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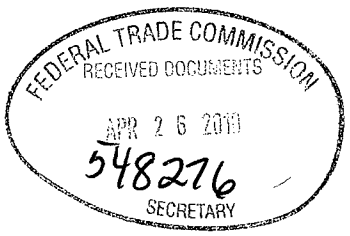

UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION

In re:	)	**PUBLIC**
INTEL CORPORATION,	)	Docket No. 9341
Respondent.	)	

COMPLAINT COUNSEL'S REPLY MEMORANDUM IN SUPPORT OF MOTION TO ADMIT EC DECISION[1]

The question before the Court is whether the European Commission's detailed ***findings of fact*** regarding market definition, Intel's market power, entry barriers, and Intel's exclusionary arrangements with certain OEMs are admissible evidence in this proceeding. Intel faces a "heavy burden" in opposing the admission of the EC decision. *Complaint of Nautilus Motor Tanker, Ltd.*, 862 F. Supp. 1251, 1255 (D. N.J. 1994). And yet, Intel ignores the factors in Rule 803(8)(C) and legal precedent, and stresses that European law might be different than United States law. *See Beech Aircraft Corp. v. Rainey,* 488 U.S. 153, 167-71 and n.11 (1988) (admitting a JAG Report and listing factors). Indeed, in nearly every case on point, the law of the reporting authority and the instant case were different.[2]

Differences between the antitrust laws of the US and the EC are irrelevant. Intel, however, argues that the EC decision is immaterial and irrelevant because of the "profound"

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We are not trying to import the EC competition law into this case. We are introducing the EC decision because its *findings of fact* -- such as market definition, Intel's market power, entry barriers, and Intel's exclusionary arrangement with certain OEMs -- are relevant and material to this case. That is what Rule 803(8)(C) says: "factual findings resulting from an investigation made pursuant to authority granted by law" are admissible. Based on all the precedent and the plain language of the Rule, it makes no sense to create an exception to the rule to disallow factual findings because the law might be different.

Admission of the EC decision into evidence is not prejudicial. The decisions cited by Intel do not support its argument for prejudice. In those cases, the courts determined that the administrative agency's findings could have had a prejudicial impact *in a jury trial.*[3] This argument does not apply to bench trials. *Abramowitz,* 1999 U.S. Dist. LEXIS 20005 at 23 n.4 ("A bench trial would, of course, present a different case"), *citing Barfield,* 911 F.2d at 651

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(decision is admissible in a bench trial). We believe, respectfully, that the Judge in this case can weigh all evidence at the end of the hearing.

The EC decision is trustworthy. Intel argues that the EC decision is somehow not trustworthy. As the foundation for this argument, Intel repeatedly cites *Coleman v. Home Depot, Inc.*, 306 F.3d 1333 (3d Cir. 2002), to justify its speculation about the EC's "suspect motivation[s]." *See* Opposition at 9-13. *Coleman* was a discrimination case before a jury in which the plaintiff sought to introduce an EEOC letter. *See* 306 F.3d at 1337 n.1. Because "[t]here [was] no indication in the one-page EEOC determination where this factual basis [for these findings] comes from," *id.* at 1340,[4] the court of appeals held that the letter was inadmissible because the letter thus had little probative value. *Id. Coleman* is not applicable here. Unlike the EEOC letter, the EC decision – which is 500 pages long, with hundreds of discrete findings of fact, each of which is supported by evidence – is trustworthy.

Intel offers no real support for its claim that the EC decision is untrustworthy. In a rather transparent effort to circumvent the word limitations of its Reply, Intel attaches on highly subjective arguments from its ***own*** lawyers and agents in Europe to argue that the EC decision is untrustworthy. Indeed, Mr. Venit represents Intel in the EC litigation. Venit Dec. ¶5.[5] Cf. Bo Vesterdorf, Due Process Before the Commission of the European Union? (CPI April 2010) ("I do not, personally, have any real reason to believe that the excellent professional officials

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working within [European] Competition do not try to be both impartial and fair in their investigations.") (Former Judge in European Microsoft case and now of counsel at Herbert Smith, LLP and Plesner law firms).

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Third, Intel argues that the EC knew its decision would be appealed and, therefore, its decision is somehow inherently untrustworthy. Opposition at 11-13. This analysis, however, is appropriate only when the declarant, in making the statement, may be affected by the risk of liability in the anticipated litigation. *Lewis*, 149 F.R.D. at 489. That the EC might be named as a

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party *pro forma* in any appeal does not render its decision untrustworthy.[7] Furthermore, there is nothing unique to this case about this argument and the federal courts that have addressed the question of the admissibility of EC fact finding have unanimously admitted the evidence. *See, e.g., In re EPDM,* 2009 WL 5218057 at *9 (finality or appeal are not a bar to admission of evidence under Rule 803(8)(C)) (citing numerous cases); *Wells v. Allstate Ins. Co.*, No. 00-0760-LFO, 2002 WL 34371516 at *2 (D.D.C. May 24, 2002) (admitting investigatory report under Rule 803(8)(C) that was not formally adopted).

Finally, Intel suggests without any evidence that the EC decision is untrustworthy because some unnamed person in the FTC Staff "may have influenced the EC's analysis or conclusions." Opposition at 13. First, there is nothing unusual, much less untoward, about law enforcement agencies communicating with each other. But more importantly, the EC's factual findings contain thousands of citations to evidence and do not cite the FTC Staff for any factual finding. Thus, this is another baseless argument.

CONCLUSION

The sole issue presented by our motion is whether the EC decision is admissible evidence. Under the law, the EC decision should be considered as part of the evidentiary record in this case. The decision is "relevant, material, and reliable." Rule 3.43(b). Accordingly, we respectfully ask that the EC decision be admitted into evidence as CX0243 (in camera) and CX0244 (public).

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[7] If this analysis were accepted, any agency decision would be inherently untrustworthy.

April 26, 2010

Respectfully submitted,

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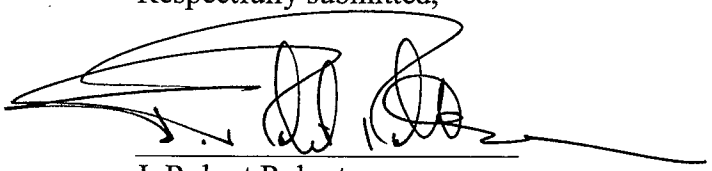

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CERTIFICATE OF SERVICE

I certify that I filed via hand and electronic mail delivery an original and two copies of the foregoing Reply Memorandum in Support of Motion to Admit EC 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 Reply Memorandum in Support of Motion to Admit EC 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 Reply Memorandum in Support of Motion to Admit EC Decision to:

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April 26, 2010

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CPI COMPETITION POLICY INTERNATIONAL

The CPI Antitrust Journal
April 2010 (1)

Due Process Before the Commission of the European Union?
Some Reflections Upon Reading the Commission Draft Paper on Best Practices in Antitrust Proceedings

Bo Vesterdorf
Herbert Smith LLP, London/Brussels
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Due Process Before the Commission of the European Union?

Some Reflections Upon Reading the Commission Draft Paper on Best Practices in Antitrust Proceedings

Bo Vesterdorf[1]

In any democratic country based on the rule of law, just as it is a fundamental principle that citizens are entitled to a fair trial before the courts,[2] it is—or at least it should be—a fundamental principle that proceedings before public authorities assure citizens a due process. As regards the European Union, the principle of a right to a due process before the public authorities has now been formulated in Article 41 of the European Union's Charter of Fundamental Rights which reads "Every person has the right to have his or her affairs handled impartially, fairly and within reasonable time by the institutions and bodies of the Union." The administrative practices of all the institutions of the Union must respect this principle.

The recently published Commission draft paper on "Best Practices on the conduct of proceedings concerning Articles 101 and 102 TFEU" is, in principle, a laudable and useful paper setting out the practices which the Commission's Directorate General for Competition (DG Competition) will follow in its proceedings in cases regarding possible infringements of either of the two aforementioned Articles. It is also commendable that the Commission, before deciding the final form and contents of the paper, has invited interested parties to present their comments and possible suggestions for modifications or further points to be included in the paper. I do not doubt that, once the Commission has had the possibility to scrutinize the no doubt numerous suggestions and comments and taken due notice thereof, the resulting document will become a helpful guide for parties involved in competition proceedings before the Commission, ensuring increased transparency of the proceedings to the benefit of all parties concerned, including the parties under investigation, third parties, and the Commission itself.

A predictable and transparent procedural framework is a worthy aim in itself and the Best Practices will go some way to achieving this. However, in order for the Commission to adhere to its stated aim of giving a "high priority to due process and fairness in antitrust proceedings,"[3] the document should not principally be an enumeration of existing practices but should indeed put in place truly "best" practices in antitrust enforcement. Best practices should include real (and necessary) improvements of the administrative proceedings leading to an administrative enforcement regime which is beyond reproach and which thus fully guarantees due process and fairness in antitrust proceedings before the Commission.

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[1] Former judge and president of the General Court of the European Union (formerly named the Court of First Instance), consultant to Herbert Smith LLP, London/Brussels, and to Plesner Lawfirm, Copenhagen. All views expressed are strictly personal.

[2] *See* Article 6 of the European Convention on Human Rights

[3] *See* the statement by the former Commissioner for Competition, Ms. Neelie Kroes, in the press release accompanying the launch of the draft

While the existing draft paper provides useful guidance and thus should lead to further predictability and transparency, it falls short of establishing truly "best" practices in antitrust proceedings. There are, in my view, a number of improvements and/or clarifications which should be made on a number of points regarding the proceedings. Such points include inter alia:

- increased transparency during the investigative phase of a case (i.e. before the issuance of a statement of objections);
- improved protection against self-incrimination (or at least a clearer description of what the existing level of protection covers);
- ensuring that the oral hearing before the Commission is changed so that it becomes a key feature of the process and parties no longer feel that participating in a hearing does not serve any purpose;
- ensuring real independence of the Hearing Officer and enlarging his/her powers to include (more than just) a look into the substance of a case;
- ensuring more reasonable and realistic time limits for the parties in the various phases; and
- increased information from DG Competition to parties regarding progress of cases.

In this comment, I shall, however, not discuss the above mentioned issues in any more detail but shall deal with another issue which is an important part, indeed the most crucial part, of what due process is all about; the issue of "impartiality and fairness" of the administrative proceedings[4] which, as noted above, is a central principle of Article 41 of the Charter of Fundamental Rights. This is an issue which is not at all mentioned in the draft paper, yet is what the Best Practices paper should be and probably is aimed at ensuring.

I do want to address this issue for a reason specific to my own experience; which is that, in a large number of cases before the EU courts in Luxembourg (indeed from the very first cases with which I had the pleasure to deal as a judge at the then CFI), applicants have put forward a plea in law and arguments in support thereof claiming that the proceedings before the Commission were vitiated by a lack of objectivity from the officials who had investigated, examined, and in reality decided the case. The officials were claimed to have acquired a so-called "tunnel vision" as a result of which they were claimed to have refused to consider or even look at evidence or factual circumstances in favor of the undertakings concerned.[5] This kind of argument has also frequently been made at conferences on competition law by lawyers who have participated in competition proceedings before the Commission. The essence of that kind of argument is that the public authority is claimed not to have been impartial or fair in its examination of a case. Were that to be true, it would mean a violation of the principles of good administration and not meet the requirements of due process.

[4] I do not in this small contribution deal with other specific aspects of due process such as the right to be heard, access to documents, and proper reasoning of decisions. Nor, indeed, do I deal with the much wider question of whether the present structure of the investigation and decision-making system of the European Commission is at all capable of meeting the requirements of due process under Art 6 ECHR. For such a wider discussion, *see* I. Forrester, 34 E.L. Rev. at 817 (2009). Consequently I shall not, in this respect, enter into the discussion of whether or not a complete overhaul of the system might be preferable or necessary; in particular, for instance, changing it into a judicial-based system where the Commission/DG Competition investigates a case and, if it believes a case can be made for infringement, brings charges before a court which decides on the case.

[5] "Tunnel vision" might probably in colloquial terms cover both what Wouter Wils calls "confirmation bias" and "hindsight bias," *see* Wils, *The Combination of the Investigative and Prosecutorial Function and the Adjudicative Function*, 27 WORLD COMPETITION: L. & ECON. REV. 202,215 (2004).

submit—if necessary during the administrative phase of the case to assist the undertaking being investigated in finding exculpatory evidence if such evidence seems to reasonably exist and the undertaking itself is not in a position to produce it without the help of the authority.[8] It is, finally, a duty under the principle of due process and good administration that DG Competition and its civil servants at all times treat undertakings fairly by adhering to the principle that, as in criminal cases, the undertaking under investigation is presumed to be innocent until proven guilty.

Such are the demands of due process for any public authority. They should apply with even greater force in a situation where a public authority has powers to take legally binding decisions with very significant negative implications on the addressee, including the imposition of fines—often extremely heavy fines. In such a situation, which is the one of antitrust proceedings before the Commission, it is of the utmost importance that the above elements of due process are scrupulously adhered to in order to ensure the legitimacy of the system as a whole. Breach of due process principles before the Commission, of course, entitles the addressee to a decision to have recourse to the EU courts. Such recourse does not, however, suffice to prevent negative impressions about due process being formed leading to constant and increasing criticism of the system which jeopardizes its legitimacy and ultimately its efficacy.

In conclusion, I think it would be wise for the Commission to tackle these issues head-on and take the necessary steps to avoid such criticisms of the due process aspects of its system in the future. I am not going through any detailed suggestions in this paper—many commentators have made suggestions and no doubt the Commission has received a number of useful suggestions in the recent consultation on the draft Best Practices. I note that such steps, which do not require any changes to the Treaty, might usefully include:

- greater separation of investigating teams from decision-making teams;
- strengthening of the peer review panels;[9]
- strengthening of the role of the Hearing Officer,[10]—in particular by enlarging his/her mandate to include also a critical look at the substance of the case; and
- amendments to the oral hearing to ensure far better procedures, including cross-examination of parties and the presence of senior hierarchy such as officials from each Commissioner's cabinet.

It is to be hoped that the new Commissioner responsible for competition will follow the path of a former Commissioner, Mr. Mario Monti, who, after a series of merger decisions were annulled in 2002 by the EU courts, took steps to improve the internal proceedings on merger control on a number of important points. There is, however, as suggested above still room for

[8] The case law of the EU Courts in Luxembourg is not entirely clear on this point. The judgment in case T-314/01 Avebe v Commission [2006] ECR II-3083, ¶ 71 et seq. comes very close to a finding of such an obligation. It must, however, be on the conditions that the undertaking has tried in vain or clearly has no way of obtaining the documents, has indicated to the Commission sufficiently clearly and convincingly where the document(s) may be found, has explained why they are presumed important as being exculpatory, and has described as clearly as possible which document(s) are required. Otherwise the Commission is just invited to go on a fishing expedition for the undertaking, taking time thus delaying procedures.

[9] The introduction of peer review panels within DG Competition has been a welcome novelty. For it to be a real response to the criticism of lack of fairness and impartiality, the persons sitting on the peer review panel should, however, not be recruited from within DG Competition, but from the Commission legal service or other parts of the Commission. The risk of any suspicion of partiality vis-à-vis colleagues within the same service should be avoided.

[10] The Hearing Officer should in any event be completely independent from the DG Competition and therefore perhaps be hired by and belong to the cabinet of the President of the Commission.

important improvements and the current debate on the draft Best Practices in antitrust proceedings is a good opportunity for the Commission to put in place practices which can truly be considered "best" from a due process perspective.