

**Summary of Commission Decision****of 13 May 2009****relating to a proceeding under Article 82 of the EC Treaty and Article 54 of the EEA Agreement****(Case COMP/C-3/37.990 — Intel)**

(2009/C 227/07)

**1. INTRODUCTION**

(1) On 13 May 2009, the Commission adopted a decision relating to a proceeding under Article 82 of the EC Treaty and Article 54 of the EEA Agreement addressed to Intel Corporation. The Commission herewith publishes the summary of the Decision, having regard to the legitimate interest of undertakings in the protection of their business secrets. A non-confidential version of the decision will be available on the Competition Directorate general website.

**2. CASE DESCRIPTION****2.1. Procedure**

(2) On 18 October 2000, Advanced Micro Devices (AMD) submitted to the Commission a formal complaint under Article 3 of Regulation No 17/62 which was further supplemented with new facts and allegations in particular in November 2003.

(3) In May 2004, the Commission launched a round of investigations relating to elements 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 the United Kingdom, Germany, Italy and Spain, as well as at the locations of several Intel customers in France, Germany, Italy, Spain and the United Kingdom.

(4) On 26 July 2007, the Commission issued a Statement of Objections (SO) concerning Intel's conduct vis-à-vis five major Original Equipment Manufacturers (OEMs) namely: Dell, HP, Acer, NEC and IBM. Intel replied to the 26 July 2007 SO on 8 January 2008, and an oral hearing was held on 11 and 12 March 2008.

(5) On 17 July 2006, AMD filed a complaint to the German National Competition Authority claiming that Intel had engaged in exclusionary marketing arrangements and other practices with Media-Saturn-Holding GmbH (MSH), a European retailer of microelectronic devices. The German National Competition Authority exchanged information with the Commission on this subject, in application of Article 12 of Regulation (EC) No 1/2003.

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

(7) On 17 July 2008, the Commission issued a supplementary Statement of Objections (SSO) concerning Intel's conduct vis-à-vis MSH. The 17 July 2008 SSO also covered Intel's conduct vis-à-vis Lenovo. It also included new evidence on the Intel conducts vis-à-vis some of the OEMs covered by the 26 July 2007 SO, which had been obtained by the Commission after 26 July 2007 SO.

(8) Intel did not reply to the 17 July 2008 SSO. Instead, Intel lodged with the Court of First Instance (CFI) an application asking the CFI *inter alia* to order the Commission to obtain several categories of additional documents from, amongst other sources, the file of the private litigation between Intel and AMD in the US State of Delaware. Intel further applied for interim measures to suspend the Commission's procedure pending a ruling of the CFI on its substantive application and to grant Intel 30 days from the date of the said judgment to reply to the 17 July 2008 SSO.

(9) On 19 December 2008, the Commission sent Intel a letter drawing Intel's attention to a number of specific items of evidence which the Commission intended to use in a potential final Decision. Intel failed to reply to this letter by the extended deadline of 23 January 2009.

(10) On 27 January 2009, the President of the CFI rejected Intel's application for interim measures and request for extension of the deadline to reply to the 17 July 2008 SSO.

(11) Following the Order by the President of the CFI, Intel served a substantive written submission including observations on the 17 July 2008 SSO on 5 February 2009. The Commission services examined the relevant arguments of Intel's belated submission despite the fact that Intel had had an ample opportunity to submit its reply to the 17 July 2008 SSO by the original deadline of 17 October 2008.

(12) 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. The Hearing Officer replied by letter of 17 February 2009, rejecting Intel's request.

(13) The Advisory Committee on Restrictive Practices and Dominant Positions issued a unanimous favourable opinion on 28 April 2009 and 8 May 2009.

## 2.2. The product concerned and the market

(14) The products concerned by the Decision are Central Processing Units (CPU) of the x86 architecture. The CPU is a key component of any computer, both in terms of overall performance and cost of the system. It is often referred to as a computer's 'brain'. The manufacturing process of CPUs requires high-tech and expensive facilities.

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

(16) The Commission's enquiry led to the conclusion that the relevant product market was not wider than the market of x86 CPUs. The Decision leaves open the question whether the relevant product market definition could be subdivided between x86 CPUs for desktop computers, notebook computers and servers since given Intel's market shares under either definition, there is no difference to the conclusion on dominance.

(17) The geographical market has been defined as worldwide.

(18) In the 10 year period covered by the Decision (1997-2007), Intel held consistently very high market shares in excess of or around 70 %.

(19) Furthermore, there are significant barriers to entry and expansion present in the x86 CPU market. They arise from the sunk investments in research and development, intellectual property and production facilities that are necessary to produce x86 CPUs. Intel's strong (must-stock) brand status and the resulting product differentiation also constitute a barrier to entry. The identified 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.

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

## 2.3. Summary of the infringement

(21) The Decision describes two types of Intel conduct vis-à-vis its trading partners: conditional rebates and so-called naked restrictions.

### 2.3.1. Conditional rebates

#### 2.3.1.1. Nature and operation of rebates

(22) Intel awarded major OEMs rebates which were conditioned on these OEMs purchasing all or almost all of their supply needs. This is the case for:

— Intel rebates to Dell during the period ranging from December 2002 to December 2005, which were conditioned on Dell purchasing exclusively Intel CPUs,

— Intel rebates to HP during the period ranging from November 2002 to May 2005, which were conditioned in particular on HP purchasing no less than 95 % of its CPU needs for its business desktop segment from Intel (the remaining 5 % that HP could purchase from AMD was then subject to further restrictive conditions set out in section 2.3.2 below),

— Intel rebates to NEC during the period ranging from October 2002 to November 2005, which were conditioned on NEC purchasing no less than 80 % of its CPU needs for its desktop and notebook segments from Intel,

— Intel rebates to Lenovo during year 2007, which were conditioned on Lenovo purchasing its CPU needs for its notebook segment exclusively from Intel.

(23) Similarly, Intel awarded payments to Media Saturn Holding (MSH), Europe's largest PC retailer, which were conditioned on MSH selling exclusively Intel-based PCs. These payments are equivalent in their effect to the conditional rebates to OEMs.

- (24) The Court of Justice of the EC 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 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.'<sup>(1)</sup>
- (25) The Decision concludes that the conditional rebates granted by Intel constitute fidelity rebates which fulfil the conditions of the Hoffmann-La Roche case-law. With regard to Intel's conditional payments to MSH, the Decision establishes that the economic mechanism of these payments is equivalent to that of the conditional rebates to OEMs. The Decision therefore concludes that they also fulfil the conditions of the Hoffmann-La Roche case-law.
- (26) It is also noteworthy that there was in general uncertainty as to the exact proportion of the rebates or payments that would be lost in case of (increased) sourcing from Intel's competitor, AMD. It was expected that the proportion would be significant and disproportionate to the number of units switched to AMD. Furthermore, there was also a possibility that the rebates withdrawn would be allocated by Intel to rival OEMs. As a result of the rebates therefore, the freedom of the OEMs in question and of MSH to source CPUs from AMD was restricted.
- (27) Therebates and payments that Intel granted to major OEMs and MSH should also be seen in the context of the growing competitive threat that AMD represented. In this respect, the Decision shows that OEMs, IT managers and Intel considered that AMD products had a number of positive innovative attributes and were a viable alternative to those of Intel. Although the Decision makes no absolute judgment on the technical performance of the Intel and AMD products at stake, OEMs' submissions and contemporaneous documents show that OEMs considered that AMD x86 CPUs were suitable for at least a part of their respective supply needs.

#### 2.3.1.2. As efficient competitor analysis

- (28) On top of showing that the conditions of the case-law for finding an abuse are fulfilled, the Decision also conducts

an economic analysis of the capability of the rebates to foreclose a competitor which would be as efficient as Intel, albeit not dominant. In essence, the test establishes at what price a competitor which is 'as efficient' as Intel would have to offer CPUs in order to compensate an OEM for the loss of any Intel rebate.

- (29) This as efficient competitor analysis is a hypothetical exercise in the sense that it analyses whether a competitor which is as efficient as Intel but which seeks to offer a product that does not have as broad a sales base as that of Intel is foreclosed from entering. This analysis is in principle independent of whether or not AMD was actually able to enter.
- (30) The analysis takes into consideration three factors: the contestable share (the amount of a customer's purchase requirements that can realistically be switched to a new competitor in any given period), a relevant time horizon (at most one year) and a relevant measure of viable cost (average avoidable costs). If Intel's rebate scheme means that given the contestable share, in order to compensate an OEM 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 foreclosing the as efficient competitor. This would thereby deprive final consumers of the choice between different products which the OEM 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.
- (31) The same kind of analysis has been conducted for the Intel payments to MSH. The analysis of the capability of these payments to foreclose an as efficient competitor also takes account of the fact that these payments are made at another level of the supply chain, and that their effect is additional to that of conditional rebates to OEMs.

#### 2.3.1.3. Strategic importance of the main OEMs

- (32) The Decision also indicates that certain OEMs, and in particular Dell and HP, are strategically more important than other OEMs in their ability to provide a CPU manufacturer access to the market. They can be distinguished from other OEMs on the basis of three main criteria: (i) market share; (ii) strong presence in the more profitable part of the market; and (iii) ability to legitimise a new CPU in the market. As a consequence, smaller OEMs are not able to legitimise new CPUs in the same way as HP and Dell, in particular in the corporate segment, which is the most profitable.

<sup>(1)</sup> Case 85/76 Hoffmann-La Roche, [1979] ECR 461, paragraph 89.

#### 2.3.1.4. Harm to competition and consumers

- (33) The evidence gathered by the Commission led to the conclusion that Intel's conditional rebates and payments 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 reduction of consumer choice and in lower incentives to innovate.

#### 2.3.1.5. Lack of objective justification

- (34) Intel submitted two different sets of arguments in order to attempt to justify its rebate schemes: (i) that by using a rebate, Intel has only responded to price competition from its rivals and thus met competition; and (ii) that the rebate system used vis-à-vis each individual OEM was necessary in order to achieve important efficiencies that are pertinent to the CPU industry. With respect to the latter, Intel argued that there were four different types of efficiencies that were attained by any exclusivity requirements of its rebates: lower prices, scale economies, other cost savings and production efficiencies and risk sharing and marketing efficiencies. Moreover, Intel claimed that conditions attached to the rebates were indispensable to attain these efficiencies and their impact on competition was minor since AMD grew during the investigation period.
- (35) The Commission addressed these arguments and analysed how far Intel's conduct would be suitable to attain the efficiencies argued by Intel in a proportionate way. However, the Commission found that Intel's arguments relating to objective justification are flawed because they relate more generally to conduct to which the Commission did not object (i.e. discounting/provision of rebates), and not to conduct to which the Commission did object (i.e. conditions associated with the discounts/rebates) and none of the efficiency defences provide a relevant justification for the conduct in question.

#### 2.3.1.6. Conclusion

- (36) The Decision concludes that the conditional rebates granted by Intel to Dell, HP, NEC and MSH constitute an abuse of a dominant position under Article 82 of the Treaty and Article 54 of the EEA Agreement.

#### 2.3.2. Naked restrictions

- (37) Intel awarded major OEMs payments which were conditioned on these OEMs postponing or cancelling the launch of AMD-based products and/or putting restrictions on the distribution of AMD-based products. This is the case for:

— Intel payments to HP which were conditioned on HP selling AMD-based business desktops only to small and medium enterprises, only via direct distribution channels (as opposed to through distributors), and on HP postponing the launch of its first AMD-based business desktop in Europe by six months; the duration of this abuse is from November 2002 to May 2005,

— Intel payments to Acer which were conditioned on Acer postponing the launch of an AMD-based notebook from September 2003 to January 2004,

— Intel payments to Lenovo which were conditioned on Lenovo postponing the launch of AMD-based notebooks from June 2006 to the end of 2006.

- (38) In *Irish Sugar*, the Court of First Instance concluded that a dominant undertaking agreeing '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' constituted an abuse<sup>(1)</sup>. 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 this regard, the CFI 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'<sup>(2)</sup>.

- (39) The Decision concludes that the Intel conducts directly harmed competition. A product which a supplier had been actively planning to release was delayed or constrained from reaching the market. Consumers therefore ended up with a lesser choice than they otherwise would have had. Intel's conduct does not constitute normal competition on the merits. Moreover, payments of Intel money to OEMs to delay, cancel or otherwise restrict the launch of an AMD-based product or restrict its distribution was not linked to any legitimate objective justification or efficiency.

#### 2.3.3. Single strategy

- (40) The Decision establishes that each of the Intel conducts vis-à-vis individual OEMs mentioned above and vis-à-vis

<sup>(1)</sup> Case T-228/97, *Irish Sugar*, [1999] ECR II-2969, paragraph 226.

<sup>(2)</sup> *Idem*, paragraph 233.

MSH constitutes an abuse of Article 82 of the EC Treaty, but that these individual abuses are also part of a single strategy aimed at foreclosing AMD, Intel's only significant competitor, from the market for x86 CPUs. The individual abuses are therefore part of a single infringement of Article 82 of the EC Treaty.

(41) The Decision adds that Intel's practices, which were applied cumulatively at two levels of the distribution chain (major OEMs and a major retailer), must be seen in the context of the growing competitive threat represented by AMD. The effects of Intel's conducts were complementary in that they foreclosed the access of competitors to the market thereby significantly diminishing their ability to compete on the merits of their CPUs. As a result, end-customers were artificially prevented from choosing non Intel-based computers on the merits (price and quality of CPUs).

(42) In that context, the Commission also recalls the case-law according to which '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 (now Article 82) of the Treaty'.<sup>(1)</sup>

### 3. DECISION

(43) The Decision establishes that Intel has infringed Article 82 of the Treaty and Article 54 of the EEA Agreement by engaging in 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 x86 CPU market.

(44) A fine of EUR 1 060 000 000 has been imposed on Intel Corporation for the infringement.

(45) Intel Corporation shall immediately bring the infringement to an end to the extent that it is ongoing and shall refrain from any act or conduct having the same of equivalent object or effect.

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<sup>(1)</sup> Cases T-24/93, T-25/93, T-26/93 and T-28/93 *Compagnie Maritime Belge v Commission*, [1996] ECR II-1201, paragraph 149; see also case C-202/07 P *France Telecom v Commission*, not yet reported, paragraphs 107 to 113.