate - when applied to the relevant contestable units - would lead to prices below cost, and thus be capable of foreclosing entry.

(1366) In contrast to the language that was described in recital (1364), an internal version of the same HP presentation, also dated 24 October 2002,[1692] contains a slide entitled *"Potential HP-Intel Commercial Desktop PC Deal"* which is identical to the first slide in the version of the presentation which was given to Intel,[1693] except for the information regarding the volumes that Intel was bidding for. It indicates that Intel was bidding for "[...] *to* [...] *units (base case, upside case)"*. On page 6 of the presentation, it is stated that *"Only the* [...] *number was communicated to Intel"*. This confirms that HP's response to Intel's request for a larger estimate of the contestable units was met in the sense that HP only communicated its upside case to Intel. [...]units corresponds to a [...]% contestable share.[1694] [...]units corresponds to a [...]% contestable share.

(1367) The presentation also once again confirms that Intel did not appear to be concerned about the legality of offering x86 CPUs below cost (though it appeared to be concerned that the offer went beyond what AMD had offered rather than just "meeting competition"). On page 7, it is stated *"Business, not a legal decision to not provide "Cellerons" at below cost (HP and Intel agree on this point)"*.

(1368) Therefore, in the light of the analysis in recitals (1364) to (1367), the HP representations which Intel claims were the basis for a "*reasonable assessment*" of the contestable share were deliberately exaggerated figures provided by HP in response to a context where Intel made HP understand that it believed it could only offer the rebates if it were to receive such exaggerated representations.

---

offer. Since Intel's list price on the slide is assumed to be [...] ([...]for the CPU plus [...]for the chipset) and the difference is assumed to be [...], this implies that AMD's offer must be zero. This can be seen on slide 6 where Intel's rebate offer (which at this point was [...]) is compared to for instance [...]which appears to be the amount needed to cover the cost difference of [...]per system for [...]units ([...]per unit times [...]units equals [...]).

1691 This is a further indication that Intel was not seeking to obtain information that it was not pricing below costs, but information that it was not pricing below AMD's offer, which was below costs. See in this context footnote 457.

1692 HP submission of 23 December 2005. [HP executive]Deposition, exhibit 19.

1693 The slide is marked "*HP EYES ONLY!!!*". Several other pages appear identical or slightly altered compared to the presentation given to Intel.

1694 See recital (1351) for the explanation on the way the correspondence is established.

(1369) What is more, Intel was still not content with those exaggerated HP representations, and sought to inflate the representation of the size of the contestable share even more. Indeed, as was explained in recital (1357), from the HP presentation of 24 October 2002, which contains an overrepresented contestable share of [...]%, Intel internally arrived at a contestable share estimate of [...]%. In order to reach that even higher number, Intel unilaterally assumed that the number of units at risk was higher than HP's representation: "*although hp has stated that transactional bids represent* [...] *of their volume, its clear that it can go to* [...] *based on their large corp bids being done as reported by other oem's.*"[1695] Intel has not provided any document which shows that it validated that increase of HP's representations with HP, nor has it explained the hypotheses of the scenario underlying that increase.

(1370) Intel nevertheless attempts to justify its unilateral inflation of HP figures by stating that: "*This presentation* [the HP presentation of 24 October 2002] *showed* [...]*units at risk in the SMB and GEM segments and an opportunity to bid for additional D3XX and D5XX units, which Intel estimated put another* [...]*units at risk.*"[1696]

(1371) However, the analysis of the file shows that the number of units at risk in the HP representation was not restricted to SMB and GEM, but rather the contrary. AMD's presence would be restricted to the SMB and GEM segments if a deal was concluded with Intel.

(1372) This is clear, *inter alia*, from the HP presentation entitled "*intel update*".[1697] Slide 10 of the presentation shows that HP was offering Intel the possibility to make an offer for the difference between "*SMB and enterprise focused products through all channels*" and "*SMB (and government, education, medical – GEM) focused product only with a direct (...) model.*" The units at risk thus did not relate only to SMB and GEM, but also involved the enterprise segment (that is, non SMB business customers).

(1373) In view of the above, it is concluded that the estimates of the number of units which HP could switch to AMD which Intel produced on the basis of HP representations cannot be held to constitute a reasonable assessment of HP's contestable share. The documents presented by Intel to support its view do not show any critical appreciation of HP's representations. Intel was, however, well

---

1695 Email of 31 October 2002 from [Intel executive]to [Intel senior executive]and others entitled '*hp deal position –atty client*'. Intel Reply to the 26 July 2007 SO, annex 148.

1696 Intel Reply to the 26 July 2007 SO. Report of Professor [...], footnote 63.

1697 See recital (371). HP presentation of 17 October 2002 entitled 'intel update', HP submission of 23 December 2005, [HP executive]deposit, Exhibit 12.

aware of the context which it had created to push HP to present only optimistic representations of its contestable share. More generally, Intel is a large and sophisticated company with decades of experience in this industry. It is therefore likely to know that its customers have an obvious interest in over-representing the number of units which they may switch to AMD in discussions with Intel. Accepting HP's representations at face value – and even adding to them - can therefore not constitute a valid defence against the substantiated contestable shares estimate provided in the Commission's 26 July 2007 SO.

(1374) In the same vein, Intel argues that, during the negotiation of HPA2, "*HP represented to Intel that* [...]*% of its corporate desktop purchases were at risk in one year and Intel discounted this claim to* [...]*%.*"[1698]

(1375) In support of that claim, Intel has submitted an internal Intel document entitled "[...] *HPA2 Prep*"[1699] dated 14 April 2004. That document is a collection of slides apparently used to prepare [Intel senior executive]for upcoming negotiations with HP with a view to concluding an HPA2 deal. In one slide, entitled *"Meeting Choreography"*, a number of steps are described, with the last ones being the closing of the HPA2 negotiations on 31 May 2004 and the start of HPA2 on 1 June 2004. The first step in that process is *"4/14* [...] *mtg."*, that is to say the same day as the presentation itself. In another slide entitled *"Approach for* [...] *meeting*", it was foreseen that the meeting would include a review of *"Scenarios 1-4"* as well as *"[i]dentify*[ing] *disconnects w/Scenarios 1-4- HP's total volume baseline too high -% volume at risk to comp too high (vs. market environment)".*[1700] Each of those scenarios was outlined in separate slides, and contained an estimate of the number of units HP expected to sell (based on a forecast growth percentage), as well as an estimate of how big a share of HP's sales were *"at risk"*. The units at risk combined with "meet comp" discounts per unit (ranging from [...] to [...] in Scenario 1 depending on x86 CPU type) allow for the calculation of the overall *"12mo meet comp"*, that is, the total discount for one year. Each of the different scenarios[1701] contains different assumptions with respect to how much HP's sales would grow, and how much was at risk in the two segments (enterprise and SMB) as well as the magnitude of unit discounts that should be given. Scenarios entitled "*HP's View*" or "*HP perspective*" contain assumptions

---

1698 Intel Reply to the 26 July 2007 SO, paragraph 359.

1699 See footnote 1622.

1700 Intel document of 14 April 2004 entitled "[...] *HPA2 Prep*". Intel Reply to the 26 July 2007 SO, annex 157.

1701 There are slides containing scenario 1-4 as well as Scenario A and B (entitled *"Intel's View"*) as well as one slide entitled Scenario 5 *"HP's View, Most extreme comp landscape (based on HP data)* ".

that lead to high discounts ([...] to [...] in Scenario 1-5), while scenarios entitled *"Intel's View"* contain assumptions that lead to lower discounts ([...] to [...] in Scenario A and B).

(1376) In this context, it appears that the different assumptions underlying the scenarios are quantitative elements to be used in the context of the negotiation to justify lower rebate offers: when faced with a request for a large rebate, Intel would offer a lower rebate, arguing that, based on its figures, a larger rebate would go beyond a meet competition offer.[1702] The setting is therefore not different from the one in HPA1.

(1377) It is therefore concluded that the document provided by Intel is not one that can be said to constitute a reasonable assessment of what volumes were actually thought to be at risk but in fact, illustrative of the same effect as was mentioned above in the letter from Intel's outside counsel to HP, that is to say that the larger the volume claimed to be at risk, the larger the discount would be.[1703] In that respect, it is telling that, despite Intel's claim that it "*discounted the HP representations*" on units at risk, the document recommends that [Intel senior executive] ("[...]") agree a maximum yearly rebate of [...] and that Intel tries to achieve a yearly rebate of [...], which corresponds to the annual rebate computed precisely using HP's (most optimistic) representations in terms of volume at risk.[1704]

(1378) Intel's claim that it had reasonably assessed and reviewed HP's claims as to the size of the contestable share is therefore incorrect. The document quoted by Intel simply takes HP's representations on that parameter at face value in a context where Intel had sent signals to HP that its estimates should be inflated (see recitals (1360) to (1362)).

(1379) Intel has not submitted any other document explaining why, in Intel's view, the amount of HP's contestable share [...] in one year from the negotiation of HPA1 to the negotiation of HPA2.[1705]

(1380) Furthermore, paragraph 471 of the 26 July 2007 SO contained a reference to an AMD contemporaneous document which appeared to have been prepared in late 2004, and concerned the foreseen ramp-up rate of AMD-based products at HP for

---

1702 See recital (1360).

1703 See recital (1361).

1704 See footnote 1622, p. 5.

1705 From values ranging from [...]% in the Commission's view to up to [...]% in Intel's highest estimate for HPA1 to values from [...]% to [...]% for HPA2.

the period covered by HPA2. The 26 July 2007 SO summarised that as set out in table 39:

Table 39 - Envisaged ramp-up rate

	Mainstream (thousands of units)	AMD (thousands of units)	AMD share
2005	[...]	[...]	[...]
2006	[...]	[...]	[...]
2007	[...]	[...]	[...]
2008	[...]	[...]	[...]

Source: AMD[1706]

(1381) As is clear from the figures in table 39, in the period covered by HPA2, AMD still did not expect a ramp up rate higher than [...]% ([...]%-[...]%) per year in its first full year. Intel did not provide any comment on that document.

(1382) Other internal documents from AMD covering the period of the HPA2 negotiations in mid 2004 confirm that the likely ramp-up rates of AMD products as envisaged by AMD and HP were far from the [...]% referred to by Intel, but were consistent with the [...]% value in the 26 July 2007 SO. A spreadsheet entitled *"HP forecasts Summary"*[1707] contains a worksheet entitled *"Model 8a June 2004"* in which it was noted that: *"This forecast view was tied out with (...) HP ~July 2004"*. One table in the spreadsheet is entitled *"LA Market Share Assumptions- [...]% Scenario"*.[1708] The numbers in table 40 are extracted from this worksheet:

Table 40 - Ramp up rate of AMD-based products in HP foreseen by AMD in year 2004 and 2005

Year	2004	2005
SMB total sales (thousands)	[...]	[...]
AMD Units (thousands)	[...]	[...]
AMD share	[...]	[...]

1706 AMD submission of 22 August 2006, Annex 10, p. 12.

1707 AMD submission 18 January 2007.

1708 A long term share of [...]% is found in several different documents, though the time horizon for this transition does not appear to be determined. Professor [...], for instance, refers to an HP presentation dated 17 October 2002 stating: *"It envisaged HP shifting [...]% of its corporate desktop microprocessor purchases to AMD by the third year"*. (Intel Reply to the 26 July 2007 SO, paragraph 214).

	[...]	[...]
Enterprise total sales (thousands)	[...]	[...]
AMD units (thousands)	[...]	[...]
AMD share	[...]	[...]

Source: AMD[1709]

(1383) As can be seen, the expected ramp-up of AMD in the two segments combined was [...]% in 2004[1710] and [...]% in 2005.[1711] Since the HPA2 agreement prevents HP from selling more than 5% AMD-based desktops, the units foreclosed by the rebates in HPA2 are significantly less than the numbers mentioned in table 40.

(1384) In view of the above, it is concluded that Intel has not provided any evidence which calls into question the Commission's estimate of the contestable share of [...]% which was provided in the 26 July 2007 SO. It is therefore concluded that the contestable share is [...]%.

g) Comparison of required share and contestable share

(1385) As set out in the table in recital (1334), the required share for the as efficient competitor ranges from [...]% to [...]% using the cost figures which the Commission considers to be appropriate. Using Intel's own figures, which are very much underestimated in Intel's favour, the required share for the as efficient competitor ranges from [...]% to [...]%.

(1386) Recital (1384) concluded that the contestable share of HP's supply was [...]%.

(1387) The required share was therefore consistently above the contestable share, whichever estimate for costs (the Commission's or Intel's) is used.

(1388) Even if the optimistic figure of [...]% which was represented by HP to Intel (see recital (1366)) was to be used for the value of the contestable share, which Intel claims it accepted at face value, the required share would still be consistently above the contestable share for all quarters using the Commission's costs. Using Intel's artificially low cost value, the required share would still be above the contestable share in all quarters but for one, in which it would be equal to the contestable share.

1709 AMD submission 18 January 2007.

1710 [...]+ [...]= [...] out of [...]+ [...]= [...], that is: [...]%.

1711 [...]+ [...]=[...]out of [...]+ [...]= [...], that is: [...]%.

(1389) Finally, the required share is above the contestable share even using the required share computations of recital (1338) which are based on methodologically incorrect assumptions by Intel on the means to compute the non-conditional share of HPA rebates. Those assumptions are very favourable to Intel. Even in the extreme situation where both the very favourable computation of the non-conditional share of HPA rebates mentioned in recital (1338) and Intel's significantly underestimated cost figures were used, the required share remains above the contestable share in one of the two Alternative Scenario considered by HP (the one which corresponds to the [...]time scope of [...]), and is below but very close to the contestable share in the other Alternative Scenario (the one which diverges form the [...]time scope of [...]).

h) Reinforcing factors

(1390) Moreover, as is the case with Dell, this conclusion does not factor in a number of additional considerations. In the first instance, as has already been explained, figures which are most favourable to Intel have been used even though they are not appropriate in a number of respects.

(1391) The 26 July 2007 SO identified another reinforcing factor which rendered the Commission's as efficient competitor analysis conservative.[1712] That reinforcing factor is discussed in recitals (1392) to (1395).

(1392) The analysis set out in the sections a) to g) of the incentives the HPA contracts provided to HP only takes into account the effect on HP's cost of purchasing x86 CPUs from Intel and AMD. It does not take into account that the revenue that HP can earn from its computers may also depend on its choice. Due to the strong presence of Intel on the market, a substantial proportion of the competitive tenders in which HP participates is against competing OEMs which offer Intel-based desktops (such as Dell). To the extent that one of those competitors obtains financial advantages from Intel for this, any switch to AMD by HP would not only entail a loss in the HP rebate, but could also mean an increased rebate from Intel to the competitor. This exacerbates the foreclosure impact. That mechanism has also been described for Dell in section 4.2.3.2.g). In the same section, the Commission explained why Intel's arguments in that respect are not convincing.

(1393) The importance of this effect can be illustrated by an exchange of 11 July 2002 between [AMD executive] and certain HP executives. Among the many conditions that HP requested in order to accept an agreement with AMD were that "*AMD will establish a fund of $25M per quarter for the first three quarters of the*

1712 Paragraphs 473 to 476 of the 26 July 2007 SO.

agreement which HP can draw from as compensation for potential 'retaliatory' acts from Intel. Such acts may include unusual discounts that Intel may provide to an HP competitor targeted at impacting HPQ's PC business or the unusual loss of discounts or market development funds from Intel as a result of the execution of this agreement."[1713]

(1394) The offer from [AMD executive] contains the following statements in response to what is termed HPQ's request for "*unusually aggressive financial terms from AMD*". "*Agreement to these terms, as you must know, would require AMD to pay HPQ tens of millions of dollars to use its processors during the first year of this partnership. No reasonable business could offer these financial terms. The best we can do is to offer you the processors for free, which no reasonable business partner could refuse to accept.*"[1714] As set out in section 4.2.2.2, HP preferred not to accept AMD's offer, but continued to source very low quantities from AMD. Net of rebates, those purchases were done at negative average prices in all quarters of the HPA agreements except the first quarter of 2004.

(1395) Intel has not addressed that reinforcing factor. It is therefore concluded concludes that, even if all Intel arguments on the parameters described in sections b) to f) above were to be accepted, which is not the case, Intel would still not have demonstrated that its rebates were not capable of foreclosing an as efficient competitor. In order to demonstrate this, Intel would still need to show why the reinforcing factors are not of a sufficient magnitude to impact its conclusions.

i) On an alleged "new theory" by the Commission

(1396) As stated in recital (1299), Intel uses an HP internal document to reject the Commission's position that 100% of the rebate amounts under HPA1 and HPA2 were conditional on the exclusivity.[1715] This led Intel to assert that only [...]% of the rebate was conditional.[1716] That was based in part on the fact that HP in the document assumed that the HPA discounts would not disappear but only *"decline from* [...]*to* [...]",[1717] which corresponds to a [...]% reduction. As mentioned in recitals (1321) to (1323), these calculations are inappropriate because they do not

---

1713 Email of 11 July 2002 from [HP executive] to [AMD executive] of AMD entitled '*AMD commercial desktop proposal*', quoting an email from HP to AMD of 10 July 2002. AMD submission of 24 March 2006.

1714 Email of 11 July 2002 from [HP executive]of HP to [AMD executive] of AMD entitled '*AMD commercial desktop proposal*'. AMD submission of 24 March 2006.

1715 HP presentation "*Managing Intel and AMD to maximise value to BPC*" of 2004. Intel Reply to the 26 July 2007 SO, annex 8.

1716 See recital (1299).

1717 Intel Reply to the 26 July 2007 SO. Report of Professor [...], paragraph 205.

take into account the fact that the scenarios envisaged were not a move away from the exclusivity, but rather a reconfiguration of the boundaries of the exclusivity from all business desktops to the [...] subsegment. Intel does not explain why, in the document HP, expected to be able to obtain [...]in HPA discounts even after the reconfiguration.

(1397) HP expected to lose the entire rebate by discontinuing the existing HPA1 agreement, but to obtain another new rebate by entering into a new "HPA-like" exclusivity agreement for [...]desktop PCs. HP's calculations are based on the assumption that that new exclusivity agreement would result in discounts of [...]% of the old rebate because the new exclusivity agreement would cover a subsegment corresponding to [...]% of the old volumes.[1718]

(1398) It is not appropriate, as Intel suggests, to compare the minimum required share that is necessary to compensate for the net rebate loss relating to abandoning exclusivity only for [...]with the contestable share that could be achieved if the exclusivity deal was abandoned for all commercial desktops (that is to say also for the [...]subsegment).[1719]

(1399) That apparent inconsistency in Intel's analysis was raised in the course of the Oral Hearing.[1720] In a submission subsequent to the Oral Hearing, Intel has argued that that criticism of its calculations amounted to *"a new theory for performing the required share analysis"*,[1721] which was *"raised for the first time at the Hearing"*.[1722] This is a mischaracterisation, since the issue at hand is how to interpret a specific document relied on by Intel in its response to the 26 July 2007 SO. It is incorrect to claim, as Intel does, that a new theory was presented where *"the HPA agreements were conditional with respect to* [...]*% of the discounts negotiated between Intel and HP"*.[1723] The Commission's constant position has been and continues to be that the entire rebate in HPA1 and HPA2 was conditional

---

1718 This can be deduced from slide 15 entitled *"Projection assumptions"* where it is stated that "[...]". Slide 15 also mentions the assumption: *"Good confidence to negotiate Intel HPAII to receive funds proportional to* [...]*volume"* (with [...]being the [...]segment). Slide 16 outlines some of the potential risks of the recommended strategy. The first one is that *"Negotiated* [...] *HPA2 value falls below* [...]*% of HPA 1 target"*.

1719 Intel Reply to the 26 July 2007 SO, Report of Professor [...], paragraph 211.

1720 Oral Hearing. Session number 8, question from Mr. [...], about 28 minutes into the session.

1721 Intel submission of 28 March 2008 *"Submission of Intel Corporation following the oral hearing"*, p. 7, last paragraph.

1722 Intel submission of 28 March 2008 *"Submission of Intel Corporation following the oral hearing"*, p. 8, paragraph 1.

1723 Intel submission of 28 March 2008 *"Submission of Intel Corporation following the oral hearing"*, p. 7, last paragraph.

upon the exclusivity commitments entered into in those contracts. This is fully in line with the assumptions underlying the presentation in question.

(1400) Intel's post-hearing submission includes an annex in which Professor [...] addresses the issue in more detail. In that annex, Professor [...] proposes to correct for the discrepancy in his initial report by performing the required share test which corresponds to the working hypothesis of the document in question, the restriction of the scope of the exclusivity agreement. That is a calculation that uses the rebates lost by abandoning exclusivity for [...]only (but keeping it for the [...]subsegment) with the contestable units in the [...]subsegment.

(1401) Professor [...] conducts the test for *"[...]in isolation"* and concludes that for HPA1, the calculations *"are essentially the same"* as the ones already presented in the original report.[1724] Professor [...] states: *"Because HP was not considering shifting any of its [...]systems to AMD at this time, changing the focus of analysis from BPC to [...]merely scales up both the required share and the contestable share".* [1725]

(1402) The claim that HP was not considering purchasing x86 CPUs for its [...]systems from AMD is contradicted by Professor [...]'s own report attached to Intel's Reply to the 26 July 2007 SO. In that report, Professor [...] states that *"Intel's internal assessment reflected HP's representation to Intel that [...]units were at risk over a one-year period."*[1726] The HP representation referred to mentions only [...]units at risk but the [...]units estimate includes Intel's own assertion that an additional [...]units were at risk due to, as Professor [...] states, an *"opportunity to bid for [...]units."*[1727] It should be noted that the [...]units in question relate to an "*opportunity to bid on* [...]".[1728] Professor [...] thus relied on an estimate of contestable units which included an alleged additional contestable share in the [...]subsegment. Yet, at the same time, he would have the Commission conclude that *"all of the contestable units are in the [...]segment."*[1729]

1724 Intel submission of 28 March 2008 *"Submission of Intel Corporation following the oral hearing"*, appendix 1, p. 3, paragraph 4.

1725 Similarly, Professor [...] states for HPA2 that *"these are essentially the same calculations I have already performed in my Report"* (p. 4, paragraph 1 of the same document)

1726 Intel Reply to the 26 July 2007 SO. Report of Professor [...], paragraph 218.

1727 Intel Reply to the 26 July 2007 SO. Report of Professor [...], footnote 63.

1728 Intel Reply to the 26 July 2007 SO. Annex 146, p. 2. RFQ refers to request for tender.

1729 Intel submission of 28 March 2008 *"Submission of Intel Corporation following the oral hearing"*, appendix 1, p. 3, paragraph 4.

(1403) For his calculations with respect to HPA2, Professor [...] applies a similar method. He states: *"At the time HPA2 was being negotiated, HP was considering expanding the use of AMD microprocessors for its* [...]*sales, but it was not considering AMD for its* [...]*system, noting* [...] *that there was* [...]*"*[1730] All contestable units are therefore assumed to relate to the [...]subsegment. On that basis, he concludes that the contestable share *"in* [...]*is approximately* [...]*%. This is calculated as* [...]*% (the contestable share for BPC during HPA2) times* [...]*."*[1731] That claim is contradicted by the evidence on which Professor [...] relies. The [...]% contestable share that is the basis of Professor [...]'s calculation is obtained from an internal Intel presentation in which a slide, entitled *"Baseline Information"* states that *"*[...]*% of* [...]*and* [...]*ICP business at risk to comp"*.[1732] As is clear from the following excerpt, the slide from which the [...]% contestable share is taken accounts for a significant number of contestable units in the [...]subsegment (in the presentation the [...]subsegment is referred to as the [...]volume [1733]):

" -	*12mo volume:*	[...]
-	*HP's* [...]*volume at risk*	[...]
-	*HP's* [...]*volume at risk:*	[...]
-	*Total volume at risk:*	[...]"[1734]

(1404) This shows that the [...]% contestable share constitutes [...]units considered at risk, which represents [...]% of total HP volume, foreseen to be [...]units over 12 months. Of those [...]units, [...]units are sales to the [...]subsegment and the remaining [...]units relate to the [...]subsegment. The document therefore indicates that a very significant share of the total number of units at risk relates to the [...]subsegment. It is therefore incorrect to state that all contestable units are in the [...]subsegment. Professor [...]'s claim that [...]% of the [...]units are contestable is thus unfounded.

1730 Intel submission of 28 March 2008 *"Submission of Intel Corporation following the oral hearing"*, appendix 1, p. 1, paragraph 4.

1731 Intel submission of 28 March 2008 *"Submission of Intel Corporation following the oral hearing"*, appendix 1, p. 3, paragraph 4. Professor [...] multiplies by [...]because the [...]subsegment is [...]% of the whole BPC segment. If the contestable units constitute [...]% of the BPC segment, they constitute [...]% of the [...]subsegment.

1732 Intel presentation of 14 April 2004 entitled "[...] *HPA2 Prep"*, Intel Reply to the 26 July 2007 SO, annex 157, p. 9. See also Intel Reply to the 26 July 2007 SO. Report of Professor [...], paragraph 219.

1733 This can be seen, *inter alia*, on p. 9 of the same document which states that "*HP's* [...]*platforms account for* [...]*% of HPs total volume"* and *"HP's* [...]*platforms account for* [...]*% of HP's total volume"*.

1734 Intel presentation of 14 April 2004 entitled "[...] *HPA2 Prep"*, p. 17. Intel Reply to the 26 July 2007 SO, annex 157. "*Mu*" stands for "*million units*", "*mo*" for "*month*", "*qtr*" for "*quarter*", "*yr*" for "*year*".

(1405) As Intel's calculations in its 28 March 2008 submissions are based on Intel's incorrect assertion that all the contestable share is included in the [...]subsegment, an assertion which is incorrectly attributed to the Commission and contradicted by the evidence, the conclusions from Intel's associated calculations must be regarded as unfounded.

j) Conclusion

(1406) On the basis of the comparison of the contestable share and the required share conducted in section g), the reinforcing factors discussed in section h) and the absence of relevance of Intel allegations concerning a "new theory" by the Commission addressed in section i), it is concluded that during the period from November 2002 to May 2005, the Intel rebate was capable of having or likely to have anticompetitive foreclosure effects, since even an as efficient competitor would have been prevented from supplying HP's corporate desktop requirements.

(1407) It should also be recalled that cost figures which are most favourable to Intel have been used.[1735]

4.2.3.4. NEC

a) Methodology for assessing the rebates

(1408) In order to conduct the analysis, the Commission compares the value of the business at risk for Intel with the total payments granted to NEC under the Santa Clara agreement.

(1409) The information provided by Intel allows that comparison to be made for the fourth quarter of 2002. The fourth quarter of 2002 was the first quarter where the Realignment plan underlying the Santa Clara agreement was supposed to take its full effects. It is therefore normal that discussions were more intense for that quarter and that this led to more documentation being available.

(1410) However, the Commission considers that that comparison is appropriate to conclude on the potential or likely foreclosing effect of the payments for an as efficient competitor between the fourth quarter of 2002 and November 2005, because:

a. the table showing total Intel payments to [...] does not show significant variations of order of magnitude of Intel payments to [...] in the subsequent quarters;[1736]

1735 See section VII.4.2.3.1.c).

1736 [NEC] submission of 29 March 2007, reply to question 9.

b. documents in the file indicate that the [prices] agreed are prolonged in the following quarters, with the introduction of appropriate new [prices] at the same level for newly introduced Intel x86 CPUs;[1737]

c. AACs do not vary in any significant way over time as is shown from the figures provided by Intel in its Reply to the 26 July 2007 SO.[1738]

(1411) It is therefore concluded that the result of the comparison of the value of the business at risk for Intel with the total payments granted to NEC under the Santa Clara agreement during the fourth quarter of 2002 gives a relevant indication of whether Intel's conduct vis-à-vis NEC was capable of causing or likely to cause anticompetitive foreclosure over the entire period of the rebate. The Commission notes that Intel did not put forward any argument to dispute that conclusion.

b) Value of the payments granted under the Santa Clara agreement

(a) Introduction

(1412) NEC originally intended to purchase no more than [...]% of its client PC x86 CPU requirements from Intel during the fourth quarter of 2002, in line with its historical level of purchases from Intel in the preceding quarters. During the April-May 2002 negotiations with Intel, NEC agreed to undertake to significantly increase its share of purchases from Intel in exchange for certain payments.

(1413) The original intention was that NEC would award Intel about [...] % of its client PC x86 CPU requirements.[1739] But as Intel and NEC could not agree on the amount of Intel payments that would be appropriate for NEC to implement such a condition, the final agreement was scaled down to NEC awarding 80% of its client PC x86 CPUs to Intel.[1740]

(1414) The NEC document entitled [...][1741] reflects that negotiation process in terms of value of business that NEC agreed to shift to Intel in exchange for the payments. The original NEC calculations valued the switch at [...] worth of business to Intel (that is, from [...] to [...]).[1742] In the calculations related to the final agreement, the

---

1737 See for instance annex 265 to Intel Reply to the 26 July 2007 SO, p. 4 and 5.

1738 Intel Reply to the 26 July 2007 SO. Report of Professor [...].

1739 Intel Reply to the 26 July 2007 SO, paragraph 451.

1740 Intel Reply to the 26 July 2007 SO, paragraph 452.

1741 NEC presentation of 6-7 May 2002 entitled [...] Intel Reply to the 26 July 2007 SO, annex 258.

1742 Idem, p. 4.

value of the planned switch was [...] (from [...] to [...]). [1743] This represents [...]% of the originally planned switch ([...]/[...] = [...]%).

(b) Types of payments involved

(1415) Page 3 of the document referred to in recital (1414) lists the payments (in the form of [prices] and [support] that were negotiated between Intel and NEC in the framework of the Santa Clara agreement. As the negotiations were still ongoing, most items are still labelled as pending.

(1416) The NEC document entitled [...][1744] summarises the status of the discussions at a later stage in the negotiation process. That document is from the same date (15 May 2002) as the e-mail referred to in paragraph 236 of the 26 July 2007 SO, which reads: *"Today I had teleconference with* [Intel Executive] *and other Intel people. The following is the conclusion. NEC will have* [...] *and increase WW* [Worldwide] *Intel market share from* [...] *% to 80%. Intel will give NEC* [support] *and aggressive* [...] *price."*[1745]

(1417) As is clear from the document, all rebate (also known as [...]) requests for [...] were accepted, with the exception of the request for [...], where the negotiation was still pending. However, even for that category, a partial agreement was reached that the price net of the rebate would not exceed [...] per unit. For [...], the agreed price net of rebate was [...] per unit, with the exception of [...] for which the net agreed price was [...] per unit.

(1418) As regards [prices] requests for [...], some requests had been rejected and others were accepted at least partially. In particular, Intel agreed to a net price of [...] for [...].

(1419) As regards [support], the document mentions a final agreement for a total of [...], which confirms the e-mail quoted in recital (1416).

(c) [price] per unit

(1420) It is possible to compute the amount of rebate per unit that those net prices represent by comparing the net price with the Customer Agreed Price ("CAP"), that

---

1743 Idem, p. 4.

1744 NEC presentation of 15 May 2002 entitled [...]. Intel Reply to the 26 July 2007 SO, annex 269.

1745 E-mail from [NEC Executive] to [NEC Executive]of 15 May 2002 entitled [...]. [NEC] submission of 15 December 2005, Annex 32.2. This e-mail is also contained in Annex 260 to Intel Reply the 26 July 2007 SO.

is, the gross price without rebates. CAP prices for the relevant x86 CPUs can be found in the attachment to an e-mail of 25 April 2002 between NEC executives.[1746]

(1421) In pages 2 and 3 of that attachment, NEC provides the CAP for relevant x86 CPUs. It appears that the CAP for [...] was [...] per unit for [...] and [...] per unit for [...]. It follows from the above that the [price] under the Santa Clara agreement should have been between [...] per unit and [...] per unit.[1747]

(1422) For the purposes of the subsequent estimates, the Commission will assume an average [...] rebate per unit for [...]. That is a conservative estimate which favours Intel since, as was shown in recital (1421), the rebate for [...] should have been at least [...] per unit, but should have sometimes exceeded that value.

(1423) As the document referred to in recital (1420) does not contain the CAP price for [...], it is not possible to compute the value of the [prices] referred to in recital (1418). For the purposes of the following estimates, the Commission will therefore disregard that rebate, which will make the estimate even more conservative and favourable to Intel because that part of the effect of the total rebate will be disregarded.

(d) Number of units concerned – [...]

(1424) In order to be able to evaluate the total amount of the rebates based on the premise that the [prices] applied only to [...] and that the rebate per unit was [...], it is necessary to estimate how many [...] NEC anticipated purchasing from Intel under the Santa Clara agreement.

(1425) The NEC document referred to in recital (1420) also includes the planned volume of each category of processor for [...]under the Realignment Plan which was negotiated in Santa Clara. As the document dates from 25 April 2002, it still represents the original Realignment Plan for the implementation of which NEC and Intel could not agree on the appropriate amount of rebates.

(1426) Under that original plan, the intention was that [...] would increase its planned purchase of [...] from [...] units (for desktops) and [...] units (for notebooks), that is [...] units in total, to [...] units (for desktop) and [...] units (for notebooks), that is [...] units in total. This means an increase of [...] units of [...] (from [...] units to [...] units) for [...]only.

1746 Email from [NEC Executive] to [NEC Executive]and [NEC Executive] of 25 April 2009 entitled [...]. Intel Reply to the 26 July 2007 SO, annex 257.

1747 The Commission notes that the documents in its possession do not allow the computation of the [price] rebate for [...].

(1427) In order to estimate the increase in [...] in the finally agreed arrangement, it must be recalled that, as described in recital (1414), in the finally agreed arrangement, the switch was [...]% of that originally foreseen.

(1428) Thus, in terms of volume of [...] to be purchased by [...], the finally agreed increase of units was [...]% of [...] units, that is, [...] units. It follows that, under the terms of the final arrangement, the total number of [...] to be purchased by [...] only was [...]+ [...] = [...] units.

(e) Total [price] amount – [...]

(1429) With a rebate of [...] per unit, [...] units lead to a total rebate of at least [...] for [...] only. That calculation underestimates certain rebates and does not take account of others, in particular rebates on [...].[1748]

(f) Other payments to NEC and [prices] to [...]

(1430) In order to estimate the total amount of Intel payments received by NEC worldwide, the following must be added to the amount referred to in recital (1429): (i) the total [support] payments received by NEC worldwide, that is, [...],[1749] and (ii) the [prices] rebates received by [...], the other branch of NEC.

(1431) The data at the disposal of the Commission do not allow for the computation of the volume of processors of each category that [...] was supposed to purchase under the Santa Clara agreement. However, in a reply to an letter pursuant to Article 18 of Regulation (EC) No 1/2003, [NEC] indicated that [...] had received [...] in the quarter at stake.[1750] The [...]branch of NEC ([...]), which was at the time of the Santa Clara agreement a branch of [...], was no longer attached to [...] at the time [...] sent its reply to the said Article 18 letter. As such, the figures in question do not include the [prices] received by [...].[1751] They are therefore once again conservative and favourable to Intel.

(1432) In a written submission of 5 February 2009, Intel has claimed that "*few, if any, of Intel's discounts to NEC were conditional.*"[1752] General Intel arguments related to the alleged non-conditionality of its rebates have already been addressed in section VI.2.6.3. However, Intel has made more specific allegations of non-conditionality as regards [prices].

1748 See recitals (1422) and (1423).

1749 See recital (1419).

1750 [NEC] submission of 29 March 2007, reply to question 9.

1751 [NEC] submission of 29 March 2007. See introduction of the reply to question 9.

1752 Intel submission of 5 February 2009 related to the 17 July 2008 SSO, paragraph 427.

(1433) In that respect, Intel argues that none of the [...] Intel [prices] to NEC calculated in the 17 July 2008 SSO was conditional.[1753] Intel bases its arguments on an exhibit of its submission which purports to show "*NEC's total discounts from Q3 2001 to Q2 2004.*"[1754] According to Intel, that exhibit shows that NEC received "*sizeable* [...] *percentage discounts*" from Intel in the period preceding the period covered by the Commission's enquiry.[1755] Intel concludes from this that "*the fraction of the discount offered to NEC for Q4 2002 that might reasonably be viewed as conditional is small.*"[1756]

(1434) Firstly, a comparison with the level of Intel discounts to NEC before the period covered by the Commission's enquiry does not make it possible to draw definitive conclusions as to the proportion of rebates which were conditional during the period covered by the enquiry. In the absence of knowledge of the precise details of the commercial relationship between Intel and NEC in the preceding period, it is not possible to conclude positively that the rebates which were granted during that period were free of constraints on NEC. As already explained in section 4.2.3.3.b), one of the underlying principles of the as efficient competitor analysis is that the "non-conditional" fraction of rebates granted to the customer is what the customer would retain if it were to award the entirety of its contestable share to the dominant firm's competitor.[1757]

(1435) Furthermore, even if it were to be accepted that the discounts in the time preceding the period covered by the Commission's enquiry were free of any condition, it would not necessarily imply that NEC would have continued to receive the same level of discounts in the period under examination even if it had disregarded its commitments under the Realignment Plan and awarded its entire contestable share to an as efficient competitor. The accuracy of the comparison proposed by Intel is therefore limited, and gives less reliable information than the examination of contemporaneous documents related to the concrete period under enquiry.

(1436) Intel did not provide the background information that it used to produce the exhibit it refers to in support of its reasoning. It is therefore difficult for the

---

1753 Intel submission of 5 February 2009 related to the 17 July 2008 SSO. Report of Professor [...] and Doctor [...], paragraph 207.

1754 Intel submission of 5 February 2009 related to the 17 July 2008 SSO. Report of Professor [...] and Doctor [...], paragraph 210, referring to exhibit 39.

1755 Idem.

1756 Intel submission of 5 February 2009 related to the SSO. Report of Professor [...] and Doctor [...], paragraph 211.

1757 See in particular recitals (1320) to (1323).

Commission to assess the exact scope of the discounts which this exhibit covers. In particular, it is possible that the exhibit includes certain discounts related to NEC's server business,[1758] which is not covered by the Commission's enquiry.

(1437) It is also clear that the data in the exhibit in question cover not only [...]but also [...].[1759] In sections (c) to (e), the Commission has already provided a precise calculation of a lower boundary for the [prices] offered by Intel to [...] in exchange for the implementation of the Realignment Plan. This assessment was based on concrete contemporaneous documents related to the Realignment Plan. As explained above, the evidentiary value of such documents when it comes to assessing which discounts were provided in return for the Realignment Plant is higher than the comparison of global figures corresponding to two different periods.

(1438) Furthermore, a contemporaneous NEC document drawn up during the process of the negotiation of the Realignment Plan gives indications that the Intel/[...] arrangements over a certain segment for the preceding period served as a model for the Realignment Plan. Slide 5 of the document reads: "[...] *Commercial Situation <Example> (...) – We requested the price that could meet comp. in value segment to Intel in 2000/Jul.* [July 2000] – *Intel proposed the* [...] *in this segment. – Since 2001/Jan.* [January 2001], [...] *commercial Intel share has become* [...]*% from* [...]*%.*"[1760] In view of the above and of the arguments in recital (1434), the exhibit provided by Intel does not provide a reliable source to assess whether a proportion of the [prices] discounts could be assumed to be non-conditional.

(1439) As stated in recital (1431), the Commission is not in the possession of concrete documents concerning [...] which would allow it to make the same detailed analysis of the [prices] awarded in the context of the Realignment Plan as that carried out for [...]. In that context, the Commission has taken the hypothesis that the entirety of the [...] which the [...] branch of [...] had received at the time was linked to the plan. As stated in recital (1431), that figure excludes the rebates obtained by the [...] branch of [...], which is favourable to Intel.

(1440) In the absence of a detailed breakdown of [prices] available for [...], which would have been the most valuable source of information, the Commission considers that the comparison with the period preceding the Santa Clara agreement

---

1758 Footnote [2] of the exhibit reads "*Sources (...) exclude* [...] *servers*", which suggests that they include NEC's x86 ([...]) server business.

1759 For instance, it includes the whole of the [...][support] payments in Q4 2002, which corresponds to the total [support] payments to NEC worldwide in the said quarter.

1760 NEC presentation of 15 April 2002 entitled [...]. Intel Reply to the 26 July 2007 SO, annex 252, slide 5.

could be used to provide a conservative estimate of conditional discounts. In order to compare like for like and to avoid some of the flaws mentioned in recitals (1434) to (1438), it is necessary to focus the scope of the comparison on [prices] granted to [...].

(1441) A [NEC] submission provides the evolution of Intel rebates to [...] in the period from the first quarter of 2002 to the last quarter of 2005. The first quarter of year 2002 was the last full quarter preceding the conclusion of the Santa Clara agreement. In that quarter, the Intel rebates to [...] totalled [...].[1761] All those rebates were granted in the form of [prices].[1762] That represents [...]% of [...], which is the amount of [prices] received by the [...] branch of [...] for the fourth quarter of 2002. The difference between the two is [...].

(1442) In view of the above, a range of [...] to [...]will be used for the conditional part of the rebates received by [...].

(g) Total payments to NEC (all regions and all types of payments)

(1443) Adding all the figures up leads to a total ranging between [...] (that is to say [...] + [...] + [...]) and [...] (that is to say [...] + [...] + [...]).[1763]

(1444) As set out in recital (1429), the amounts of [prices] granted to [...] under the Santa Clara agreement as estimated in the figures above are underestimated because they do not take account of certain categories of [prices], and undervalue others. In Intel's submission of 5 February 2009 related to the SSO, Intel has recognised that that value is underestimated. Under Intel's own assessment, a further [...] ought to be added to the amount estimated by the Commission.[1764] Adding that additional amount to the figures above leads to total amounts between [...] and [...]. In order to present a comprehensive view of the estimate of the size of the Intel payments to NEC, the Commission will use the four figures mentioned above as four scenarios for the estimation of the total payments received by NEC linked to the Santa Clara agreement in the fourth quarter of 2002. The four figures are [...], [...], [...] and [...].

1761 [NEC] submission of 29 March 2007, p. 3.

1762 This excludes Intel Inside rebates which are not covered by the present Decision.

1763 Figures taken from recitals (1429), (1430) and (1442).

1764 Intel submission of 5 February 2009 related to the 17 July 2008 SSO. Report of Professor [...] and Doctor [...], appendix B, paragraph 30. [...] is equal to the difference between the [...] [prices] amount calculated by Intel and the [...] amount estimated by the Commission. [...] is the rounded total between the [...] amount estimated by the Commission for [prices] to [...]and the [...]amount submitted by [...]. The Commission considers that the difference between the two figures is very likely to be attributable to [...] only because the figures it used for [...] were exact figures provided by [NEC] whereas the figures it used for [...] were only estimations.

c) Value of the business at risk for Intel

(1445) As stated in recital (1414), an internal NEC document calculated that, as a result of the Santa Clara agreement, the value of NEC's purchases from Intel would increase from an originally planned [...] to [...]. In the 17 July 2008 SSO, the Commission concluded from this that the value of the business at risk for Intel was [...].[1765]

(1446) In a submission of 5 February 2009, Intel alleges that the Commission has been "*double counting certain discounts*",[1766] or in other words that the Commission "*subtracted most discounts from the gross ASP twice.*"[1767] According to Intel, as a result, the [...] mentioned in recital (1414) "*was net of a large portion of the discounts at issue.*"[1768] Intel justifies its allegations by the fact that in the document referred to in recital (1414), as well as in other similar documents, "*NEC's planned expenditures for the Realignment Plan and the Original Plan were calculated using discounted prices reflecting* [prices] *that NEC was requesting from Intel for the fourth quarter of 2002.*"[1769] In other words, "*both the* [...] *and the* [...] *purchase values are projected Intel revenues net of requested discounts.*"[1770]

(1447) Intel's reasoning suffers from an arithmetical flaw. Whilst it is correct to state that both the [...] and [...] NEC estimates have been calculated using the discounted prices that NEC was requesting from Intel in exchange for achieving the shift to the Realignment Plan, it cannot be mathematically deducted from this that the [...] figure is "*net of a large portion of the discounts at issue.*"

(1448) This is because the [...] figure is a difference between the [...] and the [...] ([...] = [...] – [...]). Because the figure is a difference, the NEC requested discounts which are counted both in the [...] and the [...] terms cancel each other. It is therefore incorrect to say that the [...] "*was net of a large portion of the discounts at issue*": unlike the result of an addition, the result of a difference cannot be gross or net. It only has to be computed in a consistent way, subtracting like from like, that is, two gross values or two net values. Intel does not contest that the Commission

---

1765 17 July 2008 SSO, paragraph 302.

1766 Intel submission of 5 February 2009 related to the 17 July 2008 SSO, paragraph 34.

1767 Intel submission of 5 February 2009 related to the 17 July 2008 SSO. Report of Professor [...] and Doctor [...], appendix B, paragraph 20.

1768 Intel submission of 5 February 2009 related to the 17 July 2008 SSO. Report of Professor [...] and Doctor [...], paragraph 186.

1769 Intel submission of 5 February 2009 related to the 17 July 2008 SSO. Report of Professor [...] and Doctor [...], appendix B, paragraph 19.

1770 Intel submission of 5 February 2009 related to the 17 July 2008 SSO, paragraph 421.

did indeed subtract like from like, as it states that "*both the* [...] *and the* [...]*purchase values are projected Intel revenues net of requested discounts.*"[1771]

(1449) The cancellation effect in the difference mentioned in recital (1448) is total when the net figure is deducted from the gross figure by subtraction of a lump sum. In this case, at least a part of the NEC requested discount could be viewed as proportional to the gross price via its dependence on the volume of purchase. In such a situation, even though the cancellation effect of the difference largely remains, the calculation of the effect of the shift from the difference in net prices would, however, slightly underestimate the value of the shift compared to what would result from a calculation on the basis of gross price.[1772]

(1450) Tables 41 and 42 provide a calculation that takes account of that effect in this case. The first table is based on the Commission estimation of the rebates granted by Intel to NEC as set out in recital (1443). Under that estimation, the rebates were in total [...], of which [...] are [support] and [...] are [prices].[1773] The second table is based on Intel's assessment of the amount of rebates it granted to NEC. [1774] Under that assessment, the rebates were in total [...], of which [...]are [support] and [...] are [prices].

Table 41 - Comparison of calculations using net and gross figures based on total rebates of [...] (all figures are in USD)

	Intel revenue net of discounts requested by NEC	[support] requested by NEC	[prices] requested by NEC	Intel gross revenue

1771 Intel submission of 5 February 2009 related to the 17 July 2008 SSO, paragraph 421. Commission underlining.

1772 The following example illustrates this effect. Let it be assumed that the gross price of product A is USD 200 and the gross price of product B is USD 150. If it is assumed that the net price is obtained by applying a lump sum reduction of USD 20, then the net price of product A is USD 180 and the net price of product B is USD 130. In this situation, the difference between the gross prices of A and B is the same as the difference between the net prices of A and B (USD 200 – USD 150 = USD 50 for the former and USD 180 – USD 130 = USD 50 for the latter). The difference cancels the USD 20 lump sum.

If it is now assumed that the net price is obtained by applying a reduction of 10% of the gross price, the new net price of product A is USD 200 – USD 20 (10% of 200) = USD 180. The new net price of product B is USD 150 – USD 15 (10% of 150) = USD 135. The difference between the two gross prices is then slightly distinct from the difference between the two net prices (USD 200 – USD 150 = USD 50 for the former and USD 180 – USD 135 = USD 45 for the latter. The difference between the two results is USD 5, which is 10% of USD 50.

1773 See 17 July 2008 SSO, paragraph 318.

1774 Intel submission of 5 February 2009 related to the SSO. Report of Professor [...] and Doctor [...], exhibit 39. See also recital (1432).

Based on [...] net	[...]
Based on [...] net	
Difference	

Table 42 - Comparison of calculations using net and gross figures based on total rebates of [...] (all figures are in USD)

	Intel revenue net of discounts requested by NEC	[support] requested by NEC	[prices] requested by NEC	Intel gross revenue
Based on [...] net	[...]			
Based on [...] net				
Difference				

(1451) In view of the above, it is concluded that the value of business at risk for Intel ranged between [...] and [...] depending on the considered scenario.[1775]

d) Ratio between the total value of the payments granted under the Santa Clara agreement and the value of the business at risk for Intel

(1452) Table 43 summarises for each of the four scenarios considered by the Commission the calculation of 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.

Table 43 - Ratio between the total value of the payments granted under the Santa Clara agreement and the value of the business at risk for Intel

Business at risk for Intel (USD)	Payments granted under the Santa Clara agreement (USD)	Ratio between payments granted under the Santa Clara agreement and business at risk for Intel	Related AAC/ASP threshold

1775 These figures are slightly higher ([...]% to [...]%) than the figure used in the 17 July 2008 SSO due to the effect mentioned in footnote 1772.

[...]

(1453) In view of table 43, it is concluded that Intel was selling below *AAC*,[1776] if *AAC* is above [...]%, [...]%, [...]% or [...]% of the gross Average Selling Price (*ASP*) in the different scenarios.

(1454) Intel asserted that the value of *AAC/ASP* for NEC units during the relevant period was [...]%.[1777] In section 4.2.3.1.c), the Commission demonstrated that that value largely underestimates Intel's avoidable costs. The Commission calculated that at least [...]percentage points should be added to Intel's estimates.[1778] The value of *AAC/ASP* should therefore be considered to be at least [...]%.

(1455) Three out of the four thresholds computed in the table in recital (1452) are below [...]%, and one of them is below [...]%. The only figure which is not below [...]% is less than [...] percentage points above [...]%. Furthermore, it corresponds to a scenario which is very favourable to Intel as it is known that it does not include certain rebates, for instance rebates on [...]. Intel has conceded that the total [prices] figures on which it is based ([...]) are below the actual amount of total [prices] ([...]).[1779]

e) Conclusion

(1456) In view of the above, it is concluded that the payments granted by Intel to NEC under the Santa Clara agreements were capable of foreclosing or likely to foreclose even an as efficient competitor. This is because in order to compensate for the loss of Intel's rebates so as to gain access to the incremental share covered by the agreement, an as efficient competitor would have had to offer prices below any relevant benchmark of viable costs. It should also be recalled that cost figures which are most favourable to Intel have been used.[1780] Furthermore, two of the four

---

1776 As already indicated in footnote 1355 above, other cost benchmarks which also take into account fixed cost elements may be more appropriate. However because ability to foreclose as efficient competitors can in this instance be shown already using AAC, it is not necessary at this stage to further look into what the correct cost benchmark is for this case.

1777 Intel Reply to the 26 July 2007 SO. Report of Professor [...], exhibit 22A.

1778 See section VII.4.2.3.1.c)(g).

1779 Intel submission of 5 February 2009 related to the SSO. Report of Professor [...] and Doctor [...], appendix B, paragraph 30.

1780 See section VII.4..2.3.1.c).

scenarios considered do not take account of rebates linked to [...] and undervalue the average rebate for [...].

4.2.3.5. Lenovo

(1457) In order to ensure a consistent presentation of the as efficient competitor analysis, this section will present the calculations which the Commission conducted and its conclusions using the same structure as that followed in sections 4.2.3.2 and 4.2.3.3 on Dell and HP. This means that the Commission will first calculate the minimum required share of Lenovo's supply need which an as efficient competitor would have to acquire based on its costs, and then compare this minimum required share to the contestable share of Lenovo's supply needs.

(1458) While the calculation effected below with respect to conditional rebates to Lenovo reflects exactly the same analysis and therefore comes to the same conclusion as the calculation which was used in the 17 July 2008 SSO,[1781] the presentation of the two calculations is different. There is therefore no change as to the methodology underlying the calculations nor as to the conclusions they arrive at. This was also confirmed by Professor [...], who stated at the Oral Hearing: "*As you already know, the Statement of Objections* [the 26 July 2007 SO] *then compares the contestable share and the minimum required share, and I just want to lay it out there that this is equivalent to the price-cost test so the discount system that's in place will pass this test if the effective price is within costs like I've said, and that is, as a matter of arithmetics, equivalent to the contestable share being greater than the minimum required share.*"[1782] In the same vein, in a report attached to the Intel submission of 5 February 2009 related to the SSO, Professor [...] and Doctor [...] wrote: "*Throughout this report, we follow the Commission in comparing incremental revenues to incremental costs for contestable units. At some points, this comparison is referred to as the required share test. At other points, the comparison is between effective price and cost. As [...] explained at the Oral Hearing, these tests are economically equivalent.*"[1783]

a) Methodology for assessing the rebates

1781 The Commission first computed the net price (also known as "effective price") of CPUs sold by Intel to Lenovo over the contestable share, and then compared this effective price to the costs of an as efficient competitor.

1782 Professor [...]'s presentation at the Oral Hearing. Full session held on 11 March 2008 from 16:45 to 17:01, approximately 16 minutes into the presentation. Transcript based on the Commission's recording of the Oral Hearing.

1783 Intel submission of 5 February 2009 related to the 17 July 2008 SSO. Report of Professor [...] and Doctor [...], footnote 122.

(1459) As is the case for HP, the conditional rebates to Lenovo are provided in the form of a [...]. It is therefore appropriate to use the formula which was proposed by Professor [...] for this context.[1784] In view of the fact that, in the case of Lenovo, the contestable share of Lenovo's supply is expressed in the relevant evidence in the form of a number of contestable units as opposed to a percentage of the total Lenovo purchases, the Commission will use the variation of the formula by Professor [...] which provides the minimum required share in the form of number of units.[1785] The formula reads:

$$X = \frac{R}{(P - AAC)}$$

(1460) In the above formula, X is the minimum required share expressed in number of units. The other parameters have the same meaning as in section 4.2.3.3.a). The average sales price P (also called *ASP*) is the average sales price of the relevant units, excluding the conditional discounts. However, to the extent that other, non-conditional, discounts are also applied, the average sales prices P must take account of them as the customer will be awarded those discounts irrespective of whether it switches a part of its supply to the as efficient competitor.

b) Size and nature of the rebate

(1461) The amount of the rebates in question is set out in the Memorandum of Understanding itself. It provided for [...] incremental funding for 2007, [...].[1786]

(1462) Payments under the Memorandum of Understanding were incremental to payments from Intel under other funding programs agreed before and separately from the Memorandum of Understanding and which Intel continued to pay after the conclusion of the Memorandum of Understanding. They must therefore be attributed entirely to the outcome of the agreement on the Memorandum of Understanding. All payments and favourable trading conditions provided under the Memorandum of Understanding were conditional on Lenovo cancelling all its notebook plans with AMD microprocessors.

1784 See recital (1283).

1785 Intel Reply to the 26 July 2007 SO. Report of Professor [...], paragraph 178.

1786 Lenovo submission of 27 November 2007, Annex 23, Intel PowerPoint presentation of 5 December 2006 entitled *"Lenovo / Intel 2007* [...]*Discussion December 5th Update"*, slide 3; and Lenovo submission of 27 November 2007, Annex 23, Lenovo PowerPoint presentation of 17 December 2007 (or a few days prior to this date at most), entitled *"Prep for* [Lenovo Executive] -[Intel Executive] *3x2 on December 17th"*, slide 3.

(1463) In a submission of 5 February 2009, Intel put forward the argument that the relevant value for the size of the rebates is only [...].[1787] This is because out of the [...]funding for Lenovo provided for in the Memorandum of Understanding, only [...]were awarded in the form of cash.[1788] The rest of the funding was awarded in the form of non-cash advantages, namely [...].[1789] Intel argues that whilst the value of those two non-cash contributions for Lenovo was respectively [...]and [...], the cost of those contributions for Intel was much lower, namely, [...]and [...] respectively.[1790] Intel argues that the appropriate measure to be used in the as efficient competitor analysis should not be the value of such items for Lenovo but their economic costs to Intel.[1791] Intel reaches the amount of [...]by adding the [...]and [...]costs to the [...]cash funding.[1792]

(1464) Before discussing the validity of Intel's argument on the appropriate measure to be used in the as efficient competitor analysis, the Commission notes the disparity between the alleged economic costs of the contributions for Intel and their value to Lenovo. The ratio between the value to Lenovo and the alleged economic costs for Intel is [...]% ([...]/ [...]= [...]%) for the [...]and [...]% ([...]/ [...]= [...]%) for the [...]. Intel provided certain calculations carried out for the purpose of the 5 February 2009 submission related to the 17 July 2008 SSO and underlying its assertion of the economic costs of the contributions, but failed to explain the reason for the stark discrepancy between these costs and their value to Lenovo.

(1465) Without prejudice to the above observation, the Commission notes that Intel's argument that the appropriate measure to be used in the as efficient competitor analysis is not the value of such items to Lenovo but their economic cost to Intel is based on a misunderstanding of the principles of the analysis.

(1466) The as efficient competitor analysis assesses the price at which a competitor which is as efficient as the dominant company - but which is not dominant - would have to offer its products in order to compensate the customer for the loss of the conditional benefits granted by the dominant company and which would result

---

1787 Intel submission of 5 February 2009 related to the 17 July 2008 SSO, paragraph 343.

1788 Intel submission of 5 February 2009 related to the 17 July 2008 SSO. Report of Professor [...] and Doctor [...], paragraph 74.

1789 Intel submission of 5 February 2009 related to the 17 July 2008 SSO. Report of Professor [...] and Doctor [...], paragraphs 70 and 71.

1790 Idem.

1791 Intel submission of 5 February 2009 related to the 17 July 2008 SSO. Report of Professor [...] and Doctor [...], paragraph 73.

1792 Intel submission of 5 February 2009 related to the 17 July 2008 SSO. Report of Professor [...] and Doctor [...], paragraph 74.

from that customer's switching the contestable share of its supply needs away from the dominant company to the hypothetical as efficient competitor.

(1467) As is clear from the above, the relevant measure is the loss for the customer, as this is the loss that the as efficient competitor will have to compensate. It is not the economic costs to the dominant company in the event that the two figures diverge. That difference is well illustrated by the case of the [...]. [...].[1793] [...]. In order to compensate Lenovo for the loss of the benefit linked to [...], the as efficient competitor would therefore have to award Lenovo a monetary payment equivalent to the economic value of [...]for Lenovo.

(1468) In view of the above, it is concluded that it is appropriate to value the rebates to Lenovo at an amount of [...].

c) Average Selling Prices

(1469) In the 17 July 2008 SSO, the Commission used a gross Average Selling Price ("ASP") of Intel notebook x86 CPUs to Lenovo in 2007 of [...].[1794] Intel informed the Commission that that value was overestimated and stated that the actual average CAP (that is, the average gross selling price without any rebates, whether conditional or non-conditional) of the notebook processors sold by Intel to Lenovo worldwide in 2007 was [...]. Furthermore, an average, and according to Intel, non-conditional ECAP of [...]per unit was provided for those units.[1795] Therefore, according to Intel, the gross ASP of Intel notebook x86 CPUs to Lenovo in 2007 was [...]minus [...], which equals [...]. The Commission will therefore use the rectified figures as provided by Intel in this Decision.

(1470) The most appropriate figure to be used for ASP for the purpose of the analysis in this Decision is the ASP of Intel x86 CPUs over the contestable share. Since the contestable share is likely to be focused in the low end of the range of products, the use of a figure of [...]in that context is likely to be favourable to Intel. According to Mercury data, the global ASP of Intel's notebook x86 CPUs for the same period was [...].

d) Costs

(1471) As set out in section 4.2.3.1.c), in its Reply to the 26 July 2007 SO, Intel came up with an estimate of the ratio between its AAC and its average sales price

---

1793 Although as noted above Intel did not explain how a multiplier effect of [...]% can be reasonably achieved.

1794 17 July 2008 SSO, paragraph 277.

1795 Intel submission of 5 February 2009 related to the 17 July 2008 SSO. Report of Professor [...] and Doctor [...], exhibit 13.

(in this case the CAP) of [...]%. The Commission considers that that value significantly underestimates Intel's AAC. The analysis of the Intel computation by the Commission led the Commission to the conclusion that the actual ratio between Intel's AAC and its average sales price was at the very least [...]%.[1796] Table 44 calculates the relevant AAC for Intel's x86 CPUs in Lenovo notebook PCs in 2007 using the two assumptions above.

Table 44 - Calculation of the AAC for Intel CPUS in Lenovo notebooks

	CAP (USD)	Ratio AAC/CAP	AAC (USD)
As per Intel	[...]	[...]%	[...]
As per Commission	[...]	[...]%	[...]

Source: Commission calculations

e) Calculation of the required number of units

(1472) On the basis of all the parameters described in sections b) to d), the calculation of the minimum required share expressed in number of units X can be carried out. The parameters, as well as the results of the calculation, are set out in table 45. As in the previous sections concerning other Intel trading partners, the Commission conducted its calculations using two values for costs: on the one hand, the value which was derived by the Commission, and on the other hand, the cost data asserted by Intel (see section 4.2.3.1.c)).[1797] As has been outlined, the Commission considers that Intel's own cost data significantly underestimate the correct figure. The Commission nevertheless also conducted the computations with these values (which are favourable to Intel) with a view to testing the robustness of the conclusion of its as efficient competitor analysis

Table 45 - Required number of units

Conditional rebates R (million USD)	P (USD)	AAC as per Intel (USD)	AAC as per Commission (USD)	Required number of units X (thousand units)	
				AAC as per Intel	AAC as per Commission
[...]	[...]	[...]	[...]	[...]	[...]

Sources:
For conditional rebates R, Lenovo[1798]

1796 See recital (1333).

1797 Intel Reply to the 26 July 2007 SO. Report of Professor [...]. Used in the calculations of in the report of Professor [...], Exhibits 9A and 10A.

1798 See recital (538).

For average sales price P, Intel[1799]
For AAC: table in recital (1471)
Commission computation for the required number of units X.

f) Contestable number of units

(1473) Recitals (1474) to (1477) provide an estimate of the number of contestable units as set out in section IV.3.2.2.3.c) of the 17 July 2008 SSO.[1800]

(1474) Section VI.2.5 describes Lenovo's plans and agreement with AMD to launch Lenovo branded AMD x86 CPU-based notebooks. According to Lenovo, the plans encompassed [...].[1801] The launch in [geographical area] was originally envisaged for June 2006, followed up by a [geographical area]notebook line in September-October 2006.

(1475) By the beginning of April 2006, AMD and Lenovo finalised the so-called Statement of Work ("SOW") that envisaged their [...] co-operation and also encompassed the details of the summer 2006 launch of the AMD-based notebook.[1802] According to the SOW, for notebooks to be sold in [geographical area], Lenovo was to purchase approximately [...] AMD x86 CPUs within the first twelve months following the announcement.[1803] For the market outside [geographical area], the agreement envisaged that Lenovo would purchase [...] units of AMD x86 CPUs in the first twelve months following the announcement.[1804] Adding the figures together, over the time horizon of a year, Lenovo agreed to purchase [...]units of AMD notebook x86 CPUs. Purchase volumes in the SOW were good faith estimates for planning purposes.[1805]

1799 Intel submission of 5 February 2009 related to the 17 July 2008 SSO. Report of Professor [...] and Doctor [...], exhibit 13.

1800 17 July 2008 SSO, paragraphs 274 to 276.

1801 Lenovo submission of 27 November 2007, answer to question 4, pp. 10-11.

1802 Lenovo submission of 27 November 2007, Annex 22, e-mail from [Lenovo executive] to [Lenovo executive]of 6 April 2006 at 09:13 PM, entitled *"Fw: AMD notebook."*

1803 Lenovo submission of 27 November 2007, Annex 22, e-mail from [Lenovo executive]to [Lenovo executive]and [Lenovo executive]and others of 14 March 2006 at 00:07, entitled *"UPDATE: Lenovo* [geographical area] *Notebook Letter of Intent"*. See also AMD submission of 7 October 2008, Annex 1, Development and Marketing Funding Statement of Work #4906L10121 to Goods Agreement #4905L10507 [Statement of Work], Schedule C, paragraph 2. Range as provided by Lenovo.

1804 Lenovo submission of 27 November 2007, Annex 22, e-mail from [Lenovo executive] to [Lenovo executive]of 31 July 2006 entitled *"Work Item #3 from the Minutes from the AMD – Lenovo NB meeting 7-27-06"*; and Lenovo submission of 27 November 2007, Annex 23, Lenovo presentation of January 2006 entitled *"AMD Update – [...] Alliance"*, slide 3. Range as provided by Lenovo.

1805 Lenovo submission of 27 November 2007, Annex 22, e-mail from [Lenovo executive]to [Lenovo executive]and others of 31 July 2006 entitled *"Work Item #3 from the Minutes from the AMD –*

(1476) On the basis of the above, the 17 July 2008 SSO came to the preliminary conclusion that [...]units should be the contestable number of Lenovo's notebook x86 CPU supplies.[1806]

(1477) The figures for the market outside [geographical area] mentioned in recital (1475), and used in the 17 July 2008 SSO, were taken from a Lenovo presentation of January 2006 summarising the content of the alliance with AMD and which therefore only indirectly reflects the actual content of the SOW.[1807] Direct reference to the original executed SOW provides a closer and therefore more reliable estimate of the number of contestable units at stake for the market outside [geographical area]. That number is between [...]and [...]for four months,[1808] that is, [...]to [...]in one year. The figure used by the 17 July 2008 SSO based on the Lenovo presentation ([...]to [...]) is therefore largely overestimated and therefore very favourable to Intel. It will, however, be used in section g). For the market in [geographical area], the executed version of the SOW confirmed the AMD x86 CPU supply estimates that the Commission used in the 17 July 2008 SSO.

g) Comparison of the contestable number of units and the required number of units

(1478) The table in recital (1472) shows that the required number of units ranges between [...] and [...], depending on the cost benchmark used. Recital (1476) estimated the contestable number of units at between [...]and [...].[1809] The required number of units is therefore above the contestable number of units in all possible hypotheses, even using Intel's significantly underestimated assertion of its own costs.

h) Intel arguments on the contestable number of units

(1479) This section analyses Intel's arguments on the contestable number of units. It will be shown that Intel's assertions cannot be accepted. However, alternative calculations will be conducted taking into account Intel's hypothesis in order to

---

Lenovo NB meeting 7-27-06." See also AMD submission of 7 October 2008, Annex 1, Development and Marketing Funding Statement of Work #4906L10121 to Goods Agreement #4905L10507 [Statement of Work], Schedule C, paragraph 2, and Schedule D, paragraph 2.

1806 17 July 2008 SSO, paragraph 276.

1807 Lenovo submission of 27 November 2007, Annex 23, Lenovo presentation of January 2006 entitled *"AMD Update – [...] Alliance"*, slide 3. Range as provided by Lenovo.

1808 AMD submission of 7 October 2008, Annex 1, Development and Marketing Funding Statement of Work #4906L10121 to Goods Agreement #4905L10507 [Statement of Work], Schedule D, paragraph 2.

1809 As indicated in recital (1477), this estimate is significantly overestimated, which is in Intel's favour.

show that they lead to the same conclusion. The fact that the Commission undertakes such calculations does not mean that it agrees with Intel's assumptions.

(1480) In its submission of 5 February 2009 related to the SSO, Intel claims that the number of units mentioned in recital (1472) is underestimated. Intel alleges that the number of contestable units was in fact [...], which corresponds to the increase of the overall use of Intel processors by Lenovo between 2006 and 2007.[1810]

(1481) The Intel reasoning is primarily based on the argument that the contestable number of units should include not only notebook x86 CPUs but also desktop x86 CPUs. It will be shown hereunder that Intel's contention cannot be accepted from the point of view of principle of the as efficient competitor analysis. Nevertheless, it will be also shown that even if the argument that the contestable number of units should include both notebook and desktop x86 CPUs were to be accepted, the estimate of the [...]figure by Intel is based on unreasonable assumptions. After the correction of Intel's estimates based on more reasonable assumptions which Intel should have made, the Intel 2007 conditional rebates to Lenovo can be shown to be capable of foreclosing an as efficient competitor even if both notebook and desktop units are included in the contestable number of units.

(a) The relevance of considering de sktop x86 CPUs in the contestable number of units

(1482) Intel argues that the contestable number of units should include not only notebook x86 CPUs but also desktop x86 CPUs.[1811] This is because, according to Intel, the discount package provided by Intel to Lenovo under the MOU "*was very clearly and explicitly directed toward contestable microprocessors for both notebook and desktop computers.*"[1812] Intel makes reference to several documents in support of that assertion, including a document quoted by the 17 July 2008 SSO in which an Intel executive stated that he had "*[r]eached formal agreement with Lenovo (signed MOU) on '07 deal that awards Intel 100% Lenovo NB CPU business in '07 and grows Intel '07 DT CPU MSS to* [...]".[1813]

1810 Intel submission of 5 February 2009 related to the 17 July 2008 SSO. Report of Professor [...] and Doctor [...], paragraph 61.

1811 Intel submission of 5 February 2009 related to the 17 July 2008 SSO. Report of Professor [...] and Doctor [...], paragraphs 54 to 57.

1812 Intel submission of 5 February 2009 related to the 17 July 2008 SSO. Report of Professor [...] and Doctor [...], paragraph 54.

1813 *"2006 Accomplishments"* of [Intel Executive] , p. 1. Intel submission of 2 June 2008, annex 2, document 32. The meanings of acronyms are as follows: "NB" for notebook, "MSS" for Market Segment Share and "DT" for desktop. Intel submission of 5 February 2009 related to the 17 July 2008 SSO. Report of Professor [...] and Doctor [...], paragraph 55.

(1483) The Intel argument is misconceived. The scope of Intel's objective in terms of business coverage when it offered its discounts to Lenovo is not of primary relevance for the as efficient competitor analysis. The as efficient competitor analysis is about estimating the financial consequences on Intel's discount of Lenovo switching the contestable part of its supply share to an as efficient competitor. The relevant issue is therefore not whether the objective of the arrangement between Intel and Lenovo also covers desktop units but whether the negotiation of the arrangement leaves Lenovo flexibility to award contestable units in notebooks to competitors of Intel. This could be the case for instance if the conditions of the arrangement allowed Lenovo to compensate for the attribution of notebook units to Intel's competition by granting more desktop units to competitors of Intel.

(1484) None of the elements provided by Intel support that conclusion. On the contrary, all evidence outlined in section VI.2.5 shows that the exclusivity condition in the notebook segment was a stand-alone condition, which was not subject to flexibility. Intel did not provide any element that would support the conclusion that Lenovo was subject to a global condition for its notebook and desktop business. Indeed, Intel stated that "*[t]he MOU sets a target for 2007 involving Lenovo purchasing* [...] *desktop microprocessors and* [...]*notebook microprocessors from Intel, for* [...]*units in total.*"[1814] This shows that Lenovo was indeed subject to two cumulative conditions. That interpretation is also confirmed by the text of the MOU itself which sets distinct targets for the notebook and desktop purchases by Lenovo.[1815]

(1485) Finally, Intel's reasoning is rooted in the implicit admission that its conditional agreement with Lenovo covers not only the notebook segment of Lenovo's business but also its desktop segment. Indeed the present Decision covers only the exclusivity rebate in the notebook segment. However, this is without prejudice to the question of whether the arrangement in the desktop segment to which Intel refers is also in contravention of Article 82 of the Treaty.

(1486) In view of the above, the Commission considers that its as efficient competitor analysis based on the contestable units in the notebook segment as described in sections a) to g) is appropriate. However, it will be shown in the remainder of section h) that the Commission's conclusion would hold true even if Intel's claim that the Commission should have considered the contestable units over the combined desktop and notebook x86 CPUs segments were to be accepted.

1814 Intel submission of 5 February 2009 related to the 17 July 2008 SSO. Report of Professor [...] and Doctor [...], paragraph 58.

1815 Lenovo submission of 27 November 2007, annex 1, Memorandum of Understanding. Exhibit A.

(b) Contestable number of units in the combined desktop and notebook x86 CPUs segments

(1487) As stated in recital (1480), Intel alleges that the contestable number of units in the desktop and notebook segment was [...]. That is the sum of [...]units for desktop x86 CPUs and [...]units for notebook x86 CPUs.[1816]

(1488) Intel did not provide any contemporaneous document directly supporting those figures. Instead, Intel has justified its allegation by a two-step reasoning. Firstly, Intel has referred to an Intel internal email of 21 November 2006 in which an Intel executive reports that Lenovo represented to Intel that [...]desktop microprocessors were at risk for Intel.[1817] Lenovo's representation was allegedly that Intel's desktop x86 CPU sales to Lenovo in 2007 would remain at the same level as in 2006. According to Intel, all Lenovo's incremental business in desktop x86 CPUs, that is [...]units, may be attributed to AMD.[1818] In the same email, the Intel executive reports that Lenovo similarly represented up to [...]units at risk for notebook x86 CPUs.

(1489) Intel concludes from this that it is reasonable to assume that the entire Lenovo incremental business in 2007 as compared to 2006 as reported in the email of 21 November 2006, that is [...]x86 CPUs ([...]+ [...]), should be considered as contestable units. Intel then extrapolates that reasoning to the targets for the Lenovo incremental business which was foreseen later on in the Memorandum of Understanding as a result of the negotiations between Intel and Lenovo. These targets ([...]desktop units plus [...]notebook units for a total of [...]units) were significantly higher than the Lenovo representations reported in the email of 21 November 2006. Intel concludes that [...]units should be deemed contestable.[1819]

(1490) Each step of the Intel reasoning presented in recitals (1488) and (1489) is based on unreasonable assumptions and therefore leads to flawed results.

(1491) Intel did not provide any evidence from Lenovo that would make it possible to assess the report of the alleged Lenovo representations included in the Intel email mentioned in recital (1488). However, as was already referred to in the

---

1816 Intel submission of 5 February 2009 related to the 17 July 2008 SSO. Report of Professor [...] and Doctor [...], paragraph 59. See also exhibit 13 which shows that the total does not match exactly due to rounding.

1817 Email from [Intel executive] to [Intel executive] of 21 November 2006 entitled '*Lenovo volume projection for '07*'. Intel submission of 5 February 2009 related to the 17 July 2008 SSO. Report of Professor [...] and Doctor [...], TAB 23.

1818 Intel submission of 5 February 2009 related to the 17 July 2008 SSO. Report of Professor [...] and Doctor [...], paragraph 60.

1819 Intel submission of 5 February 2009 related to the 17 July 2008 SSO. Report of Professor [...] and Doctor [...], paragraph 61.

context of the analysis of the contestable share related to the HPA agreements in section 4.2.3.3.f), representations of contestable shares made by customers in the context of negotiations with Intel cannot be taken at face value, as they are likely to be exaggerated. Intel is an experienced company with knowledge of the sector which cannot ignore that factor. Indeed, Intel acknowledged that point in the context of its description of the negotiations with Lenovo during the first half of 2006. As Intel states, "*Lenovo engaged in a deliberate effort to exaggerate the AMD threat to extract greater discounts from Intel.*"[1820]

(1492) Against that background, it is not reasonable for Intel to rely at face value on a representation allegedly made by Lenovo. It is all the less reasonable for Intel to rely on Lenovo's representation that these figures were completely disconnected from Lenovo's historical market share figures. Indeed, Lenovo claimed that it would award 100% of its annual business growth in the notebook x86 CPU segment to AMD in a context where it had until then always been 100% Intel exclusive. Lenovo also claimed that it would award 100% of its annual business growth in the desktop sector to AMD in a context where, according to the same email reporting on Lenovo's representation, its AMD share in the previous year had been about 30%.[1821] Basing an estimate of the number of contestable units on representations departing so significantly from the historical trend without exerting any critical look at them does not provide a reasonable basis to conduct an as efficient competitor analysis.

(1493) Furthermore, Intel does not give Lenovo's representations a critical look with regard to the increased volume figures which resulted from later stages of the negotiation. Without providing any supporting contemporaneous document (either from Intel or Lenovo), Intel asserts that the conclusion that 100% of the [...]incremental annual Lenovo business represented on 21 November 2006 was contestable by AMD can be extended to the [...]incremental annual Lenovo business target which was later on agreed in the Memorandum of Understanding.

(1494) That extrapolation is also not justified. Firstly, it is not logical to consider that the outcome of a negotiation between Lenovo and Intel on targets for Lenovo's business with Intel would increase the number of units contestable by AMD. Secondly, as Intel itself notes, the result of this assumption is that Intel considers as

---

1820 Intel submission of 5 February 2009 related to the 17 July 2008 SSO, paragraph 262.

1821 Email from [Intel executive] to [Intel executive] of 21 November 2006 entitled 'Lenovo volume projection for '07'. Intel submission of 5 February 2009 related to the 17 July 2008 SSO. Report of Professor [...] and Doctor [...], TAB 23, paragraph 2. The email states that Intel's share was about 70%, which implies that AMD's share was about 100%-70%=30%. As the email was written in November 2006, this figure is an estimate. The actual AMD share in Lenovo's desktop segment in 2006 was [...]% which is even lower (Source: Gartner).

contestable by AMD a number of units which represents about [...] of the number of units sold by Intel to Lenovo in 2006.[1822] The unreasonableness of that assumption is therefore striking against the background that AMD's market share at Lenovo in 2006 was [...]% in the notebook segment and [...]% the in desktop segment.[1823]

(1495) In view of the above, it is concluded that Intel's assertion that the number of contestable units is [...]is not based on reasonable assumptions.

(1496) A more reasonable characterisation of the contestable number of units based on the same data as those used by Intel would have assessed the reasonable share of the incremental annual Lenovo business which AMD could have contested based on historical market shares. In 2006, AMD's desktop market share at Lenovo was [...]%.[1824] A reasonable estimate of the part of the total [...]incremental desktop units foreseen in the Memorandum of Understanding which was contestable by AMD is [...]% of [...], that is, [...]units. In 2006, AMD's notebook market share at Lenovo was 0% (as Lenovo had been Intel exclusive in notebook x86 CPUs). It would therefore also be reasonable to assume that only very few of the additional notebook units foreseen in the Memorandum of Understanding were contestable by AMD. However, in order to err on the side of caution, it could be assumed that AMD could contest the same share in notebooks as in desktops despite starting from 0%. That is obviously very favourable to Intel. The estimated contestable number of units for notebooks would therefore be [...]% of [...], that is, [...]units. The total number of contestable units for desktops and notebooks under that more reasonable, but still favourable to Intel, estimate is therefore [...]units ([...]+ [...]).

(1497) The estimate in recital (1496) was calculated based on reasonable assumptions applied to figures available in the Intel Memorandum of Understanding. One way to verify their reasonableness is to compare those figures with the number of x86 CPUs which Lenovo and AMD had jointly estimated they could trade in the SOW. Intel argues that that document should not be used because the SOW was negotiated in April 2006 while the Intel-Lenovo Memorandum of Understanding covered 2007.[1825] However, Intel did not provide any more recent contemporaneous document representing a faithful estimate of the contestable number of units. As noted above, Intel only presented alleged Lenovo

---

1822 Intel submission of 5 February 2009 related to the 17 July 2008 SSO. Report of Professor [...] and Doctor [...], paragraph 60.

1823 Gartner figures.

1824 Gartner figures.

1825 Intel submission of 5 February 2009 related to the 17 July 2008 SSO. Report of Professor [...] and Doctor [...], paragraph 65.

representations, which - as Intel could not fail to be aware - were likely to overestimate the contestable number of units. Furthermore, Intel did not provide any argument to support the notion that Lenovo and AMD's April 2006 forecast in the SOW was no longer valid at the end of 2006, in a context where, due to Intel's payments, the AMD projects underlying the SOW had been postponed twice, the second time until the beginning of 2007.

(1498) Moreover, Intel has claimed that, in the course of 2006, Lenovo's interest for AMD x86 CPUs had been waning (see section VI.2.7.9). There is therefore a contradiction in Intel's argumentation: on the one hand, Intel argues that Lenovo did not show any real interest in AMD products by the end of 2006, but on the other hand, it claims that the number of units which AMD could contest at Lenovo had been increasing during the same period.

(1499) Table 46 summarises the number of AMD units which the SOW foresaw in the different geographic regions and the different segments. Where the reference period is smaller than one year, the numbers have been proportionally scaled.

Table 46 - Number of AMD units in the SOW

	Number of units in the SOW for the reference period (thousands)	Reference period (months)	Scaled number of units for one year (thousands)
Lenovo branded desktop products	[...]	[...]	[...]
ThinkCenter branded desktop products outside of [geographic area]	[...]	[...]	[...]
Total desktops			[...]
Lenovo branded notebook products for [geographic area]	[...]	[...]	[...]
Lenovo branded notebook products outside [geographic area]	[...]	[...]	[...]
Total notebooks			[...]
Total desktops and notebooks			[...]

Source: SOW[1826]

(1500) Table 47 compares the estimates obtained in table 45 with the use of the SOW and the estimate based on reasonable assumptions from recital (1496). It also presents Intel's own assertion of the contestable units for comparison.

Table 47 - Comparison of contestable number of units from the different assumptions (all figures are in thousands)

	Estimate from recital (1496)	Estimate from SOW	Intel's assertion
Desktop CPUs	[...]	[...]– [...]	[...]
Notebook CPUs	[...]	[...]– [...]	[...]
Total	[...]	[...]– [...]	[...]

Sources:
For column 2: recital (1496);
For column 3: table in recital (1499);
For column 4: recital (1487)

(1501) As is clear from table 47, the estimate in recital (1496) is consistent with the figures deriving from the SOW. This corroborates the reasonableness of the estimate in recital (1496). Intel's assertion therefore bears no relation to either of the two reasonable estimates.

(c) Required share test over the combined desktop and notebook segments

(1502) This section conducts the required share test over the combined desktop and notebook segments using the reasonable estimates derived in the preceding section.

(1503) For this purpose, the total amount of discounts established in section b) will be used, that is, [...].

(1504) The calculation will use the ASP provided by Intel for the combined desktop and notebook segments of Lenovo, that is, [...]. An average [...]non-conditional ECAP was also applied to that combined segment.[1827] Table 48 provides the relevant *AAC* based on the same two set of assumptions (from Intel and the Commission) as set out in section d).

[1826] "*Development and marketing funding – Statement of work #4906L10121 to Goods agreement #4905L10507*". AMD submission of 7 October 2008, annex 1. Also, Intel submission of 5 February 2009 related to the 17 July 2008 SSO. Report of Professor [...] and Doctor [...], TAB 28. See point 2 of schedules A, B, C and D.

[1827] Intel submission of 5 February 2009 related to the 17 July 2008 SSO. Report of Professor [...] and Doctor [...], exhibit 13.

Table 48 - Calculation of the AAC for Intel x86 CPUS in Lenovo desktop and notebook combined

	CAP (USD)	Ratio AAC/CAP	AAC (USD)
As per Intel	[...]	[...]%	[...]
As per Commission	[...]	[...]%	[...]

Source: Commission calculations

(1505) Table 49 provides the required number of units on the combined desktop and notebook segments.

Table 49 - Required number of units on the combined desktop and notebook segments

Conditional rebates *R* (million USD)	*P* (USD)	*AAC* as per Intel (USD)	*AAC* as per Commission (USD)	Required number of units *X* (thousand units)	
				AAC as per Intel	*AAC* as per Commission
[...]	[...]	[...]	[...]	[...]	[...]

Sources:
For conditional rebates *R*, Lenovo[1828]
For average sales price *P*, Intel[1829]
For *AAC*: table in recital (1504)
Commission computation for the required number of units *X*.

(1506) The required number of units is therefore greater than the contestable number of units in all reasonable assumptions (even using Intel's own assertion of its costs, which is significantly underestimated, the required number of units is [...], which compares to [...]contestable units in the estimate of recital (1496)and at most [...]contestable units based on the SOW).

i) Conclusion

(1507) On the basis of the comparison of the required number of units and the contestable number of units established in section g) and of the considerations in section h), it is concluded that during 2007, the Intel rebate was capable of having or likely to have anticompetitive foreclosure effects, since even an as efficient competitor would have been prevented from supplying Lenovo's notebook x86 CPU requirements.

1828 See recital (538).

1829 Intel submission of 5 February 2009 related to the 17 July 2008 SSO. Report of Professor [...] and Doctor [...], exhibit 13.

(1508) It should also be recalled that cost figures which are most favourable to Intel have been used.[1830]

4.2.3.6. MSH

a) Introduction

(1509) Following the equivalence that was outlined in section 4.2.2.3 between Intel payments to MSH and Intel rebates to OEMs, it is possible to conduct an as efficient competitor analysis for MSH which is comparable to that carried out for OEMs. As explained, that analysis aims at establishing the level of payments per x86 CPU a competitor which is as efficient as Intel would have to provide to compensate MSH for the loss of Intel conditional payments and thus be able to sell its products via MSH, albeit on a more limited scale.

(1510) As in section 4.2.3.5, in order to ensure a consistent presentation of the as efficient competitor analysis, this section will present the calculations of the Commission and its conclusions using the same structure as that followed in sections 4.2.3.2, 4.2.3.3 and 4.2.3.5 in relation to Dell, HP and Lenovo. Recitals (1457) and (1458) set out the reasons why this different presentation is fully equivalent in economic terms to that used in the 17 July 2008 SSO. However, the results will also be presented at the end of this section in the same form as in the 17 July 2008 SSO.

b) Methodology for assessing the payments

(1511) As is the case for HP, the conditional payments to MSH are provided in the form of a [...]. It is therefore appropriate to use the formula which was proposed by Professor [...] for that context.[1831] The formula reads:

$$S = \frac{R}{(P - AAC)V}$$

(1512) In the formula above, R represents the conditional payments, which are equivalent to the conditional rebates in the case of OEMs. The other parameters have the same meaning as in sections 4.2.3.4, 4.2.3.3 and 4.2.3.5.

c) Size and nature of the payments

1830 See section VII.4.2.3.1.c).

1831 See recital (1283).

(1513) The table in recital (614) indicates the amount of Intel payments per unit to MSH during the period from 1997 to 2007. As explained in section VI.2.8.4, at least a part of those payments were conditional on MSH maintaining Intel exclusivity.

(1514) However, because MSH did not concretely test the consequences of "leaving" the agreement (see recital (691)), there is no direct evidence of the proportion of the payments which was actually conditional. In order to assess whether only a part or the totality of the payments are conditional, the Commission therefore relied on the examination of the x86 CPU quantities for which MSH attempted to negotiate with Intel a derogation to the agreement, that is, the negotiations about the possibility for MSH to sell an AMD-based [OEM Z] [flagship brand] computer.

(1515) As described in section VI.2.8.4.6, in 2002, MSH wished to sell specific [OEM Z] notebooks of the [flagship brand] which included AMD x86 CPUs. MSH discussed the topic with Intel. Intel responded that if MSH did so, Intel would no longer pay MSH any contribution for any [OEM Z] [flagship brand] notebook, whether equipped with an AMD or an Intel x86 CPU.

(1516) That is the only specific instance documented by MSH to the Commission where MSH went as far as to discuss with Intel the precise consequences of breaching the unwritten exclusivity condition. It is also the instance where the Commission can draw the most direct conclusions on what would have been the consequence for MSH of breaching the exclusivity agreement with Intel.

(1517) The MSH request was thus for a limited derogation to the exclusivity condition, which would have applied only to a specific part of the market: [flagship brand] notebook PCs. MSH would have restricted itself to marketing AMD-based notebooks of that brand, and no other AMD-based PCs. The exclusivity condition would therefore only have been partially relaxed, at least during the period in question. Because that relaxation would only have been partial, the share of the MSH business that would have been accessible to AMD-based computers would have been much smaller than that which would have been accessible in the absence of any condition. Only the small segment of [flagshop brand] notebooks would have been accessible. As a consequence of that possibility to sell AMD-based [flagship brand] notebooks, however, MSH would have lost 100% of Intel payments for the segment for which the exclusivity condition was suppressed.

(1518) Should MSH have wished to achieve complete freedom to sell AMD-based PCs of any brand (even in small volumes for each brand), the application of that rule would have led to an elimination of all Intel payments to MSH.

(1519) This comparison leads to the conclusion that the relaxation of the Intel exclusivity agreement sought by MSH for the [OEM Z] [flagship brand] AMD-

based products would have led to a 100% loss of the relevant Intel exclusivity payments.

(1520) In view of the above, in the 17 July 2008 SSO, the Commission used a loss of payments assumption of 100% for the purpose of the as efficient competitor analysis.

(1521) Intel claims that "*[t]he* [17 July 2008] *SSO made a fundamental error in assuming that 100% of Intel's discounts* [to MSH] *are conditioned on exclusivity.*"[1832]

(1522) Section VI.2.8.5.1 has already addressed Intel's arguments to the effect that none of its payments to MSH were conditional. Those arguments are therefore not repeated here.

(1523) Intel contests the validity of the Commission reasoning based on the [OEM Z] [flagship brand] episode on the ground that, according to Intel figures, the Intel payments granted on [OEM Z] [flagship brand]represented only around [...]% of the total payments received by MSH in the relevant period,[1833] and there is no evidence that Intel would have applied the same rule to all brands marketed by MSH as that which it indicated it would apply to [OEM Z] [flagship brand].[1834]

(1524) Instead, Intel examined its payments to other major European retailers. Intel claims that a "*natural place to look to learn more about the discounts Intel would likely have offered to MSH, had MSH shifted contestable sales to AMD* [is] *the discounts that Intel actually gave to other retailers who make substantial sales of AMD-based computers.*"[1835] Intel listed a number of such retailers and concluded that "*[e]ach of these other* [than MSH] *retailers also has a "Contribution Revenue Agreement," ("CRA") similar to the one that Intel has with MSH, and Intel provides sizable discounts to these other retailers.*"[1836] Intel claims that "*[t]he* [17 July 2008] *SSO's claim that 100% of Intel's discounts to MSH were conditional upon exclusivity is sharply at odds with this evidence that major European retailers received significant discounts from Intel despite the fact that they sold substantial*

1832 Intel submission of 5 February 2009 related to the 17 July 2008 SSO, paragraph 231.

1833 Intel submission of 5 February 2009 related to the 17 July 2008 SSO. Report of Professor [...] and Doctor [...], paragraph 126.

1834 Intel submission of 5 February 2009 related to the 17 July 2008 SSO. Report of Professor [...] and Doctor [...], paragraph 129.

1835 Intel submission of 5 February 2009 related to the 17 July 2008 SSO. Report of Professor [...] and Doctor [...], paragraph 109.

1836 Intel submission of 5 February 2009 related to the 17 July 2008 SSO. Report of Professor [...] and Doctor [...], paragraph 111.

numbers of computers equipped with AMD microprocessors."[1837] Intel therefore notes that, under Intel's computations, certain retailers received a higher payment rate than others. Intel attributes this to the fact that "*Intel's discounts are highly correlated to the volume of purchases by a retailer*".[1838] Intel then compares the average rate of payments for DSGI, the second largest European purchaser of PCs with Intel x86 CPUs, with the rate of payments it awarded to MSH (MSH being the largest European purchaser of PCs with Intel x86 CPUs).[1839] As that difference is [...]%, Intel concludes that the conditional share of MSH's payments is "*certainly no greater than* [...]*%.*"[1840]

(1525) Intel's arguments are unconvincing. As already explained in section 4.2.3.3.b) (see in particular recitals (1320) to (1323)), in application of the principle of the as efficient competitor analysis, the Commission must determine the part of the Intel payment which MSH would continue to receive if it decided to switch its entire contestable share to AMD-based PCs. The starting point of that examination is that, because of the principle of [...] renegotiations of the payment agreements with Intel, MSH has no legal right to continue to receive any of the Intel payments. In that respect, every [...], 100% of the Intel payments are at risk. Against that background of 100% of the payments being at risk, any finding that a certain level of payments was non-conditional must be based on solid evidence that MSH could be reasonably certain that it did not run any risk of losing that level of payments even if it switched its entire contestable share to AMD-based PCs in complete breach of its unwritten agreement with Intel.

(1526) The [OEM Z] [flagship brand] episode is the only instance documented by MSH to the Commission where MSH actually tested with Intel what would be the consequences of a switch to AMD. Intel's insistence that the episode is irrelevant because it covered only [...]% of the total payments is misconceived. Indeed, in the absence of any other, potentially broader, real life example, MSH had to rely on that example to assess the likely impact of any switch. As the as efficient competitor analysis focuses on the point of view of the dominant company's customer, the Commission must also assess that example as its main point of reference.

1837 Intel submission of 5 February 2009 related to the 17 July 2008 SSO. Report of Professor [...] and Doctor [...], paragraph 111.

1838 Intel submission of 5 February 2009 related to the 17 July 2008 SSO, paragraph 80.

1839 Intel submission of 5 February 2009 related to the 17 July 2008 SSO. Report of Professor [...] and Doctor [...], paragraph 116.

1840 Intel submission of 5 February 2009 related to the 17 July 2008 SSO. Report of Professor [...] and Doctor [...], paragraph 120.

(1527) Intel argues that the fact that it provides payments to other retailers proves that the rule derived from the examination of the [OEM Z] [flagship brand] episode cannot be generalised to conclude that MSH could have lost 100% of the payments if it had switched to AMD across all its contestable share.

(1528) That argument by Intel raises several issues of principle. Firstly, as has been explained in section VI.2.8.5.1.c), the comparison of Intel's commercial relationship with other retailers does not provide any evidentiary information on the nature of Intel's relationship with MSH. It is perfectly possible that the same level of payments granted to two different partners is associated with different provisions relating to conditionality.

(1529) Secondly, MSH was not able to compare its level of discount with that of other retailers. Indeed, as Intel itself underlines, "*MSH does not publicize the terms of its negotiated discounts with Intel (or with any other vendor), nor do any of the other large retailers with whom Intel does business in Europe. Similarly, Intel's standard practice is to maintain the confidentiality of the discounts negotiated with its customers.*"[1841] MSH was therefore not in a position to assert the relevance of the experience it gained during the [OEM Z] [flagship brand] episode against the level of payments granted by Intel to other retailers.

(1530) Finally, in any event, even if MSH had been in the possession of the relevant information on the level of Intel discounts to other retailers as that provided to the Commission by Intel, that information would have confirmed the relevance of the [OEM Z] [flagship brand] incident.

(1531) Had MSH been in a position to use the information on payments to other retailers, it would have tried to assess, on the basis of that information, whether there was any level of payments which it could be reasonably sure to retain despite breaching its exclusivity agreement with Intel on its entire contestable share. In view of the [OEM Z] [flagship brand] incident, when Intel indicated it would cancel all the Intel payments over the brand where MSH would start selling AMD-based PCs, MSH would have examined whether there was a certain level of payments which all retailers received in any circumstances. Such a level of payments received in any circumstances could be considered to be comparable with a payment to which any retailer is entitled.

(1532) The analysis of the payments received by other retailers would have demonstrated to MSH that there is no such "base" level of payment. In the first instance, it cannot be held that there is no conditionality associated with the payments made by Intel to other retailers. In the second instance, figures provided

---

1841 Intel submission of 5 February 2009 related to the 17 July 2008 SSO, paragraph 176.

by Intel show that there are many examples of significant retailers receiving no payments from Intel over periods ranging from several quarters to several years. For instance, for the retailers for which Intel provided data to the Commission and the sole period covered by the Intel information (from 2003 to 2007), [...]received no payments from 2003 to the second quarter of 2007, [...]received no payments from 2003 to the second quarter of 2005, [...]received no payments from the first quarter of 2006 to the second quarter of 2006, [...]received no payments from 2003 to the first quarter of 2006 and [...]received no payments at least from 2006 to 2007.[1842] [1843]

(1533) In view of the above, if MSH had been in a position to assess Intel payments to other retailers, that analysis would have confirmed the accuracy of the [OEM Z] [flagship brand] episode. It is therefore entirely appropriate to consider in the context of the present analysis that none of the Intel payments to MSH were unconditional.

(1534) In order to test the robustness of its analysis, the Commission will however hereunder consider an alternative rate based on a reasonable comparison with other retailers. This is without prejudice to the fundamental issues of principle linked to the use of such comparisons as set out in recitals (1528) and (1529) above.

(1535) The use of payment rates for other retailers as a benchmark for the non-conditional part of payments to MSH must at the very least respect one of the fundamental principles of the as efficient competitor analysis, namely the fact that levels of payments which are obtained in circumstances where a customer does not switch the entirety of its contestable share to the as efficient competitor do not represent real non-conditional payments. Application of that principle to the comparison with other retailers means that, in order for the benchmark to be pertinent, it must include only retailers which purchase a share of AMD-based products which is consistent with the size of the contestable share. As will be discussed in recital (1555), a proper proxy for that size, as proposed by Intel, is the average share of AMD in the consumer market for Europe, which is consistently around 33% for the period covered by the Intel data on other retailers (2003 to 2007). Therefore, in order for the comparison to be accurate, figures corresponding to retailers with significantly less than 33% AMD-based PCs must be discarded, as including them in the calculations would bias the result. In order to be

---

1842 In the case of [...], the information provided by Intel does not allow to determine whether [...] received payments in 2004 and/or 2005.

1843 Intel submission of 5 February 2009 related to the 17 July 2008 SSO. Report of Professor [...] and Doctor [...], exhibit 20.

conservative, the Commission will eliminate only retailers where the share of AMD-based PCs is below 20%, that is, less than around 61% of the typical value.

(1536) Intel has submitted detailed information of payments rates for European retailers with contribution agreements between 2003 and 2007 ([...]).[1844] Setting aside MSH (which is the point of comparison), two of the retailers have AMD-based PC shares consistently below [...]%: [...]and [...]. Those two retailers are therefore discarded from the calculation of the average. Table 50sets out the average payments to the representative retailers from the Intel list.

Table 50 - Conditional share of the payments based on comparison with competitors

Year	[retailer]	[retailer]	[retailer]	[retailer]	[retailer]	[retailer]	[retailer]	[retailer]	MSH
2003	[...]								
2004									
2005									
2006									
2007									
Average over the period									
Average between distributors									

Source: Intel[1845]

(1537) The result from table 50 is likely to be considerably overestimated. Firstly, it covers only the European retailers which had a contribution agreement with Intel during at least one year in the period from 2003 to 2007. It does not include all other European retailers, which did not have a contribution agreement with Intel, and which therefore are very likely to have received no significant payments from Intel. Furthermore, it does not include the period ranging from 1997 to 2002. The information provided by Intel indicates that Intel has progressively enlarged the number of retailers covered by contribution agreements (out of the list provided by

---

1844 Intel submission of 5 February 2009 related to the 17 July 2008 SSO. Report of Professor [...] and Doctor [...], exhibit 19 for the share of Intel-based PCs at these retailers and exhibit 20 for the rate of payments.

1845 Intel submission of 5 February 2009 related to the 17 July 2008 SSO. Report of Professor [...] and Doctor [...], exhibit 20. In the case of [...], the values for 2004 and 2005 are unknown, therefore the average covers only years 2003, 2006 and 2007. For [...], [...], [...]and [...], Intel did not grant any payments during certain quarters (see note [3] of the table in exhibit 20). This is reflected in the computation.

Intel for 2003-2007, only one retailer exited the agreements: [...], while three entered them: [...]). It is therefore very likely that the average payments over the previous period would have been even lower.

(1538) [...] represents [...]% of [...]. The Commission will therefore use for the alternative scenario an assumption that [...]% of the payments can be viewed as non-conditional. For the reasons set out in recital (1537), that value is very favourable to Intel. The figure will be used for robustness verification only. The appropriate assumption which respects the principles of the as efficient competitor analysis remains that none of the payments can be viewed as non-conditional.

d) Volume purchased and average selling prices

(1539) The table in recital (614) sets out the volumes of Intel-based PCs sold by MSH during the relevant period.

(1540) In this case, the contestable share is concentrated in the low end of the range of product.

(1541) This was noted for example by Carrefour's head of PC procurement, who stated in a presentation about AMD and Intel that *"[t]he entry product range are generally AMD based"*, and *"[i]n the PC segment, the entry product range is essentially AMD"*.[1846] In another document concerning the possibility for Carrefour to enter an exclusivity agreement proposed by Intel, the same executive asked the question: *"How can Intel guarantee success in the entry product range (Celeron* [Intel entry x86 CPU] *vs Athlon* [AMD x86 CPU]*) "*.[1847]

(1542) The fact that the contestable share is concentrated in the low end of the range of products is also illustrated by the only example in the file of MSH actually trying to negotiate an exception from the Intel exclusivity arrangement. As already explained, in that case, MSH was seeking to offer AMD-based PCs of the [flagship brand] brand from [OEM Z]. Those PCs were precisely introduced by [OEM Z] as entry products for its [flagship brand]. As Intel would not grant a derogation to the arrangement, MSH asked Intel to at least seek to find an arrangement with [OEM Z] to also offer Intel-based [OEM Z] [flagship brand] in the low end of the product range (see recital (707)). Those products would have replaced the units that could be contested by AMD-based products.

(1543) In the 17 July 2008 SSO, the Commission conducted its calculations based on the assumption that, in view of the considerations in recitals (1540) to (1542), at

---

1846 Original in [...]. Document BA1, pp. 2 and 5.

1847 Original in [...] Document BA2, p. 4.

least in the short term, MSH would merely offer AMD-based PCs in the value PCs segment.

(1544) Intel disagrees with that assumption. According to Intel, the contestable share must include also high end ("performance") microprocessors.[1848] In support of its contention, Intel refers in particular to an MSH document which summarises a commercial offer from AMD at the end of 2004.[1849] That document lists several types of AMD x86 CPUs which AMD offered MSH to include in its range of desktop and notebook PCs. Intel compares that list of x86 CPUs with the list of x86 CPUs contained in an AMD document which seems to refer to the same AMD commercial offer to MSH, which contains a characterisation of the x86 CPUs on a performance scale.[1850] From that comparison, Intel notes that only about [...]% of the desktop x86 CPUs and about [...]% of the notebook x86 CPUs in the AMD commercial offer to MSH are characterised as "Value" x86 CPUs.[1851] Intel then calculates ASPs using a weighted average of the ASPs that it had calculated for the "Value" (low end) and "Performance" (high end) segment of its offer (for instance, for notebook processors, Intel makes an ASP calculation using a [...]% weight for the Value ASP and a [...]% weight for the Performance ASP).[1852]

(1545) The Commission notes that the two documents to which Intel refers directly use figures from an AMD commercial offer to MSH: one is an AMD document summarising the terms of that offer and the other is an MSH document which reports on it. By its very nature, such a document is more likely to reflect AMD's commercial wishes than MSH's own assessment of its supply needs. In that context, it is understandable that AMD tried to push MSH to purchase more PCs incorporating its high-end x86 CPUs, as sales of high-end x86 CPUs generate more profits. The documents quoted by Intel are therefore likely to bias the analysis of the contestable share towards a higher proportion of contestable high-end x86 CPUs. In the absence of contemporaneous evidence quantifying MSH's own assessment of the positioning of the contestable share of its supply, the

---

1848 Intel submission of 5 February 2008 related to the SSO. Report of Professor [...] and Doctor [...], paragraph 168.

1849 [Inspection document from MSH's premises].

1850 AMD complaint to the Bundeskartellamt of 17 July 2006, annex 5, p. 1. AMD submission of 24 August 2006.

1851 Intel submission of 5 February 2008 related to the SSO. Report of Professor [...] and Doctor [...], exhibit 32. For its calculations, Intel uses midpoints of the ranges which were used in the non-confidential version of the MSH document provided to Intel. The Commission considers that this approximation is appropriate in view of the content of the documents provided to Intel. The Commission therefore uses the same methodology for the purpose of this Decision.

1852 Intel submission of 5 February 2008 related to the SSO. Report of Professor [...] and Doctor [...], exhibit 33. [...]% and [...]% do not exactly add up to 100% due to the use of midpoints.

Commission will rely on those documents for the purpose of its calculation, nevertheless keeping in mind the fact that that assumption is favourable to Intel.

(1546) As can be seen from the above, when conducting its calculations based on the documents reflecting AMD's 2004 commercial offer to MSH, Intel estimated ASPs by spreading AMD x86 CPUs in two categories: "Value" (low end) and "Performance" (high end). However, the AMD commercial offer included a third category entitled "Mainstream" (mid end). Intel ignored that category, and included all x86 CPUs within it in its "Performance" segment, therefore leading to a significant overestimation of the importance of those high end x86 CPUs as compared to lower end ones. For instance, in the notebook segment, AMD's commercial offer included [...]% of x86 CPUs from the "Mainstream" segment and [...]) x86 CPU from the "Performance" segment. Despite this, Intel, considered that [...]% of the contestable share should fall in the "Performance" segment.[1853] The same pattern applied to the desktop segment.

(1547) In order to rectify that bias, the Commission took due account of the existence of a third category of x86 CPUs, situated in between the "Value" (low end) and the "Performance" (high end) category. Table 51 reflects the accurate weight of the three categories stemming from the AMD and MSH documents used by Intel.

Table 51 - Weight of the Value, Mainstream and Performance segments

	Volume	Share
Value	[...]	[...]%
Mainstream	[...]	[...]%
Performance	[...]	[...]%
Total	[...]	[...]%

Source: Intel[1854]

(1548) Intel provided the gross ASP of its x86 CPUs for the Value and Performance segments.[1855] Table 52 calculates the ASP over the contestable share using the mix of x86 CPUs established in table 50, during the relevant years.[1856]

1853 Intel submission of 5 February 2008 related to the SSO. Report of Professor [...] and Doctor [...], exhibit 32.

1854 Intel submission of 5 February 2008 related to the SSO. Report of Professor [...] and Doctor [...], exhibit 32.

1855 Intel submission of 5 February 2008 related to the SSO. Report of Professor [...] and Doctor [...], exhibit 33.

1856 ASP on the mainstream segment is the average between the ASP on 'Value' and 'Performance'.

Table 52 - Calculation of the average ASP for the mix of computer over the contestable share

Year	Intel ASP in the 'value' segment (USD)	Intel ASP in the 'performance' segment (USD)	Assumed Intel ASP in the 'mainstream' segment (USD)	AMD's mix between value/mainstream/performance PCs (%)	Implied ASP assumed in the calculation
1997	[...]				
1998[1857]					
1999					
2000					
2001					
2002					
2003					
2004					
2005					
2006					
2007					

Sources:
For ASP on the 'Value' and 'Performance' segment: Intel[1858]
For the x86 CPU mix, table in recital (1547)

e) Costs

(1549) As outlined in section 4.2.3.1.c), in its Reply to the 26 July 2007 SO, Intel came up with an estimate of the ratio between its AAC and its ASP of [...]%. The Commission considers that that value significantly underestimates Intel's AAC. The analysis of the Intel calculation by the Commission led the Commission to the conclusion that the actual ratio between Intel's AAC and ASP is at the very least [...]%.[1859]

f) Calculation of the required share

(1550) On the basis of all the parameters described in sections a) to e) above, the calculation of the required share *S* can be carried out. The parameters, as well as the results of the calculation, are set out in table 53. As in the previous sections

---

1857 Last three months of 1997 and entire year 1998.

1858 Intel submission of 5 February 2008 related to the SSO. Report of Professor [...] and Doctor [...], exhibit 33.

1859 See recital (1148).

concerning other Intel trading partners, the Commission conducted its computations using two values for costs: the value which was derived by the Commission, and the cost data asserted by Intel. (see section 4.2.3.1.c)).[1860] As already explained, the Commission considers that Intel's own cost data significantly underestimate the correct figure. The Commission nevertheless also conducted the computations with those values (which are favourable to Intel) in order to test the robustness of the conclusion of its as efficient competitor analysis.

Table 53 – Required share

	Volumes	ASP of Intel CPUs (USD)	Payments (USD)	Required share S		
				AAC as per Intel	AAC as per the Commission (fully conditional payment)	AAC as per Commission (partially conditional payment)
1997	[...]					
1998[1861]						
1999						
2000						
2001						
2002						
2003						
2004						
2005						
2006						
2007						

Sources:
for Volumes and payments: MSH and/or Intel,
Intel for the AAC used in the first column,[1862]
Commission computations for AAC used in the second and third column
Payments assumed to be partially conditional at [...]%, in line with recital (1538)

g) Contestable share

1860 Intel Reply to the 26 July 2007 SO. Report of Professor [...]. Used in the calculations of in the report of Professor [...], Exhibits 9A and 10A.

1861 Last three months of 1997 and entire year 1998.

1862 Intel Reply to the 26 July 2007 SO. Report of Professor [...]. Exhibit 16A.

(1551) As MSH always had an exclusivity agreement with Intel, it is not possible to rely on historical data to assess the share of the total volume of units it sold which would be contestable by a competitor.

(1552) It is also not possible to determine that total volume of units by assessing the number of contestable units for each of the OEMs the products of which are sold by MSH. That would entail making several assumptions on many OEMs, and the addition of all uncertainties would eventually lead to a figure which could not be reliable and precise enough to draw any meaningful conclusion.

(1553) There is no documentary evidence in the file which quantifies MSH's assessment of the share of its sales which it considers it could switch to AMD-based PCs within a one year time horizon. Intel has referred to the two documents reflecting an AMD commercial offer to MSH from 2004 already mentioned in section d), and argued that those documents should serve as a basis for the evaluation of the contestable share. In those documents, AMD offered MSH to sell [...]of its PCs (about [...]%) based on AMD x86 CPUs. However, as already mentioned in recital (1545), by their nature, those documents are more likely to reflect AMD's wishes for the market share of its products at MSH than MSH's estimation of the realistic proportion of its sales which it could switch to AMD-based PCs. It is therefore likely that they overestimate the actual contestable share at MSH.

(1554) In the 17 July 2008 SSO, in the absence of any documentary evidence of MSH's expectations of its contestable share, the Commission used as a proxy for the contestable share AMD's average share in the consumer segment worldwide. In the period 2000-2007, that share ranged between [...]% and [...]%, with an average of [...]%. In the period preceding 2000, that market share was much lower: [...]% for 1997-1998 and [...]% for 1999.[1863] Table 54 below summarises this market share for the whole period from 1997 – 2007:

[1863] 17 July 2008 SSO, table in paragraph 364.

Table 54 – AMD worldwide volume share in the consumer segment

Year	AMD worldwide volume share in the consumer segment (%)
1997 1998[1864]	[...]
1999	[...]
2000	[...]
2001	[...]
2002	[...]
2003	[...]
2004	[...]
2005	[...]
2006	[...]
2007	[...]

Source: Gartner

(1555) Intel argues that since MSH is located in the EEA, AMD's share in the consumer segment in the EEA is a proxy which is superior to AMD's share in the consumer segment worldwide.[1865] Intel quotes figures from various sources and covering different periods and definitions of Europe, with AMD average market shares ranging from [...]% to [...]%.[1866] Ultimately, Intel uses for its calculations a value of [...]%.[1867]

(1556) In the remainder of section g), and in view of the elements outlined in recitals (1551) to (1555), the Commission will use as a proxy for the contestable share at MSH a value of [...]% for the years 2000 to 2007. During those years, the AMD average market share worldwide and in the EEA were relatively stable. However, that is not the case in the preceding years, when AMD's average market share worldwide was increasing. It would be inappropriate to ignore that element in the assessment of MSH's share. Since neither the file nor data provided by Intel contains a value for the European share of the consumer segment during those years, the Commission has estimated that value using the assumption that the ratio

---

1864 Last three months of 1997 and entire year 1998.

1865 Intel submission of 5 February 2008 related to the SSO. Report of Professor [...] and Doctor [...], paragraph 150.

1866 Intel submission of 5 February 2008 related to the SSO. Report of Professor [...] and Doctor [...], paragraph 154.

1867 Intel submission of 5 February 2008 related to the SSO. Report of Professor [...] and Doctor [...], paragraph 178, second bullet point.

between the worldwide share and the "Western European" share is stable. Table 55 sets out the results of that calculation.

Table 55 – Estimation of AMD's average market share in Western Europe in years 1997-1999

Period	AMD share in Western Europe in the consumer segment	AMD worldwide market share in the consumer segment
Reference period: 2000-2007	[...]%	[...]%
1997-1998	[...]%	[...]%
1999	[...]%	[...]%

Source:
For last column and second line of second column: Intel[1868]
For third and fourth line of second column, Commission calculation based on proportion from the second line.

(1557) Table 56 summarises the contestable share which will be used by the Commission in view of the considerations above:

Table 56 – Contestable share at MSH

Year	Contestable share (%)
1997-1998[1869]	[...]
1999	[...]
2000	[...]
2001	[...]
2002	[...]
2003	[...]
2004	[...]
2005	[...]
2006	[...]
2007	[...]

(1558) Those values for the contestable share are favourable to Intel. It is assumed that MSH would ramp up sales of AMD-based PCs almost immediately to their maximum levels. Furthermore, it is also assumed that MSH would accept to ramp up AMD-based PCs in a large variety of different brands simultaneously.

1868 Intel submission of 5 February 2008 related to the SSO. Report of Professor [...] and Doctor [...], exhibit 28.

1869 Last three months of 1997 and entire year 1998.

h) Comparison of required share and contestable share

(1559) Table 57 summarises the comparison of the contestable share and the minimum required share resulting from the calculations in section g).

Table 57 – Minimum required share and contestable share

Year	Required share (AAC as per Intel) (%)	Required share (AAC as per Commission – fully conditional payments) (%)	Required share (AAC as per Commission – partially conditional payments)	Contestable share (%) as per Commission
1997-1998[1870]	[...]			
1999				
2000				
2001				
2002				
2003				
2004				
2005				
2006				
2007				

Source: recitals (1550) and (1557)

(1560) As is outlined in table 57, the required share is above the contestable share in 1997-1998 and 2000. From a similar calculation, based on assumptions favourable to Intel, which yielded a result where the required share was below the contestable share in all years, Intel concluded that "*Intel passes an effective price analysis with respect to its discounts to MSH.*"[1871]

(1561) That assumption is incorrect. The comparison in table 57, as well as that carried out by Intel, shows the effect of the Intel conditional payments to MSH when seen in isolation from the other parts of the supply chain. In its section on the "*Effects of the Intel conditional payments on a competitor*",[1872] the 17 July 2008 SSO explicitly stated that the Intel conditional payments to MSH should also be viewed in the context of Intel's payments to OEMs higher in the supply chain. In

---

1870 Last three months of 1997 and entire year 1998.

1871 Intel submission of 5 February 2008 related to the SSO, paragraph 230.

1872 17 July 2008 SSO, section IV.3.4.3.7.

particular, the 17 July 2008 SSO stated that "*[i]n 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 is ready to buy PCs based on its CPUs from OEMs, but also that OEMs are ready to manufacture the PCs in the first place. In the case where Intel has provided a conditional rebate to an OEM, the as efficient competitor would therefore have to provide two payments: one in order to ensure that it captures the contestable share of the OEM, and another to ensure that it captures the contestable share of MSH.*"[1873] The 17 July 2008 SSO gave in particular the example of NEC, an OEM which received rebates from Intel from 2002 to 2005.[1874] The preliminary conclusions drawn in the 17 July 2008 SSO took full account of those cumulative effects.[1875]

(1562) Intel did not address the impact of the effect of Intel's rebates at the level of OEMs on the assessment of its payments to MSH. In particular, it disregarded the 17 July 2008 SSO's findings referred to in recital (1561) of this Decision. Intel's calculations are therefore inconclusive, and cannot provide sound support to Intel's claim that "*Intel passes an effective price analysis with respect to its discounts to MSH.*"

(1563) The cumulative effect referred to in recital (1561) of this Decision is more easily accounted for in the presentation of the as efficient competitor analysis which was used in the 17 July 2008 SSO, in which an "effective price" of the x86 CPUs covered by the conditional payments is calculated and compared to the cost of those x86 CPUs. As already mentioned in recital (1458) of this Decision, Intel agrees that the two presentations are economically equivalent.[1876]

(1564) Table 58 summarises the results of the calculation of the effective price of the relevant x86 CPUs and compares it to the x86 CPUs' AAC, taking into account the Intel conditional payments to MSH in isolation.

Table 58 – Comparison of effective price and AAC

1873 17 July 2008 SSO, paragraph 382.

1874 17 July 2008 SSO, paragraph 383. See also section VII.4.2.3.4 above on Intel's rebates to NEC.

1875 17 July 2008 SSO, paragraph 387.

1876 In the Intel submission of 5 February 2009 related to the 17 July 2008 SSO, Intel uses the presentation of the effective price.

Year	Effective price (fully conditional payments) (USD)	Effective price (partially conditional payments) (USD)	AAC as per Intel (USD)	AAC as per Commission (USD)
1997-1998[1877]	[...]			
1999				
2000				
2001				
2002				
2003				
2004				
2005				
2006				
2007				

Source: same as table in recital (1559)[1878]

(1565) As table 58 uses the same set of assumptions as those used in the table in recital (1559), it leads to the same conclusions about the Intel conditional payments to MSH seen in isolation: the effective price resulting from the Intel conditional payments to MSH seen in isolation are below AAC in the years 1997-1998 and 2000.

(1566) As explained in the 17 July 2008 SSO which is quoted in recital (1561) of this Decision, where Intel provides a conditional rebate to an OEM, the as efficient competitor would therefore have to provide two payments: one in order to ensure that it captures the contestable share of the OEM, and another to ensure that it captures the contestable share of MSH. The 17 July 2008 SSO took the example of NEC as such an OEM.

(1567) Section 4.2.3.4 assessed the Intel conditional rebates to NEC in the fourth quarter of 2002 (as that is the only quarter where sufficient data are available for the Commission to perform an analysis of the capability of the rebates to foreclose an as efficient competitor). It is established that Intel awarded conditional rebates ranging from [...]to [...]depending on the underlying assumptions.[1879] Intel's own

---

1877 Last three months of 1997 and entire year 1998.

1878 The formula used is the one outlined in paragraph 351 of the 17 July 2008 SSO. Intel used this formula for its own calculations in the Intel submission of 5 February 2008 related to the SSO.

1879 See recital (1444).

estimation of the number of contestable units at NEC during the relevant period is [...].[1880] Therefore even under the assumption which is the most favourable to Intel, the payment per contestable unit represents [...]/ [...]= [...]. Table 59 summarises the comparison of the effective price with Intel's AAC taking into account the payment made at the level of the OEM.

Table 59 – Comparison of effective price and AAC

Year	Effective price (fully conditional payments) (USD)	Effective price (partially conditional payments) (USD)	AAC as per Intel (USD)	AAC as per Commission (USD)
1997 1998[1881]	[...]			
1999				
2000				
2001				
2002				
2003				
2004				
2005				
2006				
2007				

Source: table in recital (1564) and recital (1567)

(1568) Table 59 shows that, once all factors mentioned in the 17 July 2008 SSO are taken into account, the effective prices of the x86 CPUs are below AAC in years 1997-1998, 2000, 2002 and 2007 under all assumptions, even taking into account Intel's own underestimated assertion of its costs. Using the Commission's more accurate but still underestimated analysis of Intel's costs, effective prices are also below AAC in 2001, 2003 and 2006, whatever the assumption on the conditionality of the payments. Taking into consideration the assumption that none of the payments can be considered to be non-conditional, which, as explained in recital (1533), is the most appropriate assumption in the context of the present analysis, effective prices are also below AAC in 1999 and 2005. In the latter assumptions,

---

1880 Intel submission of 5 February 2008 related to the SSO. Report of Professor [...] and Doctor [...], paragraph 193. The use of this number by the Commission in the present section of the Decision does not mean that the Commission agrees that this represents the actual number of units at risk at NEC in the relevant quarter, as there are indications that the actual number may be smaller and therefore less favourable to Intel.

1881 Last three months of 1997 and entire year 1998.

the effective price is above AAC only in 2004. The difference between the two is [...] ([...]– [...]), which is less than [...]% of the gross ASP of the x86 CPUs concerned.[1882]

(1569) The calculation in recital (1568) is very favourable to Intel. Firstly, it uses the favourable assumptions on the contestable share which were already set out in recital (1558) above. Secondly, it also assumes that the as efficient competitor would be in a position to share the loss of payments by MSH over many different brands. In the event that MSH would only ramp up NEC computers with non-Intel based x86 CPUs, the as efficient competitor would have to compensate for the relevant loss of rebate over a much smaller number of units, hence reducing even further the effective price received by the as efficient competitor for the sales of these units. Thus, assuming that the as efficient competitor might compensate the losses due to the rebate scheme of Intel by selling not only to NEC, but also to all the other OEMs is the most favourable assumption for Intel.

(1570) As was also mentioned in the 17 July 2008 SSO, Intel's payments to MSH also compound the effect of naked restrictions when they are applied to consumer products.[1883]

(1571) Naked restrictions have the effect of limiting the offerings of products based on competitive x86 CPUs. For instance, the conduct addressed in section 4.3.4 of this Decision deprived consumers of the choice of Lenovo notebooks based on non-Intel x86 CPUs.

(1572) That in turn has the effect of limiting the share of the MSH business which can be contested by an as efficient competitor which is subject to a naked restriction. In this case, for instance, MSH cannot even envisage offering an AMD-based Lenovo notebook as no such product is produced. By restricting the share of the MSH business which is contestable, Intel further decreases the number of units which the as efficient competitor can seek to sell via MSH and thereby increases the payment per unit which the as efficient competitor would have to offer MSH to overcome the Intel exclusivity payments.

i) Conclusion

(1573) On the basis of the considerations in section h), it is concluded that during the period from [October] 1997 to 12 February 2008, the Intel payments to MSH were capable of having or likely to have anticompetitive foreclosure effects, either in themselves, or as a reinforcing factor of Intel's conduct vis-à-vis other actors of the

---

1882 This ASP is USD [...] (see table in recital (1548)).

1883 17 July 2008 SSO, paragraph 384 and following.

market, since even an as efficient competitor would have been prevented from entering the relevant part of the market. That effect is particularly marked in the low end of the product range, which is precisely the segment where MSH could have principally envisaged replacing Intel-based products with products based on competing technologies.

4.2.3.7. Conclusion

(1574) On the basis of the analysis outlined above, it can be seen that an as efficient competitor would have had to offer its x86 CPUs to the OEMs mentioned above (Dell, HP, NEC and Lenovo) at a price which was below its AAC to match Intel's conditional offers. In the case of MSH, the as efficient competitor would have had to offer compensation payments to match Intel's conditions which would have resulted in a net price below its AAC. That level of pricing is not viable by any economic benchmark.

(1575) This means that the Intel payments are capable of having or likely to have anticompetitive foreclosure effects, since even an as efficient competitor would be prevented from supplying the OEM's x86 CPU requirements or ensuring that MSH sells PCs based on its x86 CPUs.

(1576) Recital (788) identified that that conduct was ongoing from October 1997 up to at least 12 February 2008.[1884]

4.2.4. The strategic importance of the main OEMs

(1577) Certain OEMs, and in particular Dell and HP, are strategically more important than other OEMs in their ability to provide a x86 CPU manufacturer access to the market. The OEMs in question can be distinguished from other OEMs on the basis of three main criteria, which are outlined in further detail in sections 4.2.4.1-4.2.4.3. Those criteria are:

- market share (section 4.2.4.1);
- strong presence in the more profitable part of the market (section 4.2.4.2); and
- ability to legitimise a new x86 CPU in the market (section 4.2.4.3).

4.2.4.1. Market share

(1578) As shown in table 60, there is a significant gap between the market shares of Dell and HP and those of the next largest OEMs. This applies to the figures for

---

1884 See recital (1640) where the Commission explains how it uses its discretion as regards the relevant period.

overall market share and to the desktop and server segments in particular, and to a lesser extent to the mobile segment.[1885]

Table 60 – Q4 2005 Units Market Share in Percent

OEM	Server	Desktop		Mobile		Total
	Corporate only	Consumer	Corporate	Consumer	Corporate	
Dell	[...]	[...]	[...]	[...]	[...]	[...]
HP	[...]	[...]	[...]	[...]	[...]	[...]
next biggest OEM	[...] (IBM)	[...] (Gateway)	[...] (Lenovo)	[...] (Toshiba)	[...] (ACER)	[...] (Lenovo)

Source: Gartner OEM Data Q2 06

(1579) The total figure illustrates that the weight of some OEMs in one of the sub-segments is not in itself related to their overall weight for all x86 CPUs (for example, Toshiba accounts for [...]% of the total market and Gateway for only [...]% of the total market,[1886] although they have significant market shares in the consumer mobile and desktop segments). Conversely, Dell and HP have a strong presence across the entire market spectrum (server, desktop, mobile) which is reflected by their total market share.

(1580) Table 60 above sets out the market situation for the last quarter of 2005. The trend since the beginning of the first quarter of 2003 shows that HP and Dell steadily increased their market share: Dell's and HP's market shares in the first quarter of 2003 were [...]% and [...]% respectively, and increased to [...]% and [...]% respectively of the total market in the fourth quarter of 2005.[1887] The Gartner OEM charts for 2007[1888]confirm that the combined share of HP and Dell continued to increase, albeit at a lower rate,[1889] and by the fourth quarter of 2006 reached [...]% of all x86 CPU units sold in the market. Thus, the trend of concentration in the industry in the hands of the key OEMs covered by this Decision became continuously stronger over the entire period covered by this Decision.

1885 Gartner "Top 25 OEMs", figures for Q3 2005. The dataset Q3 2005 is used here, because it is the last dataset showing IBM with its consolidated sales for the server and the other segments. Later datasets combine the figures as of Q1 2005 with Lenovo's figures.

1886 Gartner "Top 25 OEMs" yearly reports 2000-2006.

1887 Source: Gartner OEM data Q2 2006.

1888 Gartner computer sales data 2000-2007, June 4, 2008.

1889 Between Q1 2000 and Q4 2003, HP and Dell almost doubled their combined market share, while since Q1 2004, the increases have been more modest.

4.2.4.2. Stronger presence in the more profitable part of the market

(1581) The major OEMs, and in particular Dell and HP, have a greater ability to sell, on behalf of a x86 CPU manufacturer, more expensive x86 CPUs.

(1582) This is illustrated by the fact that [...]. This is shown in table 61.

Table 61 – Top OEM's percentage of Intel's x86 CPU Value and Volume in Q2 2004

OEM	Value	Volume
Dell	[...]	[...]
HP	[...]	[...]
Total	[...]	[...]

Source: Intel[1890]

(1583) Table 61 indicates that Dell and HP purchase a higher percentage of expensive x86 CPUs from Intel. This is due to several reasons: firstly, those OEMs have a strong presence in the server and mobile segments where unit prices are higher due to higher performance requirements (see section III.). Secondly, those OEMs sell more of the newer and/or more advanced x86 CPUs based on their strong presence in the corporate segment. As x86 CPUs are sold by means of a so called "pricing waterfall", the newest x86 CPU product with the more advanced features first starts at a high price point and then decreases in price as soon as a newer product with more advanced features is available.[1891]

4.2.4.3. Ability to legitimise a new x86 CPU in the market

(1584) As a result of their market shares, full coverage of all market segments and their higher shares of more innovative and expensive x86 CPU products, the largest OEMs have a greater ability to legitimise (that is to create consumer trust in the capabilities of a new product) a new x86 CPU in the market, and hence provide an important springboard for a x86 CPU supplier that wants to significantly increase its penetration in the market.

(1585) The large OEMs are aware of their own significance in the market, and their potential ability to change market trends in a way that would have a significant impact on Intel's market capitalisation. For example, in the course of a project (which has been described in section VI.1.3), [...] explored a scenario under which

---

1890 Intel submission of 16 February 2005 (3rd submission), answer to question 6.

1891 For instance, in July 2006, the price of Intel's Pentium 4 (960) decreased compared to the previous month from USD 530 to USD 316. Also in July 2006, Intel's Core 2 Duo (E6700) was introduced in the Desktop LGA775 segment at USD 530. Source: Intel's price lists available at www.epscontest.com, downloaded and printed on 25 July 2007.

Dell and [...]would commit to switch [...]% of their demand to AMD and to buy equity in AMD. [...]'s and Dell's idea was that they could compensate for the loss of Intel rebates on the basis that they would participate in an exponential growth of AMD market value. [...]states that "*if* [the project] *enables AMD to manufacture a higher mix of server MPs* [multiple processors] *and increase desktop prices with Tier 1 customers, their market value will exponentially grow*".[1892]

(1586) In the same vein, Intel itself expressed concern that success for AMD with HP corporate desktops would lead to a "*spill –over possibility of D315 products into corporate space 'legitimizing' AMD platforms*".[1893]

(1587) Similarly, in April 2004, an IDC analyst concluded that: "[...]"[1894]

(1588) The flip-side of large OEMs' importance in legitimising a product is that smaller OEMs are not able to do so in the same way. This is explicitly recognised by one such OEM, Fujitsu Siemens, which in 2006, although it was the next largest OEM after IBM in terms of market share (that is the number four, with an overall share in terms of overall computer sales of [...]% and a corporate market share of [...]%[1895]), expressed concerns vis-à-vis AMD that it saw itself "*as too small to legitimize AMD for enterprise.*"[1896] Intel makes reference to Toshiba, Acer and Lenovo, which, according to Intel, were capable of legitimising AMD because they are strong in particular segments.[1897] That argument, however, does not contradict the argumentation set out in recital (1584): those 3 OEMs together had lower overall market shares than either Dell or HP, and none of them had a significant presence in all segments.

(1589) Legitimisation with the largest OEMs is important for a number of reasons. In the first instance, the brand strength of the top OEMs in the more profitable corporate segment of the market is significant relative to other OEMs. According to one IDC study, Dell, HP and IBM accounted for in excess of [...] of the small and medium sized enterprise market in North America.[1898] Another study quantifies

---

1892 [...].

1893 Exhibit 9 of the HP submission of 23 December 2005, p. 2. Intel's arrangements restricting the commercialisation of AMD-based corporate HP desktops are in fact a part of the present Decision.

1894 IDC analyst [...] on internetnews.com, 23 February 2004. IBM158083.

1895 Gartner OEM data for 2Q2006.

1896 Supporting document 6 to RBB paper of 15 September 2006, AMD Internal Presentation of 27 April 2002, p. 4.

1897 "*Toshiba* [...] *a leader in mobile computing* [...], *Lenovo also* [...] *in the mobile segment,* [....] *Acer* [...] *the fastest growing PC company*". Intel Reply to the 26 July 2007 SO, paragraph 670.

1898 Gartner User survey: Small and Midsize Business PCs and Servers, North America, 2005.

the strength of OEM brands by looking at the willingness of large and medium sized corporate users to buy from a range of OEM brands. As can be seen from table 62, Dell and HP have a significant lead.[1899]

Table 62 – PC Brands Being Considered for Next Budget Cycle by Company Size and Industry (% of Respondents)

Company	ME Enterprises		Large Enterprises	
	Desktops	Mobiles	Desktops	Mobiles
Dell	[...]	[...]	[...]	[...]
HP	[...]	[...]	[...]	[...]
Lenovo	[...]	[...]	[...]	[...]
Next significant choice	[...]	[...]	[...]	[...]

Source: *IDC*

(1590) In addition, corporate customers often look to source their server and desktop requirements from the same vendor. For example, in the case of SMBs in the US, Gartner found that [...]% of IBM desktop PC customers also used IBM servers, while the figure was nearly [...]% for Dell and HP.[1900]

(1591) The sale of IBM's PC division to Lenovo in 2005 therefore reinforced the importance of Dell and HP as they are the only OEMs with a full, worldwide portfolio of desktop, laptop and server products. This is confirmed by an analysis of commercial customers' consideration of OEM brands. "*IDC's 2005 Commercial PC Survey, Part 2*" contains data in that regard. The survey confirms that for large companies, [...]% of respondents would consider buying a Dell notebook and [...]% would consider buying a Dell desktop. Similarly, [...]% of respondents would consider buying an HP notebook and [...]% of respondents would consider buying an HP desktop. Third on the list is Lenovo with slightly lower scores in the large business segment, but then the ratings drop, with no other OEM scoring over [...]%.[1901]

(1592) The significance of the largest OEMs in the corporate segment is further heightened by the fact that they not only offer computers, but also a range of complementary IT services which are often purchased in a package together with the IT infrastructure. In that regard, Gartner found that around [...]% of SMBs

---

1899 IDC's 2005 Commercial PC Survey, Part 2, Table 4, p. 15 and Table 5 p. 17, "Notebook [respectively Desktop] PC Brands Being Considered for Next Budget Cycle by Company Size and Industry (% of Respondents)".

1900 See Gartner, 13 January 2006, User Survey: Small and Midsize Business PCs and Servers, North America, 2005, p. 17.

1901 Annex 3 to the RBB paper of 15 September 2006, pp. 15 and 17.

(Small and Medium Businesses) purchased their PCs directly from the OEM[1902] and that of that group, approximately [...]% indicated that they used the same OEM for service and support.[1903]

4.2.4.4. Intel's arguments

(1593) Intel's Reply to the 26 July 2007 SO on the strategic importance of in particular Dell and HP mischaracterises the Commission's claims.

(1594) For example, Intel states that the "*SO appears to base its argument that AMD would have performed better during the exclusionary period in part on the claim that AMD was excluded from key OEMs, HP and Dell, which the SO portrays as essential gatekeepers that could have conferred instant credibility upon AMD*"[1904]. Similarly, Intel refers to "*the SO's position that Dell and HP uniquely possess the ability to propel AMD forward*"[1905] and "*the SO's theory that HP and Dell serve as unique gatekeepers*"[1906].

(1595) To be sure, the 26 July 2007 SO did state that "*Dell and HP are strategically more important than other OEMs in their ability to provide a CPU manufacturer access to the market*".[1907] Those conclusions have been maintained in this Decision for the reasons set out in this sub-section. However, the conclusion that those two OEMs are found to be "***strategically more important*** [emphasis added] *than other OEMs*" does not equate to Intel's absolute assertions that the Commission had claimed that those two OEMs were "*essential gatekeepers*", "*unique gatekeepers*" or "*uniquely possess*[ed] *the ability to propel AMD forward.*"

(1596) Rather, and as had been initially outlined in the 26 July 2007 SO, the Commission has concluded in recital (1577) that Dell and HP can be distinguished from other OEMs on the basis of three main criteria which are discussed in this sub-section (namely, market share, strong presence in the more profitable part of the market and greater ability to legitimise a new x86 CPU in the market). Intel has attempted to portray the Commission's claims in the absolute, but it has not been able to rebut any of the Commission's findings about the greater relative importance of Dell and HP compared with other OEMs.

1902 The rest go via a retailer.

1903 Gartner, 13 January 2006, User Survey: Small and Midsize Business PCs and Servers, North America, 2005, p. 12.

1904 Intel Reply to the 26 July 2007 SO, paragraph 668.

1905 Intel Reply to the 26 July 2007 SO, paragraph 669.

1906 Intel Reply to the 26 July 2007 SO, paragraph 675.

1907 26 July 2007 SO, paragraph 478.

4.2.5. Harm to competition and consumers

(1597) The conditional rebates and payments described in section 4.2 applied cumulatively to two levels of the distribution chain (namely to the most significant OEMs in the market and to a major retailer). Moreover, as highlighted in section 4.2.3, the OEMs targeted by Intel's conduct not only held a significant part of the market, but were also strategically more important than other OEMs. Targeting such strategically important OEMs has a more significant impact on the overall market than would correspond to their aggregate market share alone. Consequently, the coverage of the abusive practices has to be regarded as significant.

4.2.5.1. Reduction of consumer choice

(1598) Through a variety of rebates which were tailored for each OEM, Intel was able to use the tool of conditional rebates that were capable of inducing loyalty and thereby limiting consumer choice and foreclosing the access of competitors to the market. For Dell, the most significant OEM at the time, the rebate was across the board. For HP, the rebate was targeted at the specific segment (corporate desktops) where HP had shown an interest in expanding its AMD portfolio. In addition, the exclusivity arrangement with MSH deprived competitors of the ability to use certain distribution channels in the consumer segment,[1908] had an influence on the OEMs' choice of their x86 CPU supplier for consumer products and limited the choice of consumers that wanted to purchase their product from MSH. These findings are further explained in the following recitals (1599) to (1603).

(1599) Intel's ability to exert control over the OEMs in question (and indeed all OEMs) derives from its dominant position. The fact that it is an unavoidable trading partner for a product which is a significant element of OEMs' procurement costs, combined with the very low margins on which OEMs operate (see section 3) enables Intel to maintain tight control over the OEMs' dealings through targeted, *ad hoc* exclusionary rebates. As a consequence, Intel has the ability and the incentive to punish OEMs for not remaining loyal. The fact that [...] dollar contracts for x86 CPUs are not in fact formalised via written terms, but appear to

---

1908 The exclusivity arrangement Intel put in place with MSH, which is the largest PC retailer in Europe with a particularly strong presence in Germany and Austria, artificially reduces demand for AMD-based PCs at retail level and thus further narrows the opportunities and available sales channels for competitors. That Intel's conditional payments to MSH not only had the effect of limiting AMD's sales channel but that it was perceived to be Intel's intention to drive AMD out of the market is highlighted by [inspection document from MSH's premises]. This contains an e-mail of [summer] 1999 from MSH's management at its headquarters in Germany to Intel, which refers to the then ongoing contract negotiations between the parties. It states that: "*As regards the contract duration, I can fully understand Intel's position that 36 months may possibly be 24 months too long because if our conduct contributed to bringing AMD into more than existential problems, at least in Europe, then Intel would have reached the aim and would therefore be no longer motivated to invest more money than necessary in extraordinary measures.* [...]."

be agreed via informal arrangements such as handshakes, further improves the ability of Intel to control the loyalty inducing effect of its rebates by leaving a maximum of discretion to Intel on when to cut its rebates.

(1600) In addition, the decision of OEMs (other than Dell which during the relevant period applied a direct sales model) not to incorporate other x86 CPUs than Intel's in their consumer products, and in particular in products to be sold in Europe, was also influenced by the payments made at retail level to MSH. In that regard, the importance that OEMs attach to MSH in relation to their supply strategy is made clear by the following statement relating to the OEMs' computer configuration stemming from Intel's own market intelligence used in preparation for executive meetings with MSH[1909]: "[...]."[1910] Against that background, Intel has focused on a close relationship with MSH in order "[...]."[1911]

(1601) The [flagship brand of OEM Z] episode described in section VI.2.8.4.6 is one example of how MSH used its influence on OEMs in practice. Although [OEM Z] had initially planned to introduce a lower price range product equipped only with AMD x86 CPUs, it also later introduced low range models with Intel x86 CPUs after *"Intel and MSH* [had] *tried to persuade* [OEM Z] *to offer these cheaper models alternatively also with Intel CPUs."*[1912]

(1602) In addition, [inspection document from MSH's premises] of [autumn] 2004 illustrates the OEMs' willingness to take into account MSH's exclusively Intel-based demand due to its strategic importance at retail level. The document consists of an internal e-mail communication at MSH relating to the launch of an AMD-based "Germany-PC" planned by [OEM]. MSH's management at the headquarters in Germany asked its IT Purchasing Department in this regard: *"and which offer does* [OEM] *make us* (...) *"they" cannot sell AMD through us!!!!! This really seems a bit "strange"."* The query was answered as follows: *"You are definitely right that some things are a bit "strange" here but I have not been completely idle. We will certainly receive during the course of this week an additional offer from* [OEM]. *The then offered configuration will, except for the CPU (!), be 100% identical to the Germany-PC* [OEM's AMD-based offer]. *Like this we also have the possibility to offer the same (Intel-based) configuration at the same price."*[1913] This

---

1909 The configuration of a computer, also referred to as the line-up, is the second essential aspect that drives the sales of computers, the first being the price.

1910 Document FK33, which contains a briefing for an executive meeting with MSH on 30 July 2003, p. 2. See for example also Document FK56 of 13 January 2003, p. 4: "[...]"

1911 Document FK 18 of 10 October 2005, p. 2.

1912 [MSH submission].

1913 [...], original in [...].

again demonstrates that MSH exerts a considerable influence on OEMs' product offerings in Europe. Despite [OEM]'s initial decision to launch a special offer with AMD only, it eventually agreed to introduce an Intel-based alternative at MSH's request.

(1603) As a result of Intel's rebates and payments, end-customers were artificially prevented from choosing other products on the merits (price and quality of the respective x86 CPUs), since Intel's conduct prevented the competitors' product from being offered with certain individual OEMs and with MSH. In this case, this excluded, limited or delayed AMD x86 CPUs in the market. As such, Intel's exclusionary practices had a direct and immediate negative impact on those customers who would have had a wider price and quality choice if they had also been offered the product of their favourite OEM and/or retailer with x86 CPUs from Intel's competitors.

4.2.5.2. Relevance of the choice between combination of brands for consumers

(1604) In its Reply to the 26 July 2007 SO, Intel refers to Professor [...], according to whom "*European PC and server OEMs sold systems with AMD microprocessors in every segment and every price point during the SO period*"[1914]. Nevertheless, Professor [...]'s report does not address the reduction of choice which the Commission has identified.

(1605) In this regard, the magnitude of the consumer harm associated with such a loss of choice can be dependent on the remaining availability of close substitutes in the market. The loss of choice may be particularly palpable for consumers if the foreclosed products are manifestly different from the consumer's perspective from the remaining Intel-based products and those AMD-based products delivered by other OEMs. The loss is likely to vary from one customer to another. Nevertheless, there are strong indications that Intel's practices with respect to the OEMs in question in themselves prevented important and genuinely different AMD-based products from ever being brought to the market in significant quantities.

(1606) In that regard, an OEM is much more than simply a reseller of x86 CPUs. Each OEM undertakes significant efforts in developing its product lines, building up a reputation and investing in its brand. As Dell itself states in its Form 10-K:[1915]

1914 Intel Reply to the 26 July 2007 SO, paragraph 686.

1915 Form 10-K for the Fiscal Year Ended January 28, 2005, downloaded and printed on 26 March 2009 from http://www.sec.gov/Archives/edgar/data/826083/000095013405004423/d22995e10vk.htm, p. 2.

"Dell is focused on developing standards-based technologies that incorporate highly desirable features and capabilities at competitive prices. Management believes that Dell employs a unique and inherently better collaborative approach to product design and development. With direct customer input, Dell's engineers work with a global network of technology companies to architect new system designs, influence the direction of future development, and integrate new technologies into Dell's products. This collaborative approach enables Dell to quickly and efficiently deliver new products and services to the market. During fiscal 2005, Dell's research, development, and engineering expenses were USD 463 million, compared with USD 464 million for fiscal 2004 and USD 455 million for fiscal 2003."[1916]

(1607) From a customer's point of view, a Dell computer with an AMD x86 CPU would as such not be identical to that of another OEM, or of a generic, so-called white box computer with the same AMD x86 CPU, and that is why the argumentation of Professor [...] as referred to in the Intel Reply to the 26 July 2007 SO is invalid. This is confirmed by an analysis of commercial customers' consideration of OEM brands. In that regard, as has been highlighted in section 4.2.3 (*IDC's 2005 Commercial PC Survey, Part 2*), there is a significant brand preference for first Dell, and then HP products.

(1608) Indeed, internal evidence from the major OEMs themselves indicates that there was a real and increasing demand from customers for a combination of the respective OEM's product with an AMD x86 CPU. For example, it is apparent that HP had received expressions of interest in getting an HP corporate desktop with AMD x86 CPUs.[1917] IBM noted that by the end of 2004, it had "[...]."[1918]

(1609) Similarly, the choice of consumers is limited through the payments to MSH. MSH's significant brand strength, built on its reputation of having a comprehensive selection of products and of selling the best brands at the lowest price,[1919] plays a decisive role in that regard. MSH has traditionally been viewed as a one-stop-shop

---

1916 In comparison, Dell's gross margin was USD 9 015 million, USD 7 552 million and USD 6 349 million in 2005, 2004 and 2003 respectively.

1917 Presentation by [HP executive] dated June 13, 2002, slide 12 entitled "*343 US IT managers have petitioned for AMD desktop from top-tier OEM*" exhibit 14 of the [HP executive]deposition, annexed to HP submission of 23 December 2005.

1918 E-mail of 27 December 2004, IBM 124724.

1919 According to a recent market survey, price is by far the most important factor when choosing a computer at retail level, see Mintel Report, p. 66. Quality and therefore also CPU awareness play a secondary role, in particular because consumers tend to lack the respective technical knowledge to develop a preference for Intel or AMD CPUs.

for the electronic needs of many consumers. Intel has described MSH's pull in internal briefings as follows: "[…]"[1920] That statement also shows that consumers perceive Media Markt (MSH's brand) as a brand to which they attach value. As such, a significant body of consumers is likely to derive utility from being able to purchase computers in MSH outlets. Indeed, Intel's own perception of the market from the above quote is that consumers in countries with a high MSH market share first choose their retailer, namely MSH, and then, once the decision about the retailer has been made, decide to compare the offered computers in that retailer's offering. Consequently, once a consumer has chosen MSH as his retailer, he will not further compare MSH's offering with that of other retailers. Therefore, consumer welfare suffers through the fact that consumers are not able to find AMD-based computers (of a particular brand) at MSH even if AMD-based computers (of a particular brand) can be found at other retailers.

(1610) That conclusion is further confirmed by the fact that the alternatives consumers are left with, in particular in countries where MSH is particularly strong such as Germany and Austria,[1921] are predominantly smaller retailers.[1922] In view of the consequently limited sales volume of those retailers, the product range they offer is frequently restricted to some of the most important OEM brands. Given the must-stock nature of Intel products at OEM level and the fact that some of those OEMs exclusively or quasi-exclusively integrate Intel x86 CPUs, AMD offerings are frequently fairly limited in number and in the first place restricted to those OEMs which are not aligned with Intel's strategy.[1923]

(1611) Furthermore, a federation of European consumer associations which joined this case as an interested third party has indicated that non-technically minded consumers may not be sufficiently informed to realise that, at least in certain cases,

---

1920 See for example Document FK33 of 25 July 2003, p. 2, and Document FK18 of 10 October 2005, p. 2.

1921 According to GfK data submitted by MSH [...], MSH's sales value based on market share in Austria varied between […]% and […]% (2004 – 2007) and in Germany between […]% and […]% (2000 – 2007). It has to be noted that these market shares might by slightly overstated due to a limitation of market coverage and certain inaccuracies in the available data (see footnote 798 above).

1922 As for Germany, see Document FK31 of 30 May 2007 found at Intel's premises in [..]. According to the table attached to this document (p. 2), MSH had a market share of […]% in 2006, followed by […]with […]%, […]with […]% and a number of smaller PC retailers and food chains that also sell non-food products with […]% or less.

1923 In particular the practices related to Lenovo, Acer and Dell limited AMD's ability to sell products via MSH's smaller competitors. The practices related to Lenovo as described in the present Decision block AMD from selling CPUs in Lenovo computers via Lenovo's smaller retail distribution partners. The same is the case in relation to the product delays related to Acer described in the present Decision. Similarly, the conduct described in the present Decision relating to Dell prevented AMD from selling CPUs into the EU consumer segment between 2002 and 2005 via Dell's direct distribution channel.

AMD-based PCs may provide them with equivalent performance at a lower price.[1924] This further confirms that many consumers do not compare the computer offerings between different retailers on the basis of the various inter-related and complex technical features of a computer (including the brand and performance of the x86 CPU), but are more influenced in their choice by the retailer's brand name. For those consumers, choice is limited if the specific retailer (namely MSH) has entered into an upstream exclusivity agreement.

4.2.5.3. Longer term impact due to the weakening of Intel's main competitor

(1612) Intel, in the report from Professor [...] which accompanies its Reply to the 26 July 2007 SO, claims that consumers cannot be worse off if they are buying a product at a lower price.[1925] However, this in itself does not address the argument that product variety has suffered. Moreover, not all rebates genuinely benefit consumers. As regards conditional rebates by a dominant company, the fact that a "rebate" can be leveraged by the dominant company from its non-contestable share into the contestable share may allow that company to foreclose as efficient, or even more efficient rivals, even if its overall average price is higher than that of its rivals. This is therefore to the detriment of consumers and competition both in the short and in the long term, in terms of price, choice and innovation.

(1613) The emergence of AMD as a competitive threat to Intel was dependent on the availability of investors willing to finance risky investments in research and development as well as AMD production facilities. Such investments are only undertaken when there is a prospect of an adequate return if the research and development is successful and well implemented. Given Intel's conduct, AMD's products did not reach final customers in the volumes that their quality and price would have justified had competition been exclusively on the merits. Intel claims in its reply that the "*only limit on AMD's growth came not from Intel, but from AMD' chronic capacity constraints.*"[1926] Contrary to that claim, as is set out in section 4.4.3, AMD did not suffer from such structural capacity constraints. Therefore, the reduced choice of AMD products caused clear harm to consumers.

(1614) As such, Intel's behaviour deprived AMD and its investors of a return on their research and development investments which would have been proportionate to the success of their inventions. If left unfettered, the prospect of a continuation of Intel's strategy in the future would reduce the incentive to undertake new

---

1924 Intervention of BEUC in the Oral Hearing on case No COMP/C-3/37.990, 12 March 2008.

1925 Intel Reply to the 26 July 2007 SO, paragraph 692.

1926 Intel Reply to the 26 July 2007 SO, paragraph 816.

investments in developing new x86 CPUs because investors could not expect an appropriate return on their investment, even if AMD were successful in developing x86 CPUs that would respond to customer demand.

(1615) AMD's limited access to the main OEMs is likely in itself to have had significant negative impacts on its ability to recover its research and development costs. In that respect, the Commission recalls that Dell and HP are the two largest OEMs, that they cover the entire spectrum of the market, and that each has twice as many computer sales as the next largest OEM, Lenovo.[1927] In 2005 and 2006, Dell and HP combined accounted for 35% of Intel's total net revenue.[1928] The value of each of Dell's and HP's annual purchases from Intel in those years exceeded the value of AMD's total worldwide sales.[1929] Dell's and HP's business therefore constitute a significant potential expansion opportunity for AMD.

(1616) To summarise, the above arguments and evidence show that Intel's conditional rebates and payments described in section 4.2 induced the loyalty of key OEMs and of a major retailer, the effects of which 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 significant reduction of consumer choice and in lower incentives to innovate.

4.2.6. Objective justifications and efficiencies

4.2.6.1. Introduction

(1617) Intel first argues that the Commission has ignored its claims regarding objective justification made before the 26 July 2007 SO was issued.[1930]

(1618) Referring to paragraph 509 of the 26 July 2007 SO, Intel states "*it appears that the Commission is saying that since Intel did not state, in its responses, that the Dell, HP, and NEC agreements were conditional, the Commission is entitled to*

1927 See recital (1578).

1928 See Intel 2006 SEC Form 10-K, downloaded and printed on 26 March 2009 from http://www.sec.gov/Archives/edgar/data/50863/000089161807000111/f23627e10vk.htm#tocp.#tocp., p. 40, Intel's SEC Form 10-K, downloaded and printed on 14 January 2009 from http://www.sec.gov/Archives/edgar/data/50863/000089161806000089/f12963e10vk.htm, p. 11.

1929 Intel's revenues in 2006 were approximately USD 35 billion and approximately USD 39 billion in 2005, see Intel Form 10-K, *op. cit.*, footnote 1928. Thus, the 35 % figure relating to its two largest customers is c. USD 13 billion. AMD's net revenues in 2005 and 2006 were c. USD 6 billion, see AMD 2006 SEC Form 10-K, downloaded and printed on 3 April 2009 from, http://idea.sec.gov/Archives/edgar/data/2488/000119312507044191/d10k.htm. Consequently, Intel's revenues from its the two major customers are more than twice as big as AMD's total revenues.

1930 Paragraph 821 of Intel Reply to the SO of 26 July 2007.

ignore any objective justification which has been proffered. If that is the Commission's reasoning, it is quite extraordinary and contradicted by the established case-law which, as set out above, requires the Commission to evaluate any objective justification put forward in relation to allegedly abusive conduct. That requirement does not disappear in this case simply because Intel did not admit, but instead contested, one factual element of the Commission's objection."[1931]

(1619) It is, in fact, Intel's position that has no basis in substance, nor indeed in the case-law. The Court has stated that "*although the burden of proof of the existence of the circumstances that constitute an infringement of Article 82 EC is borne by the Commission, it is for the dominant undertaking concerned, and not for the Commission, before the end of the administrative procedure, to raise any plea of objective justification and to support it with arguments and evidence. It then falls to the Commission, where it proposes to make a finding of an abuse of a dominant position, to show that the arguments and evidence relied on by the undertaking cannot prevail and, accordingly, that the justification put forward cannot be accepted*".[1932]

(1620) Intel's objective justification arguments put forward before the Reply to the Commission's SO of 26 July 2007 and the majority of the arguments contained in that Reply are fundamentally flawed,[1933] because they relate more generally to conduct to which the Commission did not object (namely discounting/provision of rebates), and not to conduct to which the Commission did object (conditions associated with the discounts/rebates).[1934]

1931 This also applies to Intel's procedural argument that an additional Statement of Objections would be required for the issue of objective justification. In this regard, Intel states that: "*since the Commission has not yet carried out any analysis of objective justification* [that is to say after the 26 July 2007 SO], *if it now proceeds to do so it will have to embody that in a supplemental SO, giving Intel a proper opportunity to respond in written and oral submissions, before the Commission can rely on that analysis in an unfavourable decision against Intel.*" This logic cannot be justified. The preliminary conclusion that Intel's conditional rebates were abusive (which includes an analysis that they were not objectively justified) was set out in the 26 July 2007 SO. Intel therefore had a full opportunity to respond in both written and oral submissions on the question of objective justification.

1932 Case T-201/04 *Microsoft v Commission*, paragraph 688.

1933 In paragraph 822 of its Reply to the 26 July 2007 SO, Intel implies that it would have made such arguments in previous submissions but fails to make any specific reference to any specific submission. Therefore, even if Intel would have made such arguments in the abstract before knowing what the Commission's objections against its conduct were (that is to say before it had received the first SO on 26 July 2007), it would have been under the obligation to substantiate how any such arguments relate to the Commission's objections and to explain how they justify the conduct that constitutes the abuse in order to meet the required standard of proof. As Intel has failed to do so, any such arguments cannot be taken into account in the decision.

1934 Intel Reply to the 26 July 2007 SO, paragraphs 699-726.

(1621) As shown in section 4.2, the conditional rebates in question did not apply uniformly to all customers or groups of customers and had no sales targets or any particular volume requirements that typically would serve as a potential first step to justify efficiencies resulting from the sales of a maximum quantity of products. The feature of the rebates that had an impact on the OEMs' freedom to choose were the relevant exclusivity or quasi-exclusivity conditions that sought to ensure that OEMs cover all or most of their requirements from Intel. Therefore, to the extent that Intel does not address that feature of its rebates, the arguments it puts forward are in general not suitable to justify the conduct that is the subject of this Decision. Rather, it attempts to justify conduct that is different from the conduct that constitutes the abuse.

(1622) It can therefore be concluded that Intel has failed to demonstrate any objective justification for the conditional rebates in question without any further analysis.

(1623) Nevertheless, in the following sections (4.2.6.2 and 4.2.6.3), the Commission will address Intel's arguments on objective justification in the light of the fact that the rebates in question were conditional as described above, and will analyse in how far that conduct would be suitable to attain the efficiencies argued by Intel in a proportionate way.

(1624) In order to objectively justify its conditional rebates, Intel would have to show that there is an efficiency (or another legitimate objective other than exclusion of competitors), that the conduct is capable of achieving the legitimate goal, that it had no equally effective alternative in achieving the legitimate goal with a less restrictive or less exclusionary effect and finally that the conduct is "proportionate", in the sense that the legitimate objective pursued by Intel should not be outweighed by the exclusionary effect.[1935]

(1625) Intel submits two different sets of arguments in order to justify its rebate schemes: (1) that by using a rebate, Intel has only responded to price competition from its rivals and thus met competition;[1936] and (2) that the rebate system used vis-à-vis each individual OEM was necessary in order to achieve important efficiencies

---

1935 Case C-95/04 *British Airways v Commission*, paragraph 86. It is noteworthy that paragraph 90 of Case 85/76 *Hoffmann-La Roche*, to which Case C-95/04 *British Airways*, paragraph 84 refers, excludes in principle an efficiency defence for fidelity rebates, given that "*they are not based on an economic transaction which justifies this burden or benefit but are designed to deprive the purchaser of or restrict his possible choices of sources of supply and to deny other producers access to the market*" and because a fidelity rebate, "*unlike quantity rebates exclusively linked with the volume of purchases from the producer concerned, is designed through the grant of a financial advantage to prevent customers from obtaining their supplies from competing producers*".

1936 Intel Reply to the 26 July 2007 SO, paragraphs 700 – 705.

that are pertinent to the x86 CPU industry.[1937] The two broad sets of argument introduced by Intel will be addressed in turn.

4.2.6.2. The meet competition defence

(1626) Intel argues that its rebates merely responded to competition by AMD as "*OEMs made sure that it* [Intel] *knew, that OEMs were willing to shift substantial blocks of purchases to AMD unless Intel made price concessions in response to AMD's price competition. (...) Intel was better off making sales at the discounted prices than not making them, without regard to the impact of winning the sale on AMD.*"[1938] In other words, Intel essentially argues that certain chunks of demand were available for competition in the market and that through its rebates, Intel was merely adjusting its price to AMD's price offered for those specific units.

(1627) While price competition constitutes the basic mechanics of a market, according to the Court, a dominant player cannot make unlimited use of such pricing responses. The Court held that: "*it follows from the nature of the obligations imposed by Article 82 EC that, in specific circumstances, undertakings in a dominant position may be deprived of the right to adopt a course of conduct or take measures which are not in themselves abuses and which would even be unobjectionable if adopted or taken by non-dominant undertakings. (...) Even if alignment of prices by a dominant undertaking on those of its competitors is not in itself abusive or objectionable, it might become so where it is aimed not only at protecting its interests but also at strengthening and abusing its dominant position.*"[1939]

(1628) Before examining the detail of the argument, an inherent basic contradiction must be pointed out. Intel has on numerous occasions argued that AMD was failing in the market because it was capacity constrained and did not offer competitive products (for more detail, see section 4.3). However, such a description of market conditions is not consistent with Intel's contention in the present context that it offered the rebates in order to compete against particular counteroffers of AMD. It is either Intel's argument that due to lack of capacity and because of poor products from AMD, there was no need to compete or that there was a credible AMD offer, in which case its products could not have been unavailable and of bad quality. Both assertions cannot be simultaneously true.

1937 Intel Reply to the 26 July 2007 SO, paragraphs 706 – 726.

1938 Intel Reply to the 26 July 2007 SO, paragraphs 705.

1939 Case T-340/03 *Wanadoo v Commission*, at paragraph 186. See also case C-202/07 P *France Telecom v Commission.*

(1629) As regards the detail, Intel's factual description of how the market mechanics work is incorrect. As shown in the description of the specific pattern of conduct vis-à-vis individual OEMs, Intel did not structure its rebate scheme in a way that would have been able to address specific chunks of demand of those OEMs via specific rebate responses. In the case of Dell, Intel agreed with Dell on discounts calculated as a [...]from Intel that constituted 100% of Dell's demand. Such a discount could not be adjusted and was not adjusted to concrete offers by AMD on certain chunks of Dell's demand. Consequently, Intel's claim that it responded to competition from AMD through conditional rebates is not consistent with the actual design of the rebate scheme.

(1630) Intel's argument is also flawed because Intel did not simply lower its overall prices in order to respond to a competitive threat, but it created an individualised pricing system in which certain customers received special rebates that were conditioned upon exclusivity or quasi exclusivity. Thus, the abuse in this case is not determined by the size of the rebate but by the conditions attached to the payment of the rebate, namely the exclusivity and quasi-exclusivity conditions. Such conditions are unnecessary for responding to price competition and therefore their principal aim cannot be considered to be addressing price competition. Consequently, Intel's specific individualised conditional exclusivity rebates cannot be justified by a meet competition defence.

(1631) Finally, even if it were to be admitted that such a defence in this case were possible, which is not the case, Intel has not substantiated in any way how the mechanism of responding to competitive price threats would have worked in practice. In particular, Intel has not addressed the fact that x86 CPUs are not commoditised to a level that would permit a proportionate response to a competitive threat without a precise description of the quality of the x86 CPU competitive counteroffer, and the price at which that offer was made. In that regard, Intel has not submitted any evidence that it knew what counteroffer was made by AMD. Therefore, Intel's contention that its exclusivity/quasi-exclusivity rebates were responses to price competition remains speculative in nature. It has no foundation in any exchanges between OEMs and Intel that would be precise enough. The meet competition defence cannot therefore be accepted in this case.

4.2.6.3. The efficiency defence

(1632) Intel also submits that there were 4 different types of efficiencies that were attained by the exclusivity requirements of its rebates: lower prices, scale economies, other cost savings and production efficiencies, and risk sharing and marketing efficiencies.[1940] Intel further argues that the conditions attached to the

[1940] Intel Reply to the 26 July 2007 SO, paragraphs 706 - 721.

rebates would have been indispensable to attain those efficiencies[1941] and that their impact on competition would have been minor since AMD expanded during the investigation period.[1942]

(1633) On the basis of Intel's arguments and evidence put forward on those points, it is not possible to accept an efficiency defence for the conditional rebates that are the subject matter of the abuse. Intel has failed to substantiate the existence of the claimed efficiencies and how the exclusivity/quasi exclusivity conditions attached to the rebates were indispensable or even suitable to attain them. This will be addressed in further detail for each claimed efficiency in sub-sections a) to d).

a) Lower Prices

(1634) Intel argues that "*the intense price competition between Intel and AMD, and the discounts granted by Intel in response to competition, produced very substantial consumer benefits in the form of lower consumer prices*".[1943] However, that argument is not a justification for the conditionality associated with the rebates, since Intel fails to demonstrate why conditionality of the rebate would produce any additional "lower prices" benefits compared to a rebate that would not be conditional upon exclusivity or quasi exclusivity.

b) Scale economies

(1635) Intel argues that its rebates are justified by economies of scale.[1944] The x86 CPU industry is indeed characterised by very substantial economies of scale.[1945] In that context, Intel further observes that "*the goal of efficiently utilizing [Intel's] manufacturing capacity and exploiting economies of scale could be considered for discounting down a price equal to AAC*".[1946]

(1636) However, Intel's arguments do not justify its conduct. In the first place, Intel has failed to demonstrate what the precise efficiencies in the concrete context of its business relationship with specific OEMs would be, and how the exclusivity/quasi exclusivity conditions of the discounts was capable of achieving those concrete efficiencies. Secondly, Intel has not substantiated that efficiencies of scale could

---

1941 Intel Reply to the 26 July 2007 SO, paragraphs 722 - 725.

1942 Intel Reply to the 26 July 2007 SO, paragraph 726.

1943 Intel Reply to the 26 July 2007 SO, paragraphs 709-713; the quote is in paragraph 711.

1944 Intel Reply to the 26 July 2007 SO, paragraphs 714-715.

1945 This has been stated by the Commission in paragraph 36 of the 26 July 2007 SO and is confirmed by Intel in paragraph 714-715 of its reply to the 26 July 2007 SO.

1946 Intel Reply to the 26 July 2007 SO, paragraphs 714-715; quote is in paragraph 715; Professor [...]'s Report at paragraph 311.

not be generated by another discounting structure or by undiscounted lower unit prices for all customers, in other words, that that there is no other equally effective pricing alternative that would have less adverse impact on competition.

c) Other cost savings and production efficiencies

(1637) Intel further argues that its fabrication facilities can be utilised in a more cost effective way if it can predict its sales volume and the product mix.[1947] In relation to those claimed efficiencies, Intel again fails to show precise cost savings related to certain additional sales made to the OEMs covered by the present Decision. In particular, it fails to show how a certain part of an OEM's demand secured by the exclusivity/quasi exclusivity conditions created such cost savings. The prediction of sales volumes and the product mix depends on the foreseeable quantity of OEMs' purchases with Intel and not on the absence or limitation of purchases with Intel's competitors. Finally, the mere fact that such cost savings may exist in principle does not in any way justify the exclusivity/quasi exclusivity conditions concretely relating to specific OEMs.

d) Risk sharing and marketing efficiencies

(1638) Intel then further argues that it therefore has an interest in encouraging OEMs to produce additional platforms and thus believes that volume targets connected to discounts are in principle useful.[1948] However, Intel then concludes that such volume targets (which were not the basis for the Commission to preliminarily conclude on an abuse in its 26 July 2007 SO or in this Decision) are less advantageous for the OEMs since "*demand for its product is uncertain and subject to fluctuation*". Therefore a discount conditional upon sourcing a certain percentage of the OEMs' needs from Intel would "*allow OEMs to shift the risk of uncertain business conditions*" to Intel while Intel would benefit from the more efficient utilisation and efficiency.[1949] Again, that argument also fails to provide any justification for Intel's conditional rebates as long as the precise efficiencies Intel would further by its exclusivity condition are not identified. Moreover, Intel fails to show on what basis shifting a risk of uncertain business conditions to a supplier constitutes an efficiency. Finally, Intel has not shown that any such efficiency could not be achieved by pricing systems that would have less adverse impact on competition.

(1639) To summarise, none of the efficiency defences put forward by Intel provide a relevant justification for the conduct in question.

1947 Intel Reply to the 26 July 2007 SO, paragraphs 716-717.

1948 Intel Reply to the 26 July 2007 SO, paragraph 718.

1949 Intel Reply to the 26 July 2007 SO, paragraph 719. See also Report of Professor [...], section 3.1.

4.2.7. Conclusion

(1640) In the light of sections 4.2.2 to 4.2.6, it is concluded that the conditional rebates granted by Intel to Dell, HP, NEC and Lenovo as well as the conditional payments granted by Intel to MSH constitute an abuse of a dominant position under Article 82 of the Treaty and Article 54 of the EEA Agreement. The duration of each abusive conduct is as follows:

(1) Dell: December 2002 to December 2005, the period covered by the contemporaneous evidence referred to in section VI.2.3.4 and Dell's company statement;

(2) HP: November 2002, the start of the HPA1 agreement, to May 2005, the expiry of the HPA2 agreement;

(3) NEC: October 2002, the start of the Santa Clara agreement to November 2005, the last month covered by NEC's submission that the Santa Clara agreement was still in force;

(4) Lenovo: Lenovo: January to December 2007, the duration of the Lenovo/Intel Memorandum of Understanding;

(5) MSH: from October 2002 until December 2007. It is to be noted that recital (1576) identified that the Intel conditional payments to MSH have been ongoing from October 1997 to at least 12 February 2008. However, the Commission uses its discretion not to pursue in the present Decision Intel's conduct targeted only at MSH for the periods from October 1997 to September 2002 and after December 2007.

The Commission also notes that the behaviours were part of a single continuous strategy aimed at foreclosing AMD.[1950]

4.3 Naked restrictions

4.3.1. Introduction

(1641) This section will address Intel's conducts restricting the commercialisation of specific AMD-based products by HP, Acer and Lenovo. The abusive conducts relating to naked restrictions vis-à-vis those OEMs have a common strand: they relate to payments by Intel in order for the OEM in question to delay, cancel or in some other way restrict the commercialisation of specific AMD-based products.

(1642) The scope of those restrictions is more specific than that of the conditional rebates or payment arrangements between Intel and certain trading partners which were analysed in section 4.2. They are shorter in duration and focused on a specific product or line of products or specific sales channels, whereas rebate arrangements

1950 See section VII.4.5.

are longer in term and cover at least entire business segments. However, as will be explained in more detail in section 4.3.5, the two types of conduct complement each other and form part of a single strategy to foreclose AMD from the x86 CPU market. Within that single strategy, naked restrictions constitute tactical moves to foreclose AMD from well-identified specific products or sales channels of an OEM while conditional rebates constitute more strategic devices to foreclose AMD from entire segments of OEMs' demand.

(1643) In that regard, in *Irish Sugar*, the Court of First Instance concluded that it constituted an abuse when the dominant undertaking agreed *"in 1988 with one wholesaler and one retailer to swap competing retail sugar products, i.e. Eurolux 1 kilogram packet sugar of Compagnie française de sucrerie, for its own product."*[1951] Through the swap arrangement in question, the dominant firm prevented the competitor's brand from being present on the market since the retailers no longer had a stock of "Eurolux" branded sugar and instead replaced those volumes with the sugar of the dominant undertaking. In that regard, the Court of First Instance found that *"the applicant undermined the competition structure which the Irish retail sugar market might have acquired through the entry of a new product, sugar of the Eurolux brand, by carrying out an exchange of products, in the circumstances referred to above, on a market in which it held more than 80% of the sales volume."*[1952] [1953] In addition, a violation of Article 82 may also result from the anticompetitive object of the practices pursued by a dominant undertaking.[1954]

(1644) The remainder of this section is structured as follows. Sections 4.3.2- 4.3.4 will address Intel's conducts vis-à-vis HP, Acer and Lenovo respectively. Section 4.3.5 will address Intel's general arguments, and section 4.3.6 will set out the conclusions.

4.3.2. HP

(1645) As explained in section V, HP decided to launch an AMD-based commercial desktop, the D315, in August 2002. HP took that decision on the grounds that

---

1951 Case T-228/97 *Irish Sugar v Commission*, para. 226.

1952 Case T-228/97, *Irish Sugar v Commission*, para. 233.

1953 See also Case T-203/01 *Michelin II*, op. cit, paragraph 241 and Joined Cases T-24/93, T-25/93, T-26/93 and T-28/93 *Compagnie Maritime Belge and Others v Commission*, op. cit, para 149; confirmed by Joined Cases C-395/96 P and C-396/96 P *Compagnie Maritime Belge Transports and Others v Commission op. cit.*, paragraph 118-120.

1954 Case T-203/01, *Michelin II*, op. cit, paragraph 241; Joined Cases T-24/93, T-25/93, T-26/93 and T-28/93 *Compagnie maritime belge*, op. cit, para 149, confirmed by Joined Cases C-395/96 P and C-396/96 P *Compagnie Maritime Belge Transports, op. cit.*, paragraph 118-120. See also Case C-202/07 P *France Télécom v Commission* not yet reported, paragraphs 107 to 113.

AMD's market acceptance was growing, that there was customer demand for AMD-based commercial desktops, and that having both Intel and AMD-based desktops in its portfolio, that is to say pursuing a dual-source strategy, made a better business case than being Intel-exclusive.

(1646) To that end, on 4 March 2002, HP and AMD entered into a Memorandum of Understanding[1955] setting out general principles of co-operation between the two companies and on 19 August 2002, HP's AMD-based D315 model was introduced onto the US market.[1956]

(1647) However, Intel reacted negatively to the intensified HP-AMD relationship and following the AMD launch of 19 August 2002, it halted the negotiations for a desktop block rebate agreement that it had been discussing with HP during the previous months[1957] and which had already reached the finalisation stage by that time.[1958] The HP-Intel negotiations recommenced in the autumn of 2002[1959] In that context, it is important to recall that Intel is an unavoidable trading partner. As such, HP would have had little choice in practice but to resume negotiations with Intel given that OEMs depend on Intel for the most important single hardware component in their computers.[1960]

(1648) With an effective date of November 2002, HP and Intel entered into a year-long alliance agreement (HPA1),[1961] which after a year was extended on a monthly basis until May 2003, and was then followed by a similar year-long alliance agreement (HPA2).[1962] Under HPA1, Intel paid HP [...]in total, during the interim period, [...]in total, and under HPA2, [...]in total (see recital (346)).

(1649) As set out in section VI.2.4.4, the rebates provided for under the HPA1 and HPA2 agreements, in addition to the 95% MSS condition, were also subject to the

---

1955 HP-AMD Memorandum of Understanding of 4 March 2002, HP submission of 23 December 2005, Exhibit 12 to [HP executive]deposit, p. HP0000183. See also HP submission of 23 December 2005, response 2.12(a), p. 6.

1956 HP submission of 23 December 2005, answer 2.15, and Appendix 12.

1957 HP submission of 23 December 2005, answer 2.15.

1958 Email from [HP executive]to [HP executive]and others of 15 July 2002 entitled "*Negotiations Update*". Annex 150 to Intel Reply to the 26 July 2007 SO. See also HP submission of 23 December 2005, Appendix 11.

1959 HP submission of 23 December 2005, answer 2.18, p. 7.

1960 See sections VII.3.3.2 and VII.3.4.1 of this Decision.

1961 HPA1 agreement, HP submission of 6 August 2004, Annex 3, pp. 3 and 4.

1962 HPA1 agreement, HP submission of 6 August 2004, Annex 3, pp. 1 and 2.

following unwritten conditions restricting the commercialisation of HP's AMD commercial desktops (see recitals (348) and (413)):

- HP's AMD-based business desktops could only be sold to SMB and GEM customers, and not to mainstream business customers;
- HP's channel partners could not sell AMD-based business desktops, meaning that they could only be obtained direct from HP; and
- HP would delay the launch of its AMD-based business desktop (D315) in the EMEA [Europe, Middle-East and Asia region] region by six months.

(1650) HP stated that the Intel rebates were "*a material factor*"[1963] in HP's final decision to enter the HPA agreements and, thereby, to scale down its original plans for the deployment of AMD-based products. In that respect, HP stated that it "*can confirm that Intel's inducements (in particular the block rebates) were a material factor in determining HP's agreement to the unwritten conditions. As a result:*

a) HP BPC found it undesirable to offer AMD-based desktops to any substantial degree to "enterprise" customers;

b) HP BPC stayed at least 95% aligned to Intel;

c) HP BPC did not take advantage of AMD's one million free CPUs: HP only took a small number of these because the restricted distribution model adopted for the D315 and the other HPA1 requirements meant that HP was not producing the D315 in any significant volumes."[1964]

(1651) HP also submitted that "*a deferred launch of HP's AMD-based business desktop in the EMEA region was understood by HP to be an unwritten condition of the HPA1 agreement. HP did not launch the D315 in the EMEA, nor did HP launch in the EMEA the D325 AMD-based business desktop product (the successor product to the D315).*"[1965] (see condition c) in recital (348)). The D325 was launched in June 2003.

(1652) In addition, as regards the channel restrictions according to which HP could sell AMD-based corporate desktops only directly itself and then only to certain segments, "*HP confirms that* [HP Executive], *in charge of HP EMEA PSG* [Product Systems Group], *may, absent the direct-only distribution model, have distributed the D315 through HP's channel partners, at least in some countries in the EMEA and to some customer segments. The decision to accept the written and unwritten conditions in the HPA1 agreement and therefore not to distribute the*

1963 See recital (954).

1964 HP submission of 23 December 2005, answer 2.21.

1965 HP submission of 23 December 2005, answer 2.22.

D315 through HP's channel partners anywhere in the world (including the EMEA) was taken by HP's management in the US, in particular [HP Executive]. *Once that decision was taken, HP EMEA PSG implemented this policy*".[1966]

(1653) The restrictive conditions in the HPA1 and HPA2 agreements therefore meant that HP had to delay and restrict the commercialisation of its AMD-based business desktops. As a result, specific products that were destined for the market by HP and for which there was customer demand did not reach the market or reached it to a limited extent only. Customers were therefore deprived of a choice which they would have otherwise had.

(1654) Moreover, AMD was prevented from gaining market acceptance that it could have most likely achieved. This is supported by evidence that contemporaneous HP projections foresaw sales of AMD desktops that were significantly higher than what was allowed to happen under the terms of the agreements with Intel.[1967]

(1655) In the first place, Intel disputes that the conditions in question existed. These arguments have been dealt with and refuted in section VI.2.4.4.2. Intel also alleges that the marketing limitations could in any event not have had an impact on AMD beyond the impact of HP's decision to buy no more than 5% of its corporate x86 CPU needs from AMD.[1968] In other words, Intel, while denying the existence of any unwritten conditions, argues that should such conditions exist, the marketing limitations would not add any restrictive effect to the 95% Intel MSS condition.

(1656) In that regard, the relevant question is whether the marketing limitations placed constraints which were additional to the 95% MSS condition.

(1657) A 95% MSS condition alone would have left HP with full flexibility as to the sales of the AMD-based products in terms of region, channels or types of customers for the remaining 5% of sales "allowed" by the condition. HP would only have had to ensure that it did not exceed a certain cap in its sales. The marketing limitations restricted that flexibility and put an additional layer of constraints on HP concerning the marketing of AMD-based products. That additional layer of constraints had its own additional effects, one of which was the deferred launch of the D315 in the EMEA region, which resulted in companies in the EEA being deprived of a choice of any AMD-based HP corporate desktop. As HP submitted, "*HP confirms that* [HP Executive], *in charge of HP EMEA PSG, may, absent the direct-only distribution model, have distributed the D315 through*

1966 HP submission of 23 December 2005, answer 2.24.

1967 Email of 27 April 2002 from [HP executive] to [AMD Executive], entitled '*RE: Volume projections*', AMD submission of 15 September 2006, supporting document number 9.

1968 Intel reply to the 26 July 2007 SO, paragraph 338.

HP's channel partners, at least in some countries in the EMEA and to some customer segments."[1969]

(1658) It is therefore concluded that the 95% MSS condition and the naked restrictions had restrictive effects which were complementary and not identical.

4.3.3. Acer

(1659) As set out in section VI.2.4, in January 2003, Acer decided to launch both a notebook and a desktop series based on AMD's Athlon 64 x86 CPU in September 2003.

(1660) However, Intel reacted negatively to the intensified Acer-AMD relationship. Contemporaneous evidence demonstrates that Acer executives experienced both direct and indirect pressure from Intel to not launch Athlon 64-based products, or not to be the first OEM to launch them. The first such request was made in January 2003.

(1661) Acer initially refused the request to delay the launches. However, Intel repeated its request, until Acer [...] postponed the launch of its AMD notebook series. On the basis of the evidence outlined in section VI.2.4, it is concluded that Acer delayed the launch of its AMD Athlon 64 x86 CPU-based notebooks from September 2003, as initially planned, to January 2004 in the EMEA region and May 2004 in the Asia-Pacific region, because of Intel's requests to do so. Acer's understanding was that if it did not, Intel ECAP funding would fall. Intel disputes that analysis and argues that *"Acer also expressly denied (...) that it had an arrangement with Intel that precluded the use of AMD processors."*[1970] Its arguments in that regard have been dealt with in section VI.2.5.4.

(1662) As a result of Intel's request to do so, Acer restricted the commercialisation of its AMD-based notebooks. Specific products that were destined for the market by Acer did not reach the market until a later stage in time than they would have, but for Intel's conduct. Customers were therefore deprived of a choice which they would have otherwise had.

4.3.4. Lenovo

(1663) As set out in section VI.2.5, Lenovo entered into a written agreement with AMD to launch AMD-based notebooks in 2006. Two models were projected for 2006, [...], and two others were to be introduced subsequently ([...]).[1971] The plan

---

1969 HP submission of 23 December 2005, answer 2.24.

1970 Intel Reply to the 26 July 2007 SO, paragraph 443.

1971 Lenovo submission of 27 November 2007, answer to question 4, pp. 10-11.

was to introduce the models projected for 2006 in two waves, first in [geographical area] in June 2006, followed by a [geographical area] launch in September-October 2006. However, the launch was postponed twice. First, the [geographical area] launch was delayed from June 2006 to coincide with the [geographical area] launch in September-October 2006. Second, the entire launch was postponed from September-October 2006 to 2007. The first postponement happened in the context of negotiations of increased funding with Intel. The second postponement occurred as a condition of increased funding from Intel as agreed in June 2006. Finally the launch was cancelled.

(1664) Therefore, as a result of Intel's conduct, Lenovo first delayed and then cancelled the launch of its AMD-based products which it had planned and for which there was customer demand. Customers were deprived of a choice which they would have otherwise had.

(1665) Intel argues that the Commission should have performed a required share analysis not only for the MOU for 2007 (see section 4.2.3.5) but also for the Intel funding provided to Lenovo for the second half of 2006.[1972] In that regard, it should first be reiterated that the required share analysis carried out in section 4.2.3.5 is not a legal requirement for finding an abuse according to the case law. Furthermore, as has been outlined above, the Intel payment relating to the second half of 2006 constitutes a different type of abuse: it relates to a naked restriction and not a conditional rebate granted in return for exclusivity. For such an abuse, namely in the case of Lenovo a payment to delay the launch of a specific AMD-based product, the Commission considers that it is not appropriate to perform the same type of as efficient competitor analysis as that conducted for conditional rebates.

4.3.5. Intel's general arguments

(1666) Intel makes a number of general arguments with respect to naked restrictions in its Reply to the 26 July 2007 SO[1973] and its submission of 5 February 2009 related to the SSO.[1974]

(1667) In its Reply to the 26 July 2007 SO, Intel argues that "*the Commission's case is* (...) *deficient in a critical respect*" because "*the Commission would still have to*

1972 Intel submission of 5 February 2009 related to the 17 July 2008 SSO, paragraphs 318-334.

1973 Intel Reply to the 26 July 2007 SO, paragraphs 824-831. In the first instance, Intel contests the factual basis underpinning the naked restrictions. These elements are dealt with in the factual analysis relating to each OEM in sections V(HP), VI.2.4 (Acer) VI.2.5 (Lenovo) above.

1974 Intel submission of 5 February 2009 related to the 17 July 2008 SSO, paragraphs 693-703.

show that the alleged conduct foreclosed AMD".[1975] Intel repeats that argument in its submission of 5 February 2009 related to the SSO.[1976]

(1668) In a similar vein, in its Reply to the 26 July 2007 SO, Intel argues that "(i) *AMD performed better during and for some time following the alleged exclusionary period than at any other period in its 38 year history; and (ii) AMD faced serious capacity constraints during most of the SO period and for some time thereafter"* and that it *"was not foreclosed, therefore, from any market*".[1977] Intel repeats that argument in its submission of 5 February 2009 related to the SSO.[1978]

(1669) Intel's general arguments on foreclosure and AMD capacity will be dealt with elsewhere in the present Decision section 4.3. It has already been stated that the notion of abuse is an objective concept (see section 4.1) and that the performance of competitors is not relevant for the application of Article 82 of the Treaty according to the relevant case law (see section 4.2).[1979] In any event, Intel's arguments as to AMD's performance during the period under investigation do not show the absence of effects of Intel's practices. In that respect, in *British Airways*, the Court of First Instance held that "*the growth in the market shares of some of BA's airline competitors, which was modest in absolute value having regard to the small size of their original market shares, does not mean that BA's practices had no effect. In the absence of those practices, it may legitimately be considered that the market shares of those competitors would have been able to grow more significantly* ."[1980] Paragraph 149 of the judgment in *Compagnie Maritime Belge* had similarly held that "*the fact that G&C's* [the only competitor's] *market share increased does not mean that the practice was without any effect, given that, if the practice had not been implemented, G&C's share might have increased more significantly.*"[1981] Intel's contentions are therefore not supported by the case-law.

(1670) In any case, the Commission has examined the effects of Intel's naked restrictions in this Decision with respect to the specific OEMs at which the

---

1975 Intel Reply to the 26 July 2007 SO, paragraph 826.

1976 Intel submission of 5 February 2009 related to the 17 July 2008 SSO, paragraphs 693-703.

1977 Intel Reply to the 26 July 2007 SO, paragraph 827.

1978 Intel submission of 5 February 2009 related to the 17 July 2008 SSO, paragraphs 696.

1979 See also Case T-203/01 *Michelin II*, op. cit, paragraph 241 and Joined Cases T-24/93, T-25/93, T-26/93 and T-28/93 *Compagnie Maritime Belge and Others v Commission*, op. cit, para 149, confirmed by Joined Cases C-395/96 P and C-396/96 P *Compagnie Maritime Belge Transports and Others v Commission op. cit.*, paragraph 118-120. See also Case C-202/07 P *France Télécom v Commission* not yet reported, paragraphs 107 to 113.

1980 Case T-219/99 *British Airways v Commission* [2003] ECR II-5917, paragraph 298.

1981 Joined Cases T-24/93, T-25/93, T-26/93 and T-28/93 *Compagnie Maritime Belge*, paragraph 149.

conducts were targeted. The Commission has demonstrated that the effect of each conduct was that OEMs cancelled, delayed or placed restrictions on the commercialisation of AMD-based products which they had actively planned and for which there was a consumer demand. Customers were therefore deprived of a choice which they would have otherwise had. Intel's conducts therefore had a detrimental effect on competition on the merits.

(1671) Intel also criticises the Commission for not explaining in the 26 July 2007 SO the conclusions it drew from the *Irish Sugar* case.[1982] Without prejudice to the fact that conduct by a dominant undertaking must be judged in the light of Article 82 of the Treaty, and that in that context, as has already been stated, abuse is an objective concept, the Commission's reference to *Irish Sugar* in the 26 July 2007 SO was sufficiently clear for Intel to discern what specific conclusions the Commission may draw. In the 26 July 2007 SO, the Commission stated that: "*through the swap arrangement in question, the dominant firm prevented the competitor's brand from being present on the market since the retailers no longer had a stock of "Eurolux" branded sugar and instead replaced those volumes with the sugar of the dominant undertaking*".[1983] It should be clear that that was analogous to the situation in this case where Intel's conduct prevented a product of its competitor from coming to market (to the advantage of its own products).

(1672) Still with regard to *Irish Sugar*, Intel also argues that the Commission must establish the anti-competitive effects of the conduct.[1984] In the same context, Intel argues that to the extent that the Commission claims that the conduct in question is a form of *per se* abuse, that is not supported by case-law.[1985] Although Intel did not define what it meant by *per se* in that context, the Commission did not use that term in either of its Statements of Objections. In any case, leaving aside that it is not required under the case law to do so, the Commission has examined the effects of the conduct and its impact on the market. In section 4.3.6, the Commission concludes that competition on the merits was harmed by Intel's conduct because customers were deprived of a choice which they would have otherwise had.

(1673) In that respect, the Commission has analysed whether the conduct, in the words of the *Hoffmann-La-Roche* and *Irish Sugar* judgments which Intel cites, had

---

1982 Intel Reply to the 26 July 2007 SO, paragraph 828.

1983 Paragraph 512 of the 26 July 2007 SO.

1984 Intel Reply to the 26 July 2007 SO, paragraph 829.

1985 Intel Reply to the 26 July 2007 SO, paragraph 830. Intel also makes this argument in its submission of 5 February 2009 related to the 17 July 2008 SSO, in paragraphs 697-699.

"*the effect of hindering the maintenance of the degree of competition still existing in the market or the growth of that competition*".[1986]

(1674) Finally, Intel argues that the Commission "*would still have to consider the objective justification for Intel's conduct, which it has also not yet done*".[1987]

(1675) The only reference Intel makes to objective justification with regard to naked restrictions is that "*Intel's comments at Part II.I* [of Intel's Reply to the 26 July 2007 SO] *apply mutatis mutandis in this respect*".[1988] However, the arguments made in Part II.I of Intel's Reply to the 26 July 2007 SO refer to conditional rebates and not to naked restrictions.[1989]

(1676) Intel has therefore not raised any objective justifications or efficiency claims with respect to naked restrictions. In any case, the Commission considers that with regard to all the naked restrictions described in this section, namely payment to delay, cancel or restrict the commercialisation of a specific AMD-based product, there is no link to any criterion which could potentially be a legitimate objective justification, and the Commission cannot therefore discern any economic justification in the conduct. Alternatively, the same reasoning developed in section 4.2.6.3 to refute Intel's objective justifications and efficiency claims in respect of conditional rebates applies *mutatis mutandis* to naked restrictions.

4.3.6. Conclusion

(1677) As has been outlined above, each OEM referred to in this section was planning the introduction of a specific AMD-based product. Such products either existed or technical development or preparations for introduction to the market were well advanced. This was due to the fact that there was consumer demand for such AMD-based products.

(1678) In each case, Intel paid the OEMs to delay, cancel or otherwise restrict the commercialisation of the planned AMD-based products. In each case, Intel's conduct had a material effect on the OEMs' decision-making in that they delayed, cancelled or otherwise restricted their commercialisation of the AMD-based computers.

1986 Intel Reply to the 26 July 2007 SO, paragraph 829.

1987 Intel Reply to the 26 July 2007 SO, paragraph 831.

1988 Intel Reply to the 26 July 2007 SO, paragraph 831.

1989 See Case C-202/07 P *France Télécom v Commission*, paragraph 112. To the extent that the Commission can discern, since as has already been highlighted, those arguments do not generally address the question of the conditionality of the rebates, but rather discounting more generally.

(1679) As a consequence, AMD-based products for which there was a customer demand did not reach the market, or did not reach it at the time or in the way they would have in the absence of Intel's conduct. As a result, customers were deprived of a choice which they would have otherwise had and competition on the merits was harmed.[1990]

(1680) Furthermore, there is no link between the conducts and any criterion which could potentially be a legitimate objective justification, and the Commission cannot therefore discern any economic justification in the conducts.

(1681) In the light of the above, Intel's conducts of making the grant of payments to HP, Acer and Lenovo subject to restrictive conditions concerning the commercialisation of AMD-based products therefore constitutes recourse to methods different from those governing normal competition and are therefore abuses of a dominant position under Article 82 of the Treaty and Article 54 of the EEA Agreement. The duration of each abuse is the following.

(1) HP: November 2002, the start of the effect of the HPA1 agreement, to 30 May 2005, the expiry of the HPA2 agreement;

(2) Acer: September 2003, the original launch date of AMD Athlon 64-based Acer notebooks, to January 2004, to when the launch was delayed;

(3) Lenovo: at the latest June 2006, when Lenovo decided to delay the [geographical area] launch of its planned AMD-based notebook, until the end of 2006, when Lenovo entered into the Memorandum of Understanding with Intel;

The Commission also notes that the behaviours were part of a single continuous strategy aimed at foreclosing AMD.[1991]

4.4 Intel's general arguments as regards AMD's performance

4.4.1. Introduction

(1682) In its Reply to the 26 July 2007 SO, and more so in subsequent correspondence with the Commission, Intel has attempted to characterise AMD as

---

1990 In its submission of 5 February 20009 related to the SSO, with regard to the Lenovo naked restriction, Intel makes the claim that there cannot be any actual foreclosure "*given that the contested volumes accounted for around 1% of worldwide demand for x86 microprocessors in 2006.*" - paragraph 696 of Intel submission of 5 February 2009 related to the 17 July 2008 SSO. However, this does not invalidate the Commission's conclusion that Intel's conduct has harmed competition on the merits, has had a detrimental effect and is an infringement of Article 82 of the Treaty. Moreover, the Commission notes that as is outlined in section VII.4.5 below, Intel has engaged in a strategy aimed at foreclosing AMD where each of the various conducts are elements that reinforce each other.

1991 See section VII.4.5.

a competitor which cannot have been foreclosed by the Intel conduct outlined in this Decision because AMD was in the first place, unable to satisfy customer needs.

(1683) Annex 1 to Intel's letter to the Commission of 4 September 2008 provides the best synthesis of Intel's arguments in that respect. In that letter, Intel set out a list of topics which it argued are "*issues of great importance*" relating to "*AMD's profound failings in key areas of its commercial activity*".[1992]

(1684) Among these issues, Intel cites the following: "*AMD's failure to execute properly and to introduce competitive products limited its ability to compete successfully with Intel*"; "*AMD's failure to provide products that satisfied the needs of enterprise customers explains its lack of success in the corporate segment*"; "*AMD was at a serious competitive disadvantage in the enterprise segment because of its inability to offer the platform solutions required by enterprise customers*"; "*AMD lacked a competitive mobile product and thus did not perform well in this rapidly expanding segment*"; "*AMD did not have technological leadership over Intel but rather lagged behind in the key parameters that were of important to, inter alia, enterprise customers*"; or "*AMD's capacity constraints mean that it was not foreclosed by Intel*". That line of argumentation by Intel[1993] therefore claims that to the extent that AMD has not performed well in the market, it is not because of any conduct on the part of Intel, but rather because of AMD's own failings of the type described above in this recital.

(1685) As a preliminary remark on that issue, it should be noted that abuse is an objective concept[1994] and that the case-law does not require the Commission to prove the actual effects of an abuse under Article 82 of the Treaty (see recital (922)).[1995] As regards conditional rebates, the performance of rivals in the market is not relevant for the application of Article 82 of the Treaty according to the relevant case-law (see recitals (920), (921) and (923)). Similarly, the as efficient competitor analysis examines the effect of the conditional rebates on a hypothetical as efficient competitor, in other words, a company that would be hypothetically as efficient as the dominant company. Therefore, the conclusion of the analysis is whether the rebates in question are capable of foreclosing such a hypothetically as efficient

---

1992 Intel's letter to the Commission of 4 September 2008, p. 2.

1993 Intel has repeated these arguments in its submission of 5 February 2009 related to the 17 July 2008 SSO; see pp. 20-34.

1994 This is consistent with a long line of the case law; see for example: Case T-219/99 *British Airways v Commission* [2003] ECR II-5917, paragraph 241.

1995 Case T-219/99 *British Airways v Commission*, paragraphs 239-241; Case T-203/01*Michelin II, op. cit.*, paragraph 239.

competitor without reference to whether actual competitors are as efficient as the dominant company or not.[1996]

(1686) It is also important to note that Intel's argument that AMD had profound failings in key areas of its commercial activity, failed to execute properly, or failed to introduce competitive products is hard to reconcile with the fact that, during the period under examination, Intel awarded significant conditional rebates to its main customers. In Intel's own words, those rebates were in order to "*meet competition*" from AMD (the Commission has separately addressed those arguments in section 4.2.6 on objective justification). However, that exposes a contradiction in Intel's line of reasoning, since if Intel believes that AMD suffered in the market not because of any conduct by Intel but because of profound failings in key areas, then there would consequently be little need for Intel to provide what it terms "*meet competition*" rebates.

(1687) In its Reply to the 26 July 2007 SO, Intel develops an argument which attempts to address that contradiction: during the period from 2002 to 2005, it argues that AMD was successful in certain parts of the market (the server segment and the consumer segment),[1997] and not successful in other parts of the market (the corporate segment and the mobile segment).[1998]

(1688) That argument still does not square with the reality of Intel's conduct. Firstly, a number of the Intel arrangements to which this Decision relates concern business related to the segments where, according to Intel, AMD was successful. This is the case for the rebates to Dell which cover all Dell products,[1999] including the server and consumer segments, the rebates to NEC, which cover in particular the NEC consumer segment,[2000] and the payments to MSH,[2001] which concern consumer PCs. On those segments, Intel cannot argue that, due to AMD's lack of performing products, its conduct could not have foreclosed it.

(1689) Secondly, if the Intel claim that AMD had profound failures in the corporate and mobile segments were to be admitted and hence any Intel conducts could not be the cause of poor AMD performance, Intel would have to explain why it still

---

1996 In that sense, to the extent that an actual competitor is less efficient than the dominant company, the analysis is favourable to the dominant company.

1997 See in particular Intel Reply to the 26 July 2007 SO, paragraphs 614 and 615.

1998 See in particular Intel Reply to the 26 July 2007 SO, paragraphs 617 and 635; see also Intel submission of 5 February 2009 related to the 17 July 2008 SSO, paragraphs 60-62.

1999 Sections VI.2.3 and VII.4.2.2.2.

2000 Sections VI.2.6 and VII.4.2.2.4.

2001 Sections VI.2.8 and VII.4.2.2.6.

considered it necessary to award significant "meet competition" rebates in all these segments, such as for instance the Intel rebates awarded to Acer in 2003 in relation to an AMD-based notebook,[2002] the rebates awarded by Intel to HP from 2002 to 2005 for its corporate desktop segment,[2003] or the rebates awarded by Intel to Lenovo for its notebook segment.[2004]

(1690) Intel has failed to provide any explanation for those contradictions. What is more, in the case of HP, where Intel awarded more than [...] rebates over less than 3 years just for the corporate desktop segment of HP's business, Intel provided evidence aimed at justifying that HP genuinely intended to buy a significant portion of its x86 CPU needs for its corporate desktop segment from AMD (see section 4.2.3.3.f)). Intel would therefore have the Commission simultaneously conclude that AMD's products were unfit for the corporate segment but that HP, at the time the world's second largest OEM, wished to purchase a significant quantity of x86 CPUs for that precise segment.

(1691) In addition, Intel's arguments on AMD's success or failure in certain segments are too broad brush to address the complexity of OEM's requirements. There is no single parameter which defines the quality of a product, in particular such a complex product as a x86 CPU. Shortfalls in certain characteristics can be made good by performance in other fields, for instance price. Large OEMs have lines of products for each segment of the market. In order to convincingly make the argument that an AMD technical shortfall is sufficient to rule out that Intel's conducts had the capability to foreclose AMD from all lines of an OEM in a particular segment, Intel would have to prove that that technical shortfall could not be compensated by any technical or price advantage in another field. Intel has failed to undertake that required logical step. In that respect, it is to be noted that OEMs never considered switching instantaneously large parts of their supply needs from Intel to AMD: any switch would have been progressive, and first probably restricted to the limited part of the business where AMD's advantageous features would have compensated any drawbacks it might have had.

(1692) The remainder of this section examines Intel's arguments with respect to the quality of AMD's products (section 4.4.2), AMD's capacity (section 4.4.3) and AMD's performance in the market (section 4.4.4).

2002 Sections VI.2.5 and VII.4.3.3.

2003 Sections VI.2.4 and VII.4.3.2.

2004 Sections VI.2.7, and VII.4.3.4.

4.4.2. Quality of AMD products

(1693) As has been discussed in section VI.1, the price and performance of AMD's products improved as of 2001 to the point that AMD represented a growing competitive threat to Intel.

(1694) In its Reply to the 26 July 2007 SO, Intel has misrepresented the Commission's reasoning on that point. Intel alleges that "*the SO* [the 26 July 2007 SO] *is wrong to assert that AMD enjoyed a technological superiority over Intel and that Intel has only recently caught up.*"[2005]

(1695) The Commission has not made any such definitive assertion about the technological superiority of AMD's products - or Intel's for that matter.[2006] The paragraph to which Intel refers to draw its conclusion on what the SO "*asserts*"[2007] actually reads: "*As specified in section III.1.2, Intel has made references to having recently "caught up" with AMD following the launch of its new generation of CPUs based on the "Core" micro-architecture. Following this launch, AMD has lost significant market share and on a revenue basis, AMD's share has now reduced to less than 12% market share. These developments are consistent with what has been outlined in the present Statement of Objections, namely that following improvements in AMD's product, Intel engaged in a successful strategy to deny and delay AMD's access to the market. This strategy allowed Intel to contain the increased competitive threat from AMD as much as possible, during which time it caught up with AMD. It is now reaping the rewards of its abusive conducts.*"[2008] None of this language, nor indeed any other language from the Commission, has asserted that "*AMD enjoyed a technological superiority over Intel*".

(1696) It is possible that AMD might have had shortcomings in certain performance areas and/or in certain segments, and that there are documents which specify that on the file.[2009] In the same vein, however, there is significant evidence on the file

---

2005 Intel Reply to the 26 July 2007 SO, paragraph 79.

2006 Similarly, Intel misrepresents the Commission's assessment stating in paragraph 56 of its submission of 5 February 2009 related to the 17 July 2008 SSO: "*The Commission aggressively overstates the purported superiority of AMD's products in order to support its theory that Intel's discounts excluded a technologically superior AMD.*"

2007 Intel Reply to the 26 July 2007 SO, footnote 140.

2008 26 July 2007 SO, paragraph 571.

2009 See for example AMD summary of "Intel Strengths and Challenges" in the context of AMD Desktop Business Unit Strategy Development; Annex 488 of Intel submission of 5 February 2009 related to the 17 July 2008 SSO where AMD in the vein of self-criticism lists Intel's strengths linked to CPU design, manufacturing, capacity, exccution as well as the fact that Intel has "[...] in the bank".

that OEMs and Intel considered that AMD products also had many positive and innovative attributes.

(1697) Similarly, it is not questioned that there have been positive innovations in Intel's x86 CPU products, and that there is evidence on the file to support this. At the same time, however, there is also evidence on the file that OEMs and Intel itself considered that Intel's products also suffered from shortcomings.

(1698) In the light of the above, in this case, it is not for the Commission to make absolute judgments on the technical performance of the products at stake, or relative judgments on the comparative performance of AMD and Intel products, either across the board or within certain segments. OEMs are the best-placed to come to the soundest judgment as regards their supply needs, and the most appropriate products to fulfill those needs. OEMs are well aware of the advantages and disadvantages of the products of each of their suppliers. If a specific OEM considered purchasing a certain share of its x86 CPU needs for its corporate or notebook segment from AMD, that OEM therefore did so in full awareness of the attributes of the AMD product, including any shortcomings it might have had.

(1699) This is the reason why, rather than conduct an absolute or relative comparison of the technical and commercial value of Intel's and AMD's products, the Commission has chosen to rely on OEM submissions and contemporaneous documents to analyse whether they concretely considered switching to AMD. Intel's generic judgments on AMD being disadvantaged in certain segments or products are therefore unable to put into question the conclusion drawn from the fact that the OEMs considered that the AMD x86 CPUs were fit for at least a part of their respective supply needs.

(1700) By way of illustration, in two specific areas where Intel has claimed that AMD's products had shortcomings, irrespective of whether Intel's claims are correct, there was nevertheless demand from OEMs.

(1701) The first illustration is the case of the D315 AMD-based corporate desktop by HP. As was illustrated in section VI.2.4.2, in August 2002, HP launched its first AMD-based corporate desktop, the D315.[2010]

(1702) An HP presentation of June 2002 describes the segments of the market for which the D315 had been devised. It states that D315 was "*targeted at SMB* [Small and Medium Business segment] *but suitable for enterprise deployments*" and

---

[2010] HP submission of 23 December 2005, response 2.12(d) to question 2, p. 6.

"ready to launch on all regions by the summer 2002".[2011] As regards the quantities originally involved, the presentation stated that *"Americas, EMEA, Asia Pacific L2's have committed to ship* [...] *units in first 12 months with potential* [...] *additional upside"*.[2012]

(1703) HP decided to introduce that AMD-based product for its corporate segment, while, according to Intel, that is precisely one of the segments which AMD *"neglected"*.[2013] It is also noteworthy that HP considered that that product was *"suitable for enterprise deployments"*, while Intel argues that *"AMD lacked the experience with enterprise customers to be able to satisfy their need"*, that *"AMD's reputation for "cheapness" limited its ability to gain acceptance with enterprise customers"*, and that *"AMD was at a serious competitive disadvantage in the enterprise segment because of its inability to offer the platform solutions required by enterprise customers"*.[2014]

(1704) The HP project is a good example that a sophisticated OEM considered it attractive to offer an AMD-based product in the corporate segment, including for enterprise customers, despite Intel's claims that AMD x86 CPUs in the segment exhibited shortcomings. In that regard, sections 4.2 and 4.2.4 have described how Intel abused its dominant position to prevent HP from realising that product deployment on a significant scale, not least by imposing limits to its sales on the enterprise subsegment.

(1705) The second illustration is the planned launch by Acer in 2003 of a notebook product based on the new K8 (Athlon 64) AMD x86 CPU. As illustrated in sections VI.2.4 and 4.3.3, throughout 2003, Intel requested Acer to delay the planned launch of that Acer product until the beginning of 2004.

(1706) It is again noteworthy that Acer had decided to introduce the AMD-based notebook product, while, according to Intel, that is precisely one of the segments where AMD *"has also lagged behind Intel"*,[2015] and despite the Intel allegation that *"AMD lacked a competitive mobile product and thus did not perform well in this*

2011 HP presentation of 13 June 2002 entitled 'commercial AMD desktop – strategic rationale', slide 14. Exhibit 14 to [HP executive]Deposition. HP submission of 23 December 2005.

2012 HP presentation of 13 June 2002 entitled 'commercial AMD desktop – strategic rationale', slide 14. Exhibit 14 to [HP executive]Deposition. HP submission of 23 December 2005.

2013 Intel Reply to the 26 July 2007 SO, paragraph 618.

2014 Intel makes the same argument in its 5 February 2009 related to the 17 July 2008 SSO; see for example paragraph 58, p. 26 on AMD's alleged *"lack of suitability in the corporate segment"*.

2015 Intel Reply to the 26 July 2007 SO, paragraph 635; see as well paragraphs 60-62 of Intel's 5 February 2009 submission related to the 17 July 2008 SSO.

rapidly expanding segment."[2016] In fact, in this specific case, AMD was offering a product (the K8 or Athlon 64) with a 64 bit capability which Intel did not offer.

(1707) The Commission therefore considers that Intel's arguments about AMD's lack of performance for certain segments or in certain technical fields are not able to cast convincing doubt on the Commission's conclusion, based on concrete OEM documents, and on evidence from Intel itself, that AMD represented a growing and credible threat to Intel.

(1708) Section VI.1 has already outlined a significant amount of evidence in that regard. Moreover, the individual sections dealing with Intel's conduct relating to each OEM have shown how OEMs were giving serious consideration to AMD's products during the period in question. The file is replete with other similar instances.

(1709) For example, in 2002, HP perceived that "*AMD offers no-compromise performance at superior value.*"[2017] Dell observed in 2005 that "*over the last two to three years, some of AMD's high-end CPUs, in particular AMD's Opteron CPU, have achieved some measure of performance and price advantages over Intel counterparts.*"[2018] In the same vein, in a presentation entitled "*Intel is not meeting Competition*", IBM stated: "[…]", and that "[…]"[2019]

(1710) Similarly, US IT managers recognised AMD's product improvements. According to an HP internal memo, 343 US IT managers had petitioned for an AMD-based desktop from a top tier OEM. In addition, AMD-based corporate desktops had already won several big tenders (EDF, Siemens AG, City of Berlin) in the EMEA region.[2020]

(1711) The growing threat represented by AMD must also be seen in the light of apparent Intel product shortcomings. For example, Intel's executive responsible for relations with Dell, reacting to the news that Dell had finally in 2006 made a decision to include in its computers some AMD x86 CPUs, stated: "[…]"[2021].

2016 Intel's letter of 4 September 2008, annex 1.

2017 HP presentation of 28 May 2002 (Annex to HP submission of 23 December 2005), p. 23.

2018 Dell submission of 19 December 2005, p. 3.

2019 IBM presentation, IBM 126764.

2020 See HP submission of 23 December 2005, Exhibit 14 to [HP executive]deposition, pp. 11-12.

2021 Email of 18 May 2006 from [Intel executive] to [Intel executive], entitled: "RE: [Intel senior executive] on dell/amd", Annex 1 to Intel submission of 2 June 2008, document 2.

(1712) On 27 September 2006, [Intel senior executive] , stated: "*[m]uch has been written in the last year about Intel losing its momentum, losing its leadership in the server market space. I believe very much that with this new set of dual and quad-core CPUs we've regained our leadership.*"[2022] At least in the server space, Intel's own perception therefore appeared to be that it had previously lost its technological leadership, or at least that it had been seen to lose its leadership.

(1713) In November 2007, [Intel senior executive] stated: "*If you look at the troubles that we caused for ourselves in 2005-2006, it wasn't on the process side it was on the microarchitecture side. We in essence missed a generation of microarchitecture. Takes you four years to recover from that. We're very determined not to miss another circle like that.*"[2023]

(1714) More recently, [Intel senior executive] stated: "*We just got off the treadmill. We got off the treadmill reinvented with the Pentium 4 and shame on us.* (...) *We do screwed up and we are back to that model again and that model is good because it drives.*"[2024]

(1715) At the Oral Hearing in these proceedings held on 11 and 12 March 2008, [Intel senior executive] that: "*It is generally viewed that Intel did not have across the board leadership in server space as the Opteron product improved over its early production and mapped into the market place* (...) *even though we had silicon process leadership in that time frame.*"[2025]

(1716) On the basis of the analysis outlined in this subsection, it is concluded that Intel's arguments about AMD's lack of performance for certain segments or in certain technical fields do not provide a sufficient ground to disprove the Commission's analysis of concrete instances of abusive conducts by Intel.

4.4.3. Capacity

(1717) Intel dedicates one section of its reply to the 26 July 2007 SO to the argument that AMD had capacity constraints.[2026] According to Intel, "*for three and a half years (from mid-*2003 *to the end of 2006) AMD faced severe capacity*

2022 See http://digitaldaily.allthingsd.com/tag/centrino printed and downloaded on 2 April 2009.

2023 [Intel executive] at Credit Suisse Technology Conference, 28 November 2007, Exhibit 10 to AMD submission of 29 February 2008.

2024 [Intel senior executive] at Morgan Stanley Technology Conference, on 5 March 2007, Exhibit 6 to AMD submission of 29 February 2008.

2025 Answer by [Intel senior executive] to a question from [...] on 11 March 2008: transcript of section 5 of the Oral Hearing.

2026 Intel Reply to the 26 July 2007 SO, paragraphs 556 to 612.

constraints."[2027] Later on during the procedure, Intel again highlighted these alleged constraints, and concluded that "*AMD's capacity constraints mean that it was not foreclosed by Intel.*"[2028]

(1718) That reasoning of Intel is not convincing for several reasons.

(1719) Firstly, as has already been outlined, abuse is an objective concept, which does not depend on the actual situation of the competitor of the dominant company. Whether or not AMD was in a position to actually supply a significant amount of additional x86 CPUs is therefore irrelevant for the finding of an abuse.

(1720) Secondly, even if it were the case that AMD had capacity constraints and could not (or not entirely) have met additional demand, in the absence of Intel's conducts foreclosing it from such large OEMs as Dell and HP, AMD would still have had the possibility to switch the configuration of its sales towards those OEMs. AMD might have valued sales to those important OEMs more than an equivalent number of sales with second/third tier OEMs. One set of reasons for such a possible preference is outlined in section 4.2.3.

(1721) Thirdly, the claim that AMD was capacity constrained is not itself demonstrated in a convincing way by Intel.

(1722) In that regard, Intel refers to statements from AMD executives. One such statement, also presented by Intel during the Oral Hearing, reads: "[o]*ur factories are fully utilized.*"[2029] However, the quote goes on to state that: "[o]*ur factories are fully utilized. When we look at the second quarter, on a global basis we were able to meet customer demand* (...) *we built some planned inventory at the end of the second quarter.*" Read in its entirety, that quote would therefore in fact indicate that AMD's factories were fully utilised but that they were producing units which were not sold, and, instead, contributed to building inventory.

(1723) Similarly in its 5 February 2009 submission related to the SSO, Intel refers to an internal AMD email exchange in which an AMD executive states that: "*we are pretty much at capacity*",[2030] on the basis of which Intel calls into question AMD's ability to supply customers.

2027 Intel reply to the 26 July 2007 SO paragraph 557.

2028 Intel's letter of 4 September 2008, annex 1.

2029 Intel Reply to 26 July 2007 SO, paragraph 565 and Intel Oral Hearing PowerPoint presentation entitled: "Foreclosure and AMD Performance" of 11 Match 2008, slide 16.

2030 Intel submission of 5 February 2009 related to the 17 July 2008 SSO, p. 31.

(1724) In that context, [Intel senior executive] stressed at the Oral Hearing that "*Intel's profitability depends on* [...] ."[2031] Indeed, as explained in recital (116), due to economies of scale, capacity utilisation of cleanroom space normally ranges between 75% and 100%. Therefore, full utilisation of a Fab cannot in itself be regarded as synonymous with production shortages but rather indicative of a company's ability to use its facilities in an effective way.

(1725) Another example of evidence put forward by Intel to claim that AMD acknowledged its capacity constraints relates to regulatory filings with the United States Securities and Exchange Commission (SEC). Intel refers to statements of AMD executives in which, according to Intel, AMD informed investors of capacity shortage risk.[2032] However, a full reading of the filings reveals, *inter alia*: (i) that the filings refer to a risk of a capacity shortage and not an actual capacity shortage;[2033] and (ii) that there has in fact been underutilisation of capacity due to reduced demand.[2034]

(1726) Secondly, Intel argues, on the basis of Professor [...]'s report, that AMD had no further possibility of increasing its output during the period from 2002 to 2005.[2035] However, the Commission has examined the relevant AMD data[2036] submitted in the course of the investigation according to which AMD has consistently produced more than it has shipped.

(1727) This is demonstrated by table 63. During the period in question (2002-2005), AMD had a surplus production of on average [...]. Moreover, as production measures only x86 CPUs that were produced for sale, AMD has not included the number of wafers that were used for testing or R&D. Consequently, in the short term, AMD could have converted additional wafers to production and increased its actual supplies.

Table 63 – AMD Production and Shipment in thousand Units

2031 [Intel senior executive] presentation during the Oral Hearing, slide 3.

2032 See paragraph 562 of Intel Reply to 26 July 2007 SO.

2033 "[...]." Intel Reply to 26 July 2007 SO, annex 364.

2034 "[...]". Intel Reply to 26 July 2007 SO, annex 364.

2035 Professor [...] claims that AMD fabs were fully utilised. In addition, on the basis of the analysis of the hypothetical possibilities of the extension of AMD's capacity, Professor [...] maintains that such possibilities did not exist. Intel Reply to 26 July 2007 SO Report of Professor [...], paragraphs 145-180.

2036 AMD submissions of 26 January 2006 and 27 June 2006.

	Production from AMD fabs			Shipments	Excess output of finished CPUs[2037]	% Difference
	F30	F25	Total			
2000	[...]	[...]	[...]	[...]	[...]	[...]
2001	[...]	[...]	[...]	[...]	[...]	[...]
2002	[...]	[...]	[...]	[...]	[...]	[...]
2003	[...]		[...]	[...]	[...]	[...]
2004	[...]		[...]	[...]	[...]	[...]
2005	[...]		[...]	[...]	[...]	[...]
					Overall	[...]

Source: AMD[2038] submission of 27 June 2006

(1728) Finally, in the declaration of [Intel executive] attached to Intel's reply to the 26 July 2007 SO, [Intel executive] specified that in the period from December 2002 to December 2005, AMD could have met possible Dell demand in the event of a switch of up to [...]% of Dell's total requirements: *"During the period from December 2002 to December 2005, I considered the likelihood that Dell would add AMD as a second source of microprocessors to be low for a variety of reasons, (...) I believed that if Dell were to add AMD as a second source, it would likely source* [...]*% of its microprocessors from AMD in the first year and* [...]*of its microprocessors by the third year of a ramp. Even though I did not think such a switch in Dell's business model was very likely, I believed AMD could meet this level of demand."*[2039]

(1729) Without prejudice to the accuracy of [Intel executive] statement (this is discussed in section VI.2.3.4.3), it should be noted that the statement is not consistent with Intel's general argumentation on capacity.

(1730) In the same vein, and more generally, it is also difficult to understand why Intel would have found the need to offer significant amounts of "meet competition" rebates to its customers if it was unequivocal that AMD was experiencing "*chronic capacity constraints*" such that it could not satisfactorily supply the market.

(1731) In conclusion, Intel's argument that its conduct could not foreclose AMD because AMD had capacity constraints cannot be accepted.

2037 After AMD: "[...]". AMD submission of 26 July 2006, p. 7, footnote 9.

2038 AMD submission of 27 June 2006.

2039 Intel Reply to the 26 July 2007 SO, annex 89, p. 2.

4.4.4. AMD's market performance

(1732) Intel further argues in several sections of its Reply to the 26 July 2007 SO that any conduct by Intel cannot be considered abusive in the light of the fact that AMD performed better than ever in its corporate history during the period covered by this Decision.[2040]

(1733) Without prejudice to the accuracy of Intel's characterisation of AMD's performance, Intel's argument is flawed for several reasons. Firstly, as stated in recital (1685), the performance of rivals in the market is not relevant for the application of Article 82 of the Treaty according to the relevant case-law (see section 4.2), nor for the application of the hypothetical as efficient competitor analysis.

(1734) Secondly, the extent to which AMD may have experienced "success" during the period covered by Intel's abusive conduct is not directly related to the effectiveness of Intel's strategy to foreclose its competitor, which is described in greater detail in section VII.4.5. For example, it has not been shown that AMD's lack of significant penetration with the major OEMs covered by this Decision cannot (at least partly) be imputed to Intel's conduct or that AMD's performance in the market would not have been better in the absence of Intel's conduct. Finally, even if that could be shown, which is not the case, it would only demonstrate that Intel's conduct had not been particularly successful, not that it did not in fact exist.

(1735) In any case, it cannot be concluded that AMD has achieved sustainable success in the market. AMD's market share evolution for x86 CPUs between 2003 and 2007 (by revenues, based on Mercury research data) is set out in table 64:

Table 64 – AMD's Total Revenue Share 2003-2007[2041]

2003	2004	2005	2006	2007
[...]	[...]	[...]	[...]	[...]

(1736) As can be seen, AMD increased its overall market share between 2003 and 2006. This coincides with the fact that as has been highlighted in the present Decision, its products were recognised by both OEMs and Intel to represent a growing competitive threat to Intel. In 2007, AMD's market share fell back. Naturally, it is impossible to specify what AMD's market share evolution would have been in the absence of Intel's abusive conduct. However, that evolution is

---

2040 Intel Reply to the 26 July 2007 SO, paragraphs 515-555; Intel repeated its arguments also in its 5 February 2009 submission related to the 17 July 2008 SSO; see paragraphs 444-446.

2041 Source: Mercury data, 1997-2008.

consistent with the finding that Intel intensified its abusive conduct at precisely the time when AMD began to represent a greater competitive threat, and with the possibility that as a result, AMD was not able to capitalise substantially on its technological improvement during its "window of opportunity",[2042] and has since fallen back.

4.5 Single continuous strategy

(1737) In the 26 July 2008 SO, the Commission preliminarily concluded that Intel had engaged in a strategy to foreclose AMD from the strategically most important sales channels in the market. In that regard, this Decision described a range of abusive practices on the part of Intel. All of those practices were targeted at Intel's direct customers, namely the OEMs, and a major European electronics retailer, MSH. As regards Intel's arrangements with major OEMs, two separate types of exclusionary abuses have been identified: (i) conditional rebates granted to Dell, HP, NEC and Lenovo, and (ii) naked restrictions relating to HP, Acer and Lenovo.[2043]

(1738) In this case, the Commission in its 26 July 2007 SO preliminarily concluded that Intel's practice of providing bid pots to be used by OEMs for making more attractive offers in the context of bids, so that x86 CPUs were actually provided below cost, was an abuse pursuant to Article 82 of the Treaty. The Commission has decided not to proceed with regard to this preliminary conclusion. This is without prejudice to the lawfulness of this type of conduct. Similar considerations apply to Intel's conduct relating to the [...], which were covered by the 26 July 2007 SO. On this last element, on 5 May 2009, Intel submitted to the Commission documents from the private litigation between AMD and Intel in the US State of Delaware [...]. Because the Commission decided not to proceed with regards to this conduct, this Intel submission is not relevant for this Decision.

(1739) In the present case, the Commission in its 26 July 2007 SO preliminarily concluded that Intel's practice of providing bid pots to be used by OEMs for making more attractive offers in the context of bids, so that x86 CPUs were actually provided below cost, was an abuse pursuant to Article 82 of the Treaty. The Commission has decided not to proceed with regard to this preliminary conclusion. This is without prejudice to the lawfulness of this type of conduct. Similar considerations apply to Intel's conduct relating to the [...] which were covered by the 26 July 2007 SO. On this last element, it is to be noted that, on 5

2042 For instance, by making sufficient R&D investments to be able to also develop competitive products in the future.

2043 [...]

May 2009, Intel submitted to the Commission documents from the private litigation between AMD and Intel in the US State of Delaware [...]. Because the Commission decided not to proceed with regards to this conduct, this Intel submission is not relevant for the present Decision.

(1740) The individual abuses described in this Decision are mostly concentrated during the period from 2002 to 2005: the relevant period for the Dell rebates is from December 2002 to December 2005, the relevant period for the HP rebates is from November 2002 to May 2005 and the relevant period for the NEC rebates is from October 2002 to November 2005. This means that during the period from December 2002 to May 2005, three individual abuses related to conditional rebates were ongoing (for Dell, HP and NEC), as well as the individual abuse related to the conditional payments to MSH. The naked restrictions related to HP and Acer also happened during that period (November 2002 to May 2005 for HP and September 2003 to January 2004 for Acer). Thus, during the period from September 2003 to January 2004, as many as six different individual abuses were ongoing (conditional rebates or payments for Dell, HP, NEC and MSH, naked restrictions for HP and Acer). In the period following the end of the Dell conditional MCP rebates, Intel still implemented naked restrictions to Lenovo and conditional payments to MSH for the period from June 2006 to December 2006, and conditional rebates to Lenovo and conditional payments to MSH for the period from January 2007 to December 2007.

(1741) All those elements form part of a comprehensive strategy. Intel's behaviour must be seen in the context of the growing competitive threat represented by AMD. Intel itself recognised this. For example, an e-mail of 6 May 2005 from an Intel executive, which refers to problems with Intel's x86 CPU development and how they might be resolved, states: *"there is so much ingrained 'bad habits' and inertia that has developed over the past decade (which has been hidden/tolerated because we've had a money printing machine with really no competition until recently)."*[2044] In a similar vein, Intel's executive [...], reacting to the news that Dell had in 2006 finally made a decision to include some AMD x86 CPUs in its computers, stated: "[...]"[2045]

(1742) It should also be noted that Intel has attempted to conceal the nature of its conduct. For example, in the e-mail which [Intel senior executive] wrote to [Lenovo senior executive] in which he specified that any move by Dell towards

---

2044 E-mail of 6 May 2005 from [Intel executive] to [Intel executive] entitled *"CPU development"*, Annex 1 of Intel submission of 2 June 2008, document 20.

2045 E-mail of 18 May 2006 from [Intel executive] to [Intel executive] entitled *"RE:* [...] *on dell/amd"*, Annex 1 of Intel submission of 2 June 2008, document 2.

AMD would lead to a loss in Intel rebates to Dell, [Intel senior executive] began by stating: "[Lenovo senior executive], [...]."[2046] Similarly, section VI.2.8 has outlined the secret nature of the exclusivity agreement between Intel and MSH, and how Intel insisted on this. As regards HP, section Vhas shown that Intel entered into rebate agreements that contained unwritten anti-competitive clauses.

(1743) In addition, in written communications, Intel has attempted to portray its conduct in a manner which it believed would not arouse suspicion through the use of euphemisms, and has instructed and reminded its employees to do so. That has already been outlined in section VI.2.8.4.3 with regard to MSH, but evidence indicates that the practice is wider within Intel. For example, in an e-mail from an executive of Intel France which responds to an e-mail from an executive of Intel Germany in which there had been reference to attempts by Intel to *"successfully inhibit further Opteron implementation in our key accounts"*,[2047] it is stated: *"please be very careful using expressions like 'inhibit further Opteron implementation' which could be misinterpreted as anti-competitive – I think you mean 'win with IA vs Opteron' – If you see others use similar expressions please remind them of the current investigations by EU _FTC / dawn raids etc."*[2048] That communication took place before any inspections by the Commission had taken place.

(1744) Intel argues that "*there is no factual basis for the Commission's conclusion that Intel had a long-term comprehensive strategy to foreclose AMD.*"[2049] In essence, Intel claims that the Commission has not demonstrated that Intel had any anti-competitive strategic plan.[2050] It claims that Intel's commercial actions were nothing more than "*the independent pursuit of several disparate and legitimate business activities - separated by the passage of years and the distance of continents*".[2051]

(1745) However, that is not borne out in reality. The Intel practices described in this Decision reflect a common pattern and constitute the expression of a common

---

2046 E-mail of 18 June 2006 from [Intel senior executive]. to [Intel executive] entitled *"RE: status check..."*, Annex 2 of Intel submission of 2 June 2008, document 2.

2047 E-mail of 30 April 2004 from [Intel executive] to [Intel executive] entitled *"Deliverables urgently needed to fight against Opteron"*, Annex 2 of Intel submission of 2 June 2008, document 50.

2048 E-mail of 30 April 2004 from [Intel executive] to [Intel executive] entitled *"RE:Deliverables urgently needed to fight against Opteron"*, Annex 2 of Intel submission of 2 June 2008, document 50.

2049 Intel submission of 5 February 2009 related to the 17 July 2008 SSO, paragraph 716.

2050 Intel submission of 5 February 2009 related to the 17 July 2008 SSO, paragraph 735.

2051 Intel submission of 5 February 2009 related to the 17 July 2008 SSO, paragraph 721.

strategy. In particular, they take place in a consistent sequence of time, cover a significant number of OEMs across the world, and all seek to or have the effect of anticompetitively foreclosing AMD.[2052] As such, they are not "*the independent pursuit of several disparate and legitimate business activities*", or "*separated by the passage of years and the distance of continents*".

(1746) In that context, the Commission also recalls the case-law according to which *"for the purposes of applying Article 82 EC, establishing the anti-competitive object and the anti-competitive effect are one and the same thing (see, in that regard, Irish Sugar v Commission* [...] *paragraph 170). If it is shown that the object pursued by the conduct of an undertaking in a dominant position is to limit competition, that conduct will also be liable to have such an effect"*,[2053] and *"the Court however considers that, where one or more undertakings in a dominant position actually implement a practice whose aim is to remove a competitor, the fact that the result sought is not achieved is not enough to avoid the practice being characterized as an abuse of a dominant position within the meaning of Article 86 of the Treaty"*.[2054] [2055]

(1747) In conclusion therefore, although each Intel behaviour described in this Decision also constitutes an abusive conduct in itself, the Commission considers that it would not be appropriate to only view each of the respective conducts of Intel in isolation. In the light of the above, it is therefore concluded that Intel has engaged in a long-term comprehensive strategy to foreclose AMD from the strategically most important sales channels in the market.[2056] That strategy targeted a number of major OEMs as well as one retailer, with the measures adopted

---

2052 Moreover, given these characteristics, it is not necessary, as Intel seems to argue, that a formal anti-competitive strategic plan be uncovered.

2053 Case T-203/01 *Michelin II, op. cit.*, paragraph 241; and Case T-228/97 *Irish Sugar v Commission, op. cit.*, paragraph 170.

2054 Case T-24/93 , T-25/93, T-26/93 and T-28/93 *Compagnie Maritime Belge v Commission, op. cit.*, paragraph 149.

2055 See also case C-202/07 P *France Telecom v Commission,* paragraphs 107 to 113.

2056 here are also references to Intel's strategy in earlier e-mails authored by Intel's top executives:

On 27 November 1998, [Intel senior executive]., wrote that *"there is really no question that in the long run, i would like amd output spread round the world as a low cost/low value, unbranded brand. the backstreets of beijing are wonderful"*; e-mail of 27 November 1998 from [Intel senior executive]. to [Intel executive] of 27 November 1998 entitled *"RE: FW: ICP task force – need to meet Monday*"*, Annex 1 of Intel submission of 2 June 2008, document 1. This demonstrates that Intel's aim was to limit AMD's access to the market.

Similarly, on 20 November 1998, [Intel senior executive]., had written: *"Acknowledging that we have to face competition I think it would be better to have them selling their product with limited penetration around the world rather than high penetration in the most visible and trend setting market."*, e-mail of 20 November 1998 from [Intel senior executive]. to [Intel executive]. and others entitled *"Time For Something New"*, Annex 1 of Intel submission of 2 June 2008, document 1.

complementing each other. Taken together, those practices were capable of having or likely to have had an even greater negative impact overall on the market, which harmed consumers by depriving them of choices of computers based on AMD x86 CPUs.

(1748) Intel's conducts should therefore be considered to be part of a single infringement of Article 82 of the Treaty from October 2002 until December 2007, aimed at foreclosing competitors from the market.[2057]

VIII. EFFECT ON TRADE BETWEEN MEMBER STATES

(1749) Article 82 of the EC Treaty prohibits an abuse of dominant position "*in so far as it may affect trade between Member States*". That criterion has three basic elements.

(1750) First, "trade between Member States" must be affected. According to settled case law, abuses that have an impact on the competitive structure in more than one Member State are by their very nature capable of affecting trade between Member States.[2058]

(1751) Second, it is sufficient that the abuse "may affect trade", that is to say, that is sufficiently probable that the practice is capable of having an effect[2059] on the patterns of trade based on an objective assessment (as well as subjective elements, if any).[2060] Trade need not necessarily be reduced.[2061] The pattern of trade must simply be capable of being affected by the abusive practices.

(1752) Third, the effect on trade of the abuse must be appreciable. That element requires that the effect on trade between Member States must not be insignificant and it is assessed primarily with reference to the position of the undertaking(s) on the market for the product concerned.[2062]

2057 In its 5 February 2009 submission related to the 17 July 2008 SSO (paragraphs 704-707), Intel argues that the Commission has adopted a "*single complex continuous infringement*" doctrine in order to "*lower and shift the burden of proof*", and that such a doctrine only applies to cartel cases. However, this is not what the present Decision establishes, and nor indeed is it what was contained in the two Statements of Objections. Rather, the Commission has concluded that Intel had a single and continuous strategy which aimed at excluding or limiting AMD's access to the market.

2058 Joined Cases 6 and 7/73 *Commercial Solvents v Commission,* [1974] ECR 223; Case 6/72 *Continental Can* [1973] ECR 215.

2059 Joined Cases C-241/91 P and C-242/91 *RTE and ITP v Commission* [1995] ECR I-743, paragraph 69.

2060 See for example Case T-228/97 *Irish Sugar v Commission, op. cit.*, paragraph 170.

2061 See for example Case T-141/89 *Tréfileurope v Commission* [1995] ECR II-791.

2062 Case 5/69 *Volk v Vervaecke* [1969] ECR 295.

(1753) Section VII.4 has described how Intel abused its dominant position by attempting to limit the growth of AMD competition in the market, and depriving consumers of AMD-based products for which there was clear consumer demand. Intel's abusive practices are by themselves capable of having at least a potential effect on the competitive structure in more than one Member State and thereby on trade between Member States. Because of the size of the market concerned and of Intel's position on that market, the effect on trade is appreciable. As a result, it is concluded that Intel's abusive practices may affect trade between Member States within the meaning of Article 82 of the Treaty. For the same reasons, it is concluded that Intel's abusive practices may affect trade between the Contracting Parties to the EEA within the meaning of Article 82 of the EC Treaty and Article 54 of the EEA Agreement.

IX. REMEDIES AND FINES

1. Article 7 of Regulation (EC) No 1/2003

(1754) According to Article 7(1) of Regulation (EC) No 1/2003, *"Where the Commission (...) finds that there is an infringement of Article 81 or of 82 of the Treaty, it may by decision require the undertakings and associations of undertakings concerned to bring such infringement to an end."*

(1755) To the extent that any of the identified abuses are still ongoing, Intel is required to bring such abuses to an end, and henceforth to refrain from any practice which would have the same or similar object or effect as described in this Decision.

(1756) In addition, Intel's future compliance with Article 82 of the Treaty would be facilitated if there were no uncertainty in its commercial arrangements with its customers and commercial partners (for instance, the full terms of such arrangements could be written down, and there could be a warranty that such written terms constitute the full nature of the relevant arrangements).

2. Article 23 (2) of Regulation (EC) No 1/2003

(1757) Under Article 23(2)(a) of Regulation (EC) No 1/2003, the Commission may by decision impose fines upon undertakings or associations of undertakings where, either intentionally or negligently, they infringe Article 82 of the Treaty and/or Article 54 of the EEA Agreement. Under Article 15(2) of Council Regulation No 17: First Regulation implementing Articles 85 and 86 of the Treaty [2063] which was applicable at the time of a part of the infringement, the fine for an undertaking

---

[2063] OJ 13, 21.2.1962, p. 204.

participating in the infringement could not exceed 10% of its total turnover in the preceding business year. The same limitation results from Article 23(2) of Regulation (EC) No 1/2003.

(1758) In fixing the amount of the fine, the Commission must have regard to the gravity and duration of the infringement. In setting the fines to be imposed, the Commission will refer to the principles laid down in its Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003 (the 'Guidelines').[2064]

(1759) As has been stated above, Intel has contested the conclusion that it has infringed Article 82 of the Treaty. In addition, Intel argues that, even if it were to be accepted that it had infringed Article 82 of the Treaty, the Commission should not impose a fine in this case because the Commission did not prove that the abuses were committed intentionally or negligently.[2065] In that respect, Intel puts forward the following arguments:

(a) *"Intel's discounts were given in response to the OEMs' characterisations and descriptions of the nature of competitive threats posed by AMD. In these situations, Intel was faced with an absence of certainty as to the competitive threats it faced. It was dependent on the information volunteered by the OEM, not only as to AMD's competitive offer, but also as to the OEMs' intentions. Nevertheless, Intel instead set the parameters of its competitive response only after subjecting the information provided by the OEMs to its own best attempts realistically to evaluate the nature and extent of the competitive threat. Intel's competitive response was at all times, therefore reasonable and proportionate. Furthermore, it is not legitimate to attribute bad intent or negligence where Intel was merely reacting to pressure from its customers to meet competition, responding to what it was told were competing offers, and doing so at prices that were not only above any meaningful measure of Intel's costs, but in almost every case also above its rival's prices."*[2066]

(b) *"The Commission's allegations of abuse in relation to the Dell and HP discounts rest largely on its required share analysis. But even ignoring the errors in the Commission's required share calculations, the assumption*

2064 OJ C 210, 1.9.2006, p. 2.

2065 Intel Reply to the 26 July 2007 SO, paragraph 840.

2066 Intel Reply to the 26 July 2007 SO, paragraph 842, indent (a).

underlying the SO's analysis could not have been known to Intel at the relevant time."[2067]

(c) *"In relation to the NEC discounts and the so-called "naked restraints", the SO is silent as to their capability to foreclose AMD. If the Commission is unable to offer the analysis in its own SO, it cannot fairly be suggested that Intel should have known, years before the SO, that its conduct was economically capable of foreclosing AMD."*[2068]

(d) *"The Commission's allegations of abuse also all rest on its claim that AMD was foreclosed by Intel's conduct. But the SO does not explain how Intel was supposed to know that its conduct had that effect when, to all appearance and according to AMD's repeated public statements, AMD was doing better than it had ever done in the history of the company, and was selling its entire capacity."*[2069]

(1760) It is important to first underline several points. Firstly, there is clear decisional practice of the Commission and consistent case law from the Community Courts on the unlawfulness of conditional rebates (see for example section VII.4.2.1). Intel cannot claim that it was not aware of that decisional practice and case-law. The same applies to the unlawfulness of naked restrictions (see for example section VII.4.3.1.). Secondly, and following on from the first point above, section VI.2.1 as well as the individual descriptions of Intel's conducts vis-à-vis OEMs and MSH have shown that Intel took particular care to preserve the secrecy of its conduct. Thirdly, the as efficient competitor analysis conducted in section VII.4.2.3 is not relevant for the purpose of deciding whether the Commission should impose a fine or for determining its level as it does not relate to the existence of the infringement or to the question whether it was committed intentionally or by negligence, or to its gravity within the meaning of Article 23(2)(a) of Regulation (EC) No 1/2003 and of the Guidelines, in particular points 19 to 23 thereof. Finally, as was stated in section VII.4.5, all Intel conducts addressed in this Decision were part of a single strategy the overall object of which was to foreclose AMD from the x86 CPU market.

(1761) Those elements are sufficient in themselves to conclude that Intel's conduct was either intentional or negligent. Nevertheless, in the following recitals, the Commission will address the specific Intel arguments set out in recital (1759).

2067 Intel Reply to the 26 July 2007 SO, paragraph 842, indent (b).

2068 Intel Reply to the 26 July 2007 SO, paragraph 842, indent (c).

2069 Intel Reply to the 26 July 2007 SO, paragraph 842, indent (e).

(1762) The Intel argument in letter (a) in recital (1759) does not address the relevant issue. As already explained in section VII.4.2.6, the Commission does not call into question the fact that Intel can offer rebates or payments to its trading partners, but the fact that those rebates or payments were offered under certain anticompetitive conditions (exclusivity or quasi-exclusivity conditions, or conditions to cancel, postpone or restrict the sales of AMD-based products). As explained in section VII.4.2.6, Intel has not justified why it is necessary to put such conditions on rebates or payments to trading partners in order to meet the competitive pressure from AMD.

(1763) The Intel argument in letter (b) in recital (1759) is also not convincing. It is true that the Commission's "required share analysis" (namely, the as efficient competitor analysis conducted in section VII.4.2.2.6) was applied for the first time by the Commission in the 26 July 2007 SO. However, as pointed out in paragraph 374 of the 26 July 2007 SO and paragraph 260 of the 17 July 2008 SSO, that analysis is only one possible way of examining whether Intel's conditional rebates are capable of foreclosure. Paragraph 260 of the 17 July 2008 SSO made it clear that that analysis is not indispensable for finding an infringement under Article 82 of the Treaty and this Decision confirms it.

(1764) The Intel argument in letter(c) in recital (1759) is wholly misconceived. As already stated, the as efficient competitor analysis is only one possible way of demonstrating the capability to foreclose of a rebate which is conditional upon exclusivity or quasi exclusivity. As stated above, it is not a requirement for finding an abuse within the meaning of Article 82 of the Treaty according to settled case-law. Furthermore, the mere fact that the 26 July 2007 SO did not contain such a quantitative analysis for NEC, as it did for Dell and HP, cannot therefore logically lead to the conclusion that the 26 July 2007 SO was silent on the rebates' capability to foreclose. Section IV.4.2.2.4 of the 26 July 2007 SO showed in qualitative terms that the Intel rebates induced NEC to lower its share of supply from AMD in the client PC subsegment from an originally foreseen [...]% to 20% (see also section VII.4.2.2.4 of this Decision). Sections IV.4.2.4 and IV.4.2.5 of the 26 July 2007 SO further elaborated on the potential effects of Intel's conditional rebates, including rebates to NEC, on the foreclosure of AMD and harm to consumers.

(1765) Finally, it is also incorrect to state that the 26 July 2007 SO is silent on the capability of foreclosure of the conducts described in section VII.4.2.4 of this Decision, which Intel refers to as "*naked restraints*". Section IV.4.3 of the 26 July 2007 SO and Section IV.3.2.1 of the 17 July 2008 SSO show in detail how Intel's conduct materially affected the relevant OEMs' decisions to cancel/postpone/limit the marketing of AMD-based products. For such conducts, the harm to competition is immediate. Therefore, Intel cannot reasonably claim that it was unaware that such restrictions negatively affected consumer choice.

(1766) The Intel argument in letter (d) in recital (1759) is also not applicable. The notion of abuse is an objective concept which cannot reasonably depend on the content of public statements by the dominant company's competitor. There is case-law finding there to have been an abuse of a dominant position irrespective of the relative performance or growth of the dominant company's competitors during the infringement period.[2070] In particular, in *Compagnie Maritime Belge*, the Court of First Instance held that *"the fact that* [the only competitor's] *market share increased does not mean that the practice* [abuse of dominant position by the dominant company] *was without any effect, given that, if the practice had not been implemented,* [the only competitor's] *share might have increased more significantly"*[2071]

(1767) In addition to the questions Intel has raised under the heading 'Jurisdiction' in its Reply to the 26 July 2007 SO, Intel also argues that, in calculating the fine, the Commission must give due consideration to the degree of complexity and novelty of the competition law analysis that supports its findings.[2072] Intel makes reference to the Commission's decision regarding *Clearstream*,[2073] where the Commission decided not to impose fines, amongst other reasons, due to the fact that novel issues had been raised in that case.[2074] Intel mentions the following aspects of this case which it considers to constitute such novelty:

(a) Intel granted its discounts to OEMs that are large and have negotiating leverage vis-à-vis Intel, in some cases in an auction designed by the customer; the discounts usually represented less than the customer had sought;[2075]

(b) AMD performed well during the period covered by this Decision and made public announcements declaring how well it was doing;[2076] and

(c) the Commission applied the required shared methodology.[2077]

(1768) Intel makes erroneous reference to the Commission's *Clearstream* decision. In that case, the Commission decided not to impose fines, despite having established

---

2070 Case T-219/99 *British Airways v Commission* [2003] ECR II-5917, paragraph 239-241; *Michelin II*, *op. cit.*, paragraph 239.

2071 Joined Cases T-24/93 *Compagnie Maritime Belge*, paragraph 149.

2072 Intel Reply to the 26 July 2007 SO, paragraph 845.

2073 Commission Decision of 2 June 2004, Case COMP/38.096.

2074 Intel Reply to the 26 July 2007 SO, paragraphs 846.

2075 Intel Reply to the 26 July 2007 SO, paragraph 847.

2076 Intel Reply to the 26 July 2007 SO, paragraph 848.

2077 Intel Reply to the 26 July 2007 SO, paragraph 849.

infringement of the Community competition rules, for a number of reasons, none of which is present in the Intel case. Amongst others, there was no case-law at the time concerning the economic activity of cross-boarder clearing and settlement,[2078] which was an activity of particular concern for the Commission: the Commission set the objective of creating a single European capital market and the shortcomings of cross-border clearing and settlement had been identified as one of the most important obstacles to the attainment of that objective[2079]. Therefore, it is not certain novel factual circumstances that led the Commission not to impose fines in *Clearstream*, but the economic activity of the dominant undertaking as such and its high importance for the attainment of European policy objectives of the time. In this case, the economic activity of Intel does not raise any controversial issue similar to that of *Clearstream*, and there is no novel or specific circumstance present that would justify the non-imposition of fines, similar to that of *Clearstream*.

(1769) As regards the argument that there is novelty because Intel was faced with large buyers which possess negotiating leverage, there is existing case-law addressing such situations. Intel itself points to such cases in its Reply to the 26 July 2007 SO.[2080] Moreover, in *Irish Sugar*, the applicant argued that it was not dominant because of its customers' commercial strength, in other words, that it had a lack of independence vis-à-vis its customers. The Court of First Instance upheld the Commission's reasoning that that power did not affect the dominant position of the applicant since *"the applicant's other customers* [than the largest two] (...) *did not have such commercial strength."*[2081] Therefore, *"the demand side composed of a number of buyers which were not equally strong and which cannot be aggregated to conclude that they may constrain the market power of the supplier with over 90% of the market.* (...) *The share of sales of the two largest customers does not counterbalance the dominant position of Irish Sugar."*[2082] Moreover, case-law is clear as regards the role of customers in soliciting offers from a dominant company. According to the judgment in *Hoffmann-La Roche*, "*an undertaking which is in a dominant position on a market and ties purchasers - even if it does so at their request – by an obligation or promise on their part to obtain all or most of their requirements exclusively from the said undertaking, abuses its dominant*

2078 Commission Decision of 2 June 2004, Case COMP/38.096, paragraphs 342 and 344.

2079 Commission Decision of 2 June 2004, Case COMP/38.096, paragraph 342, referring to the first Giovanni Report on Cross-Border Clearing and Settlement Arrangements in the European Union, Brussels, November 2001.

2080 Intel Reply to the 26 July 2007 SO, paragraph 762.

2081 Case T-228/97 *Irish Sugar v Commission*, paragraph 97.

2082 Case T-228/97 *Irish Sugar v Commission*, paragraph 98.

position".[2083] Furthermore, in *Irish Sugar*, the Court of First Instance held that "*it is of little importance in that respect to determine whether the applicant* [the dominant company] *or SDL* [the distributor of sugar supplied by the applicant] *took the initiative in the product swap with the retailer Kelly, the Commission merely accusing the applicant of having agreed with one wholesaler and one retailer to exchange its own sugar for Eurolux sugar and not having taken the initiative in those two exchanges.*"[2084] In other words, the Court considered it irrelevant whether the dominant company or the retailer took the initiative in agreeing to swap the sugar from the dominant company's competitors for the sugar supplied by the dominant company. Consequently, in this case, the argument that OEMs may have invited Intel to bid cannot constitute a reason to exempt Intel from the imposition of fines. Therefore, in this case, the presence of large buyers is a situation similar to those that have already been addressed in several cases by the Courts and does not present any novelty.

(1770) In any case, as stated in section VII.3.4.1, Intel's argument that OEMs have similar power to Intel is incorrect: OEMs operate in a very competitive market, with very small margins and are dependent on Intel which is an unavoidable trading partner. However, even if Intel's contention that OEMs could exert significant leverage against Intel were to be accepted, again, there is existing case-law which shows that this cannot affect the Commission's findings. For instance, in *BPB Industries*, the Court of First Instance ruled that: "*The fact* (...) *that the promotional payments represented a response to request and to the growing buyer power of the merchants does not, in any case, justify the inclusion in the supply contracts* (...) *of an exclusivity clause*".[2085] Therefore, in this case, any such similar situation would not present any novelty. As regards the argument that AMD performed well, there is existing case-law on abuse of a dominant position which makes clear that the relative performance or possible growth of the dominant company's competitors during the infringement period is not a material consideration. In particular, in *Compagnie Maritime Belge*, the Court of First Instance held that "*the fact that* [the only competitor's] *market share increased does not mean that the practice* [abuse of dominant position by the dominant company] *was without any effect, given that, if the practice had not been implemented,* [the only competitor's] *share might have increased more significantly.*"[2086] Therefore, once again, in this case, to the extent that the situation is similar, there is no novelty present.

2083 See Case 85/76 *Hoffmann-La Roche, op. cit.*, paragraph 89 (emphasis added).

2084 Case T-228/97 *Irish Sugar v Commission*, paragraph 228.

2085 See Case T-65/89 *BPB Industries and British Gypsum v Commission , op. cit.*, paragraph 68.

2086 Joined Cases T-24/93 *Compagnie Maritime Belge*, paragraph 149.

(1771) Finally, as regards the as efficient competitor analysis, the relevant context was already described in recitals (1763)-(1764). As stated there, the analysis is not a legal requirement for finding an abuse according to the case-law but only represents one possible way of examining the capability to foreclose. In any event, any element of novelty involved in the analysis and its application could only work in Intel's favour.

(1772) In summary, in view of the above considerations, it is concluded that Intel's conduct justifies the imposition of a fine.

3. The basic amount of the fines

3.1 Calculation of the value of sales

(1773) In a submission of 3 April 2009, Intel has provided the Commission with the yearly value of x86 CPU sales which it invoiced to companies located in the EEA during the period ranging from 1997 to 2008. In the last full business year of the infringement, in this case Intel's business year ended on 29 December 2007, this amounts to EUR [...].[2087] [2088]

(1774) This value very likely underestimates the value of Intel sales of x86 CPUs directly or indirectly related to the infringement in the EEA. This is because most of the world's computers are assembled in Asia or in the United States, even if they are eventually sold in the EEA to EEA customers. Computers incorporating x86 CPUs which are manufactured or assembled outside the EEA but sold into the EEA are therefore not accounted for in the figure delivered by Intel.

(1775) This conclusion is confirmed by an analysis of data from independent market reporting companies. In this regard, Gartner data show that the share of sales of computers incorporating Intel x86 CPUs generated in the EMEA region is around [...]% of the worldwide total.[2089] The EMEA region is larger than the EEA (EMEA stands for "Europe, Middle East and Africa"). However, in view of the difference in the relative economic importance of the different zones of EMEA, it is unlikely that the difference in scope would lead to a significant reduction in the percentage. As a point of reference, the data submitted by Intel on 3 April 2009 show that, in

---

2087 Intel's submission of 3 April 2009.

2088 This amount was converted from [...]"*based on the average monthly exchange rates published by the European Central Bank*" (Intel's submission of 3 April 2009, p. 3, last paragraph).

2089 In 2002, 2003, 2004 and 2005, this share was respectively [...]%,[...]%, [...]% and [...]%. These shares are calculated in volumes. There is no reason to believe that the revenue share would be significantly different from the revenue share region-wise. Furthermore, there is no reason to believe that this share would have significantly decreased in more recent years. Indeed, it was very stable during the 2002-2005 period.

terms of the value of Intel sales invoiced to companies located in the different geographic zones, the EEA represents [...]% of the EMEA zone.[2090] Applying the same ratio to the figure of 32% would lead to a result of [...]%. [...]% of the worldwide turnover of Intel for x86 CPU in 2007 amounts to [...], which is still well above [...].

(1776) The Commission considers that the relevant value of Intel sales of x86 CPUs directly or indirectly related to the infringement in the EEA, which serves as a basis for the purpose of establishing a fine, may correspond to the value of Intel sales of x86 CPUs incorporated into computers eventually sold to consumers located in the EEA.

(1777) However, in the present Decision, the Commission uses the figures provided by Intel based on the invoice location of the x86 CPUs. As explained above, this choice works in Intel's favour. Therefore, for the purposes of calculating the basic amount of the fine, the Commission based its calculations on [...].

3.2 Determination of the basic amount of the fine

(1778) 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.[2091]

3.2.1. Gravity

(1779) In order to decide whether the proportion of the value of sales to be considered in a given case should be at the lower end or at the higher end of that scale, the Commission carries out a case-by-case analysis, taking account of all the relevant circumstances of the case. The Commission has regard to a number of factors, such as the nature of the infringement, the market share of the undertaking and the geographic scope of the infringement.[2092] These will be analysed in sections 3.2.1.1 to 3.2.1.4.

3.2.1.1. Nature of the infringement

(1780) The x86 CPU market is of great economic importance. According to market data, in terms of revenue, in 2007, the market generated revenues above USD 30 billion.[2093] This means that any anticompetitive behaviour on that market has a

---

2090 Intel's submission of 3 April 2009, p. 3, paragraph 1.

2091 Guidelines, point 19.

2092 Guidelines, points 20 and 22.

2093 Source: Mercury data, 1997-2008.

considerable impact. As has been mentioned on several instances in this Decision, besides Intel, which has consistently held around 80% market share, the only meaningful competitor is AMD. It has also been outlined in section VII.4.5 that Intel has designed and implemented a multi-faceted strategy encompassing a range of abusive practices with the common goal of anti-competitively foreclosing AMD from the market.

(1781) In addition, it is important to note that there are only two meaningful players on the market for x86 CPU production, Intel and AMD. In other words, the abusive practices of Intel aimed at the elimination or the restriction of the access to the market of the only competitor of a dominant company. Furthermore, as x86 CPU production requires heavy initial and then continuous investments, entry is difficult. Therefore, it is likely that in case AMD were to be eliminated or marginalised, there would be no credible potential entrant in this market. Moreover, it has been established that Intel is an unavoidable trading partner for all major OEMs.

(1782) Conditional rebates by undertakings in a dominant position have already been condemned on several occasions by the Commission and the Court of Justice.[2094] Moreover, on several instances, the Community Courts have found loyalty-inducing discount systems applied by a dominant firm in order to shut competitors out of the market to be an infringement of the competition rules.[2095] Furthermore, it is long-standing case-law that a violation of Article 82 of the Treaty may also result from the anticompetitive object of the practices pursued by a dominant undertaking.[2096] As demonstrated in this Decision, naked restrictions, that is to say paying OEMs to delay or not launch computers incorporating competitors' x86

2094 Case 85/76 *Hoffmann-La Roche v Commission* [1979] ECR 461, paragraph 89. See also Case C-62/86 *AKZO v Commission* [1991] ECR I-3359, paragraph 149; Case T-65/89 *BPB Industries and British Gypsum v Commission* [1993] ECR II-389, paragraphs 71 and 120; Case C-393/92 *Municipality of Almelo and others* [1994] ECR I-1477, paragraph 44; Joined Cases T-24/93, T-25/93, T-26/93 and T-28/93 *Compagnie Maritime Belge Transports and Others v Commission* [1996] ECR II-1201, paragraphs 182 to 186; Case T-203/01 *Michelin v Commission (Michelin II)* [2003] ECR II-4071, paragraph 56; and Case T-219/99 *British Airways v Commission* [2003] ECR II-5917, paragraph 244, confirmed on appeal in Case C-95/04 P *British Airways v Commission* [2007] ECR I-2331, paragraphs 62 and 65. See also Commission Decision 2002/180/EC in Case Comp/C-1/37.859 - *De Post - La Poste.*

2095 See for example Case T-203/01 *Michelin II*, op. cit, paragraphs 251 and 278.

2096 Case T-203/01 *Michelin II*, op. cit, paragraph 241; Joined Cases T-24/93, T-25/93, T-26/93 and T-28/93 *Compagnie maritime belge*, op. cit, para 149; confirmed by Joined Cases C-395/96 P and C-396/96 P *Compagnie Maritime Belge Transports, op. cit.*, paragraph 118-120. See also Case C-202/07 P *France Télécom v Commission* not yet reported, paragraphs 107 to 113.

CPUs, also constitute abuses of a dominant position according to settled case-law.[2097]

3.2.1.2. Market share

(1783) It has been established in this Decision that during the entire infringement period, Intel not only held a dominant position in the x86 CPU market in all segments, but its market share was much higher than its competitors'.

3.2.1.3. Geographic scope

(1784) It has been demonstrated in this Decision that Intel's exclusionary strategy against AMD was worldwide in scope. For the purposes of establishing the gravity of the infringement, this means that the whole EEA was covered by the unlawful conduct.

3.2.1.4. Conclusion on the gravity of the infringement

(1785) 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 the factors set out above, in particular the nature, the market share and the geographic scope of the infringement. In this specific case, the Commission also took into account additional factors, namely that while Intel's conducts vis-à-vis individual OEMs constitute separate abuses, the Commission has also found Intel to have engaged in a single infringement. However, the intensity of that single infringement differs across the years. Most of the individual abuses concerned are concentrated in the period ranging from 2002 to 2005, whilst, after the end of 2005, at most two individual abuses occur simultaneously at any given point in time.[2098] The Commission also took into consideration that some of the individual abuses have a short duration. Further, the abuses differ in their respective likely anticompetitive impact. The Commission also took account of the fact that Intel took measures to conceal the conducts established in this Decision, which made it more difficult to detect and sanction them.

(1786) In view of the above, 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%.

2097 Joined Cases T-24/93, T-25/93, T-26/93 and T-28/93 *Compagnie Maritime Belge and Others*, *op. cit.*, paragraph 149; Case T-228/97 *Irish Sugar*, *op. cit.*, paragraph 170; and Case T-203/01 *Michelin II*, *op. cit.*, paragraph 241.

2098 See recital (1740).

3.2.2. Duration

(1787) Intel's abuse of its dominant position commenced in October 2002 and continued until at least December 2007. Although different conducts were in place at different times, a continuous abusive pattern was present throughout that period. Therefore, the overall duration of Intel's infringement to be taken into account for the calculation of the fine to be imposed starts in October 2002 and amounts to 5 years and 3 months, which is an infringement of long duration.

(1788) In accordance with paragraph 24 of the Guidelines, for the purposes of the calculation of the fine, the amount determined in recital (1785) above should be multiplied by 5,5 to take account of its duration.

3.2.3. Conclusion on the basic amount of the fine

(1789) On the basis of the above, the basic amount of the fine to be imposed on Intel should be EUR 1 060 000 000.

3.3 Mitigating circumstances

(1790) According to the Guidelines, the basic amount of the fine may be reduced where the Commission finds mitigating circumstances, such as the undertaking providing evidence that it has terminated the infringement as soon as the Commission intervened, the infringement having been committed as a result of negligence, the undertaking having effectively cooperated with the Commission outside the scope of the Commission notice on immunity from fines and reduction of fines in cartel cases ("the Leniency Notice")[2099] and beyond its legal obligations to do so or where the anti-competitive conduct of the undertaking has been authorised or encouraged by public authorities or legislation.[2100]

(1791) None of those elements are present in the case at hand. Intel did not terminate its abusive practices after the initiation of proceedings, Intel has not convincingly argued or forwarded any convincing evidence showing negligence on its part and the Commission has found Intel to have engaged in a strategy of exclusion, Intel has not effectively cooperated with the Commission outside the scope of the Leniency Notice and beyond its legal obligations to do so and there is no element of encouragement by public authorities or legislation.

2099 OJ C 298, 8.12.2006, p. 17.

2100 Paragraph 29 of the Guidelines. The Guidelines list other types of possible mitigating circumstances but these apply mainly to cartels.

(1792) Intel argues that the following factors are relevant mitigating circumstances:[2101]

(a) Intel provided discounts to OEMs on the basis of invitations from OEMs to bid for a percentage of their x86 CPU requirements; all OEMs were large corporations with comparable bargaining power to that of Intel, and which used the threat of switching to AMD to extract lower prices from Intel;

(b) Intel was misled by the OEMs as to the extent to which they would switch to AMD and the timescale in which such a switch could take place; and

(c) because of AMD's competitive success, Intel had no grounds to believe that AMD was foreclosed.

(1793) Those arguments are not capable of undermining the conclusions reached in section 3.2.1 on the factors which have to be considered when establishing the gravity of the infringement. They cannot be accepted, even for the purpose of recognising mitigating circumstances, for the reasons explained in recitals (1794) to (1800).

(1794) As regards Intel's argument that the OEMs' bidding process should be taken into account as a mitigating factor, this case is not about Intel's response to AMD competition by lowering its prices, but about the conditions attached to the said prices. As was already demonstrated in particular in section VII.4.2.6.2, the fact that OEMs were seriously considering switching to AMD could in no way justify the conditions attached to Intel rebates and/or payments. Furthermore, as has already been stated, Community case law clearly spells out that the fact that conditional rebates may have been requested by the dominant company's customers is irrelevant to the finding of an abuse under Article 82 of the Treaty.[2102] It is equally irrelevant for the purpose of applying mitigating circumstances because the dominant company can be expected to resist a request to behave in a manner which would obviously violate Article 82 of the Treaty. This suffices to reject Intel's argument outlined in letter (a) in recital (1792) as a ground to reduce the fine to be imposed on Intel on the grounds of mitigating circumstances.

(1795) The Report of Professor [...] annexed to the Intel Reply to the 26 July 2007 SO also mentions the argument of the alleged "bidding process". Professor [...] states that "[c]*ompetition between Intel and AMD to have their microprocessors selected in the new computer systems offered by OEMs at refresh cycles is an excellent example of a design win situation.*"[2103] Professor [...] outlines that, in that

---

2101 Intel Reply to the 26 July 2007 SO, paragraph 852.

2102 See recital (964).

2103 Intel Reply to the 26 July 2007 SO. Report of Professor [...], paragraph 14.

type of situation, "*suppliers of intermediate goods often compete to have their products included as inputs in a finished product.*" [2104] Professor [...] argues that even though *"one could say that the losing bidder is "excluded" (for some period of time) from supplying its input for this particular system (...) any such "exclusion" does not constitute anticompetitive conduct that raises antitrust concerns, if the winning firm's prices are above appropriately measured cost."*[2105]

(1796) That argument is not convincing. The bargaining process between chip manufacturers and OEMs includes offers and counter offers, repeated contacts and even long term relationships. The negotiations at different "refresh cycles", for different PC models or lines do not appear to be independent. Those negotiations are very different from auctions. Hence, the use of the term "bid" is misleading and the implicit reference to the presumed competitiveness of independent auctions is irrelevant. Furthermore, in itself, the qualification of the nature of the competition between Intel and AMD as "design wins" is unhelpful as Intel does not provide specific evidence showing that those markets are in general more competitive or less prone to foreclosure.

(1797) In any case, the argument that rebates were offered by Intel to HP and NEC "*based on invitations to bid for a percentage of their requirements and thus specifically demanded by the OEMs in question*"[2106] is a misrepresentation of Intel's actual role in the negotiations. As described in section VI.2.4.4.2, the case file does not contain sufficiently conclusive evidence as to whether HP or Intel first came up with the idea of a 95% MSS condition for the Intel rebates. However, there is ample evidence that Intel did not reject the condition, and was even pushing in the negotiations for a 100% exclusivity clause, in exchange for more rebates.

(1798) The case file contains similar evidence that, contrary to Intel's depiction of its negotiations with NEC, Intel actually had the objective of achieving an exclusivity condition with NEC.[2107] Indeed, as outlined in section VI.2.6.3, contemporaneous evidence on the file demonstrates that NEC did not independently develop the so-called Realignment Plan, but it was Intel's objective to make NEC adopt it. In other words, Intel's argument that NEC organised a bidding process between Intel and AMD for its x86 CPU shares[2108] is factually not correct.

2104 Intel Reply to the 26 July 2007 SO. Report of Professor [...], paragraph 12.

2105 Intel Reply to the 26 July 2007 SO. Report of Professor [...], paragraph 13.

2106 Intel Reply to the 26 July 2007 SO, paragraph 852, ident (a).

2107 See recital (469).

2108 Intel Reply to the 26 July 2007 SO, paragraph 470.

(1799) Intel's argument that Intel was misled by OEMs with respect to the proportion of their x86 CPU purchases they were willing to switch to AMD, that is to say their contestable share, cannot be accepted as a mitigating factor either. Firstly, as set out above, the as efficient competitor analysis is not a requirement for finding an abuse according to the case-law. Knowledge about the contestable share is therefore not relevant to the finding of abuse according to the case-law and hence to the imposition of fines. Secondly, Intel raised that argument in its Reply to the 26 July 2007 SO only in respect of HP.[2109] Therefore, it cannot be accepted as a mitigating circumstance with respect to the overall amount of the fine. Thirdly, Intel knew that in their negotiations, HP overstated its contestable share. As described in section VII.4.2.3.3.f), Intel actively encouraged HP to provide it with overestimated contestable share figures, and even increased the HP representations itself.

(1800) With respect to Intel's argument that it had no grounds to believe that AMD was foreclosed, this argument would not be sufficient to show that the infringement has been committed as a result of negligence. Furthermore, as this Decision demonstrates, Intel pursued an overall exclusionary strategy vis-à-vis AMD. Therefore, it is irrelevant if Intel was unaware of the exact extent to which it succeeded in foreclosing AMD.

(1801) In the light of the above analysis concerning mitigating circumstances, there is no justification for reducing the amount of the fine to be imposed on Intel.

3.4 Conclusion

(1802) According to the Guidelines, the final amount of the fine shall not, in any event, exceed 10% of the total turnover in the preceding business year of the undertaking participating in the infringement.[2110] Intel has submitted that its annual turnover in the business year ending 29 December 2008 was EUR 25 555 million (USD 37 586 million).[2111]

(1803) The final amount of the fine to be imposed on Intel should therefore be EUR 1 060 000 000,

HAS ADOPTED THIS DECISION:

Article 1

2109 Intel Reply to the 26 July 2007 SO, paragraphs 309-315.

2110 Paragraph 32 of the Guidelines.

2111 Intel's submission of 3 April 2009, answer to question 3.

Intel Corporation has committed a single and continuous infringement of Article 82 of the Treaty and Article 54 of the EEA Agreement 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 EMEA 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 imposed on Intel Corporation.

The fine shall be paid in euros, within three months of the date of notification of this Decision, into bank account No 001-3953713-69 of the European Commission with FORTIS Bank S.A., Rue Montagne du Parc 3, B-1000 Bruxelles/Brussel (Code SWIFT: GEBABEBB – code IBAN BE71 0013 9537 1369). After the expiry of that period, interest shall automatically be payable at the interest rate applied by the European Central Bank to its main refinancing operations on the first day of the month in which this Decision is adopted, that is 1,25 % as published in the Official Journal of the European Union No C 103 of 5 May 2009, plus 3,5 percentage points.

Article 3

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

Intel Corporation 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.

Article 4

This Decision is addressed to

Intel Corporation, 1209 Orange Street, Wilmington, 19801, County of New Castle, Delaware, United States of America

c/o

Intel Ireland, Collinstown Industrial Park, Leixlip Co. Kildare, Eire.

This Decision shall be enforceable pursuant to Article 256 of the Treaty and Article 110 of the EEA Agreement.

Done at Brussels, *For the Commission*