

**THE DECISION OF THE COMMISSION OF 13 MAY 2009 IN THE *INTEL* CASE:  
WHERE IS THE FORECLOSURE AND CONSUMER HARM?**

**Damien Geradin**

**ABSTRACT**

On 21 September 2009, the European Commission published a provisional non-confidential version of its 13 May 2009 Decision in which it condemned Intel to a record fine of €1.06 billion on the ground that it had granted conditional rebates and payments to a number of OEMs and a large retailer of consumer electronics purchasing its x86 CPUs, and that it had paid OEMs to delay, cancel or in some other way restrict the commercialization of specific AMD-based products.

This paper shows that the Commission Decision contains a number of flaws. They include the facts that the Decision: (i) relies in substance on a *per se* prohibition of conditional rebates recognized by the formalistic case-law of the Community courts, notwithstanding that the Commission had clearly indicated in various important policy documents, including its Guidance Paper on Article 82 EC, its intention to move away from this approach for an effects-based analysis; (ii) states, contrary to sound policy, that it need not conduct an “as efficient competitor” test, but conducts a misguided one anyway; (iii) insufficiently supports its speculative theory that the OEMs’ purchasing policy was influenced by their understanding of Intel’s alleged intention to reduce or eliminate their rebates should they buy x86 CPUs from AMD; (iv) fails to demonstrate its contention that Intel’s rebates harm competition and consumers; and (v) conducts an excessively restrictive analysis of the efficiencies created by Intel’s rebates.

The Intel decision thus stands for the dangerous proposition that any dominant firm is at risk under Article 82 EC if there exists evidence that employees of a customer believe that reducing present purchases from it could have repercussions with regard to the availability and terms of future purchases, even if the belief is ambiguous, equivocal or contrary to written assurances of the firm or its executives, and without any showing of foreclosure. While the foregoing may be considered as an overstatement and that an “agreement” on conditions (not a mere unilateral belief on the part of the customer) is necessary to find a violation, the Commission accords itself so much latitude on how it collects, interprets and weighs evidence that the distinction is illusory.

The compatibility of the Commission Decision with EC competition law will now be examined by the Court of First Instance of the European Communities to which Intel lodged an appeal. Because of the wide-ranging implications of this Decision, not only for Intel but for all large corporations having to negotiate price incentives with their customers, it is to be hoped that the Court of First Instance of the EC will review this decision carefully and hold the Commission to the same rigorous standards it has applied in the merger control area.

An important question (that will not be addressed by the Court of First Instance, but which is nevertheless relevant from a policy standpoint) is whether antitrust intervention was at all needed in a market characterized by increasing output, decreasing prices and sustained innovation. These characteristics alone should raise serious doubt about claims of anti-competitive foreclosure and consumer harm, especially when they are made by competitors. These characteristics also question the Commission's wisdom of investing large enforcement resources in what turned to be a long and protracted investigation. As this paper will demonstrate, the market for x86 CPUs was competitive and there is no convincing evidence that Intel's conduct was anti-competitive and foreclosed AMD and harmed consumers.

**The Decision of the Commission of 13 May 2009 in the *Intel* case:  
Where is the Foreclosure and Consumer Harm?**

Damien Geradin<sup>(\*)</sup>

**I. Introduction**

On 21 September 2009, the European Commission (hereafter, the “Commission”) published a provisional non-confidential version of its 13 May 2009 Decision in which it condemned Intel to a record fine of €1.06 billion on the ground that it had committed two types of abuses: (i) the granting of conditional rebates and payments to a number of OEMs and a large retailer of consumer electronics and (ii) the imposition of “naked restrictions”, which relate to “payments by Intel in order for the OEM in question to delay, cancel or in some other way restrict the commercialization of specific AMD-based products.”<sup>1</sup>

A *prima facie* review of this Decision suggests that it contains a number of flaws that raise serious questions about its compatibility with EC competition law in particular and sound antitrust policy in general. These flaws include the facts that the Decision: (i) arguably relies in substance on a *per se* prohibition of conditional rebates recognized by the formalistic case-law of the Community courts, notwithstanding that the Commission had clearly indicated in various important policy documents, including its Guidance Paper on Article 82 EC, its intention to move away from this approach for an effects-based analysis; (ii) states, contrary to sound policy, that it need not conduct an “as efficient competitor” test, but conducts a misguided one anyway; (iii) insufficiently supports its speculative theory that the OEMs’ purchasing policy was influenced by their understanding of Intel’s alleged intention to reduce or eliminate their rebates should they buy x86 CPUs from AMD; (iv) fails to demonstrate its allegation that Intel’s rebates

---

(\*) Professor of competition law and economics at Tilburg University (The Netherlands) and Director of the Global Competition Law Center at the College of Europe in Bruges (Belgium). The author has taught international and comparative antitrust law in several leading law schools in Europe and the United States, including Harvard Law School and the University of Michigan Law School, and he is the co-author of *Global Antitrust Law and Economics*, Foundation Press, 2007 with Professor Einer Elhauge.

<sup>1</sup> Commission Decision of 13 May 2009, COMP/37-990 Intel, available at <http://ec.europa.eu/competition/sectors/ict/intel.html>

would harm competition and consumers; and (v) conducts an excessively restrictive analysis of the efficiencies created by Intel's rebates.

These issues will now be examined by the Court of First Instance of the European Communities (the "CFI"), which will hear the appeal to the Commission's Decision lodged by Intel. Given the complexity of the case and the heavy workload of the CFI, its judgment is not expected before a couple of years. It is to be hoped that the CFI will review this decision carefully and hold the Commission to the same rigorous standards it has applied in the merger control area.<sup>2</sup>

A broader question that must be kept in mind when reading the Commission Decision is whether antitrust intervention was needed in a market characterized by increasing output, decreasing prices and sustained innovation. These characteristics alone should raise serious doubt about claims of anti-competitive foreclosure and consumer harm. They also question the Commission's wisdom of investing large enforcement resources in what turned to be a long and protracted investigation.

Against this background, this paper is divided into VI Parts. Part II discusses whether the Guidance Paper on Article 82 EC published by the Commission in December 2008 should have bound, or at least should have inspired, the Commission when it analyzed Intel's rebates. Part III addresses some issues related to the analysis of dominance contained in the Decision. Part IV reviews the Commission's analysis of foreclosure and consumer harm, including the Commission's application of an "as efficient competitor" test. Part V discusses the Commission's analysis of the efficiencies raised by conditional rebates. Finally, Part VI contains a short conclusion.

## **II. Does the Guidance Paper on Article 82 EC Apply to Intel's Rebates?**

The Commission's Decision to condemn Intel for allegedly granting conditional rebates comes in the footsteps of a long line of case-law<sup>3</sup> that has been heavily criticized

---

<sup>2</sup> See, e.g., Case T-342/99, *Airtours v. Commission*, [2002] ECR II-2585; Case- T-5/02, *Tetra Laval BV v. Commission*, 2002 ECR II-04381.

<sup>3</sup> See Case 85/76, *Hoffman-La Roche v Commission* [1979] ECR 461; Case 322/81, *Michelin v Commission* [1983] ECR 3461, §71; Case T-203/01, *Manufacture française des pneumatiques Michelin v. Commission* (Michelin II), [2003] ECR II-4071 ; Case T-219/99, *British Airways plc v Commission*, [2003] ECR II-5917 and Case C-95/04 P, *British Airways plc v Commission*, [2007] ECR I-2331.

by legal and economic commentators for pursuing a formalistic, *per se* approach<sup>4</sup> inconsistent with the modern economic approach applied in other jurisdictions, such as the United States.<sup>5</sup> More recently, the Commission issued a Guidance Paper on Article 82 EC, which puts forward an effects-based approach and proposes the application of an “as efficiency competitor” test as a tool to determine whether a given pricing regime is capable of creating foreclosure.<sup>6</sup> Although this Guidance Paper is not flawless, it was seen as a positive development by the vast majority of commentators as it “modernized” the application of Article 82 EC.

The Commission’s application of a *per se* approach in this Decision is wrong as a matter of sound antitrust policy, and reflects retrenchment by the Commission from its endorsement of an effects-based approach in its Guidance Paper. The Commission, however, claims it is not bound by the Guidance Paper on Article 82 EC as this document is “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”.<sup>7</sup> While this may be formally true, this gives the terrible impression that the Commission is more concerned with “winning” its case against Intel, even on grounds that fail to make sense,<sup>8</sup> than with applying a sound policy approach, which it has itself promoted. Of course, the Commission purported in the decision to conduct an “as efficient competitor test” to demonstrate that its decision is in line with the Guidance Paper, but its statement that this is not required means that it would have found Intel’s rebates to violate Article 82 even if the test had shown that Intel’s rebates are not capable of foreclosing competition.

---

<sup>4</sup> See, e.g., Denis Waelbroeck, “Michelin II: A Per Se Rule against Rebates by Dominant Companies?”, (2005) 1 *Journal of Competition Law and Economics* 149; John Temple Lang and Robert O’Donoghue, “Defining Legitimate Competition: How to Clarify Pricing Abuses under Article 82”, (2002) *Fordham International Law Journal*, 83.

<sup>5</sup> See Hew Pate, “The Common Law Approach and Improving Standards for Analyzing Single Firm Conduct”, *Thirtieth Annual Conference on International Antitrust Law and Policy*, Fordham Corporate Law Institute, 23 October 2003 (“In general, we in the United States are certainly open to the possible pro-competitive effects of bundled rebates, bundled pricing, fidelity discounts, whichever term you would like to use, and certainly not in favor of using *per se* rules to address this sort of conduct.”)

<sup>6</sup> Guidance on the Commission’s Enforcement Priorities in Applying Article 82 EC Treaty to Abusive Exclusionary Conduct by Dominant Undertakings, 3 December 2008, available at <http://ec.europa.eu/competition/antitrust/art82/guidance.pdf>

<sup>7</sup> Decision, ¶ 916.

<sup>8</sup> Herbert J. Hovenkamp, “Discounts and Exclusions”, U Iowa Legal Studies Research Paper No. 05-18, U Iowa Legal Studies Research Paper No. 05-18 August 2005 (“no discounting practice should ever be unlawful *per se*. Discounting is a vertical practice that is presumptively procompetitive. It should be condemned only in the presence of significant market power and proven anticompetitive effects.”)

Moreover, the Commission's argument that it is not bound by the Guidance Paper in this case seems even wrong on its face as the Commission's commitment to pursue an effects-based analysis can be traced as early as 2005. For instance, in a major policy speech at the Fordham international antitrust conference in September 2005 in which she announced the Commission's intention to revamp its policy on Article 82 EC, Commissioner Kroes declared that she was "convinced that the exercise of market power must be assessed essentially on the basis of its effects in the market, although there are exceptions such as the per se illegality of horizontal price fixing. [...] Article 82 enforcement should focus on real competition problems: In other words, behavior that has actual or likely restrictive effects on the market, which harm consumers. [...] *Low prices and rebates are, normally, to be welcomed as they are beneficial to consumers.*"<sup>9</sup> Commissioner Kroes' speech was immediately followed by a Commission Discussion paper on Article 82 EC,<sup>10</sup> which promoted the very effects-based approach contained in the Guidance Paper, including the "as efficient competitor test" applied by the Commission to Intel's rebates.

### **III. Market definition and dominance**

It is difficult to comment on market definition given this is essentially a factual issue, but a few remarks should be made on the Commission's assessment of dominance. The Commission bases its finding of dominance on the fact that Intel held high market shares in the x86 CPU market, which was characterized by barriers to entry.<sup>11</sup> The Commission, however, rejects Intel's arguments that (i) the undisputed, significant decline of prices in the CPU industry in recent years confirms that Intel is not dominant, and that CPU customers and consumers have not been injured and (ii) the degree of buyer power in the market means that Intel is not able to "behave independently" of its customers and competitors.<sup>12</sup>

---

<sup>9</sup> Neelie Kroes, "Preliminary Thoughts on Policy Review of Article 82", Speech at the Fordham Corporate Law Institute New York, 23 September 2005.

<sup>10</sup> DG Competition discussion paper on the application of Article 82 of the Treaty to exclusionary abuses, December 2005, available at <http://ec.europa.eu/competition/antitrust/art82/discpaper2005.pdf>

<sup>11</sup> Decision, ¶¶ 837 et seq.

<sup>12</sup> Decision, ¶ 884.

The Commission rejects Intel's first argument in saying that:

“The fact that prices in a market may be falling is not in itself inconsistent with the existence of a dominant position. 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.

The first point to make is that the microprocessor industry is characterised by rapid technological progress. ... 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.”<sup>13</sup>

While it may be true that falling prices are not inconsistent with a finding of dominance, what is specific to this case is that falling prices have been combined with huge increases in CPU performance. In many high technology industries, prices have remained constant, or at least have not significantly decreased, as consumers were “getting more” for the same money. But that has not been the case here. Moreover, if it is true that Intel enjoys significant market power (given the lack of constraints from competitors), it is difficult to understand why it would not have pocketed the cost savings generated by technological progress instead of passing them on to its customers. That must be due to healthy competition.

As to the second argument, there is a common misunderstanding that large suppliers, such as Intel, decide unilaterally the rebates they grant to their customers and the conditions attached to these rebates. This may be true when a large supplier faces lots of small distributors or customers as was the case in some prior Commission decisions.<sup>14</sup> But it is clearly not true when, as in this case, large customers are involved. Large customers demand rebates from their suppliers and will generally condition their purchases on their receipt of such rebates, and suppliers – large and small – will have little choice but satisfy these requests on pain of losing business.<sup>15</sup> The fact that a large

---

<sup>13</sup> Decision, ¶ 908.

<sup>14</sup> Case T-203/01, *Manufacture française des pneumatiques Michelin v. Commission* (Michelin II), [2003] ECR II-4071 ; Case T-219/99, *British Airways plc v Commission*, [2003] ECR II-5917 and Case C-95/04 P, *British Airways plc v Commission*, [2007] ECR I-2331.

<sup>15</sup> An excellent illustration of the fact that large OEMs play Intel and AMD off each other can be found at ¶517 of the Decision: "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 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

supplier grants significant rebates to large OEMs raises legitimate questions about its ability to exercise market power.

One can of course argue that the competition problem is not that suppliers grant rebates, but the conditions that are attached to the granting of such rebates. In this case, Intel denies that its rebates were conditional, but even if conditionality could be established these rebates would nevertheless represent a trade-off between customers and suppliers. The equation is simple. Customers want low prices to stay competitive and suppliers want to sell large volumes as higher volumes lower costs that can feed back into lower prices. Conditionality thus goes both ways. OEMs make high volumes conditional on low prices and suppliers make low prices conditional on large volumes. In addition, rebates conditioned to purchase requirements align the incentives of suppliers (as loyalty typically generates, although does not guarantee, volumes) and customers (as provided they meet their percentage requirements they will receive rebates even if they purchase volumes that are lower than expected). As will be further discussed below, these rebates thus represent efficient risk-sharing mechanisms.

Beyond the issue of dominance, the point that needs to be made here – as it is important for the rest of the analysis – is that, when, as in this case, large buyers and a large supplier are involved, conditional rebates are much more the product of complex negotiations between these parties than a unilateral action reflecting the market power of the large supplier.

#### **IV. Analysis of the alleged abuses: Is there Foreclosure and Consumer harm?**

The Decision of the Commission finds that Intel violated Article 82 EC by (i) granting conditional rebates and payments to a number of large OEMs, and (ii) by making payments to some OEMs to delay or cancel the commercialization of specific

---

the long term." 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." 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." 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." 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."

AMD-based products (“naked restrictions”). Given space constraints, this paper will focus on the first alleged abuse, i.e. the conditional rebates.

A. The Commission’s *per se* approach

In its Decision, the Commission relies on the restrictive approach that prevails in the case-law of the Community courts dealing with conditional rebates, noting for instance 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.”<sup>16</sup> Referring to *British Airways* and *Michelin II*, the Commission also notes 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.” The Commission appears to be saying that no evidence of foreclosure is needed.<sup>17</sup> But the fact that it went ahead and cited evidence of such foreclosure nevertheless betrays the Commission’s own lack of confidence that it can ignore the foreclosure issue, contrary to the overwhelming weight of authority.

As already noted, case-law that appears to support a *per se* approach to rebates has been unanimously criticized by legal and economic commentators for its divergence from modern economic thinking. This case-law must also be contrasted with the case law of US federal courts on single product rebates (*Barry Wright Corp. v. ITT Grinnell Corp.*<sup>18</sup>, *Concord Boat Corp. v. Brunswick Corp.*,<sup>19</sup> and *Virgin Atlantic Airways Ltd. v. British Airways*<sup>20</sup>) which, as pointed out in a joint DoJ and FTC submission to the OECD, “illustrate both the importance of factual evidence of an anticompetitive effect (rather than simply of an effect on a competitor) and the substantial judicial concern about deterring beneficial price cuts.”<sup>21</sup> United States courts recognize that potential antitrust liability for above-cost price discounts is more likely to harm than promote competition.

---

<sup>16</sup> Decision, ¶ 920.

<sup>17</sup> Decision, ¶ 922.

<sup>18</sup> 724 F.2d 227 (1983).

<sup>19</sup> 207 F.3d 1039 (8th Cir. 2000).

<sup>20</sup> 257 F.3d 256 (2nd Cir. 2001)

<sup>21</sup> See DoJ/FTC submission to OECD, 2008

Indeed, the United States Supreme Court “has urged great caution and a skeptical eye when dealing with unfair pricing claims’ ...because ‘low prices benefit consumers regardless of how those prices are set, and so long as they are above predatory levels, they do not threaten competition.’”<sup>22</sup> As the U.S. Supreme Court explained, “because cutting prices in order to increase business often is the very essence of competition . . . mistaken inferences [of anticompetitive conduct]. . . are especially costly, because they chill the very conduct the antitrust laws are designed to protect.”<sup>23</sup>

Thus, to avoid criticism that it pursues a form-based approach, the Commission applies an “as efficient competitor” test that allegedly proves “that the conditional rebate schemes prevented or made it more difficult for each of those OEMs to source x86 CPUs from AMD.”<sup>24</sup> As will be seen below, the “as efficient competition” test, applied correctly, is a useful tool to mathematically show that rebates are not capable of having anti-competitive effects (safe harbor). Where a supplier prices its products above cost, which must be the case if it passes an as efficient competitor test, there is no need for regulatory intrusion into the competitive process. On the other hand, failing the test does not, standing alone, demonstrate foreclosure (let alone provide a basis for imposing a very heavy fine on a given corporation). In such a case, it is still necessary to demonstrate anticompetitive effects from the challenged discounts.

**B. The Commission’s attempt to demonstrate that Intel’s rebates were conditioned on exclusivity**

The Commission considers that, to prove the existence of an abuse, it is sufficient to demonstrate 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 from Intel and thereby restricting those companies’ freedom to choose.”<sup>25</sup>

---

<sup>22</sup> Concord Boat, 207 F.3d at 1060, citing Atlantic Richfield Co. v. USA Petroleum Co., 495 U.S. 328, 340 (1990). See also Barry Wright Corp. v. ITT Grinnell Corp., 724 F.2d 227, at 231 (“After all, lower prices help consumers. The competitive marketplace that the antitrust laws encourage and protect is characterized by firms willing and able to cut prices in order to take customers from their rivals. . . . Thus, a legal precedent or rule of law that prevents a firm from unilaterally cutting its prices risks interference with one of the Sherman Act’s most basic objectives: the low price levels that one would find in well-functioning competitive markets.”)

<sup>23</sup> Brooke Group Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209 (1993).

<sup>24</sup> Decision, ¶ 922.

<sup>25</sup> Decision, ¶ 926.

The problem for the Commission is that, unlike in prior rebates cases where the conditions linked to the granting of the rebate(s) were part of a written agreement, according to the Commission, the conditions allegedly attached to Intel's rebates are not always written. The Commission, however, claims that they are based on a customer's understanding that if it had sourced x86 CPUs from AMD, it *would* have entailed the loss of a significant and disproportionate part of Intel's rebates.<sup>26</sup> According to the Commission, "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 larger fractions of its purchases, as it is evidenced by its internal documents."<sup>27</sup>

The Commission's theory of harm is highly speculative as it seeks to infer from a variety of documents, the OEM's *understanding* of Intel's *intention* should these OEMs decide to buy x86 CPUs from AMD. The Commission must thus establish that Intel could and would have disproportionately reduced its rebates and that the OEM understood this based on Intel's statements and actions. For instance, to support its theory, the Commission refers to a submission by Dell in which it said that it

"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."<sup>28</sup>

But this extract hardly reads like the kind of materials that should be sufficient, or even contribute, to establish that Intel's rebates to Dell were of such nature as to be capable of foreclosing AMD. In fact, it merely says that: (i) Dell *assumed* that shifting some orders to AMD would translate in a loss of rebates (but what if that "assumption" was wrong? And in any event, don't reduced purchases always lead to a loss of rebates?); (ii) Dell had no real clue as to how much the rebates would decline, in what manner and

---

<sup>26</sup> Decision, ¶ 306.

<sup>27</sup> Decision, ¶ 268 (emphasis added).

<sup>28</sup> Decision, ¶ 234.

over what time period (which is rather strange if the theory is that Intel was trying to scare Dell that purchasing AMD chips would have adverse financial consequences); (iii) Dell tried to forecast the impact of this scenario (but don't large corporations try to forecast all sort of things when they make their purchasing decisions?); and (iv) that they "did not rule out the possibility" that such reduction might be disproportionate to the reduction in the volume of Dell's purchases from Intel (in other words, that it was Dell's forecasted worst case scenario). In sum, even according to the Commission, Intel's intentions were not clear and Dell's understanding of these intentions was not clear either. That should be sufficient to seriously question the validity of the Commission's theory of harm.

Of course, an obvious way to clarify Intel's intentions and the OEMs' understanding of such intentions is to determine whether (i) OEMs effectively refrained from purchasing CPUs from AMD and did so because of the rebates (as pursuant to the Commission's theory they were scared of being punished by Intel), and whether (ii) Intel retaliated against the OEM(s) that decided to purchase AMD CPUs. Surprisingly, however, the Commission notes in its Decision 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."<sup>29</sup>

It is difficult to discern the point the Commission is trying to make in this passage, but what it says does not make much sense. First, the fact that Dell switched a part of its orders to AMD strongly suggests that it was not excessively concerned about the financial consequences of no longer buying exclusively from Intel. A plausible explanation is that they knew that Intel could not afford to adversely affect their largest customer and could in fact come back with even more attractive rebates. Thus, even if Dell had an understanding of Intel's alleged intentions, it did not prevent it from buying

---

<sup>29</sup> Decision, ¶ 268

AMD x86 CPUs. Second, Intel's reaction to Dell's decision to buy chips from AMD is certainly highly relevant to understand its true intentions. A less than disproportionate reduction in Dell's rebates would tend to suggest that Intel's intentions were different than those alleged by the Commission.

Besides the questionable adequacy of the Commission's theory of harm and whether it was sufficiently demonstrated, there is another question of central importance in this case, which is at the core of the disagreement between Intel and the Commission. That question relates to the way the Commission collected and assessed relevant evidence. A large part of the Decision contains an analysis of dozens of emails, internal presentations, and various other materials that are meant to demonstrate Intel's intentions and their impact on large OEM's purchasing behavior. Whether or not the Commission collected the right kind of evidence and assessed that evidence fairly (i.e., in an unbiased manner) is a difficult question for the outside observer considering the significant level of redaction of the Decision. Several general remarks can nevertheless be made.

First, the various documents cited by the Commission to support its case are not always very convincing and the Commission often seems to read too much into these documents. Anyone who has conducted a document review in a rebates case – a painful exercise I supervised on a couple of occasions – knows that certain categories of documents, and in particular emails, are often ambiguous and unreliable.<sup>30</sup> Moreover, absent the ability to cross-examine the authors of these emails,<sup>31</sup> distinguishing anti-competitive from competitive intent is very difficult, and subject to interpretation mistakes. After all, the very purpose of competition, and the job description of sales executives, is to take away business from competitors. It is thus hardly surprising that all sorts of “juicy language” can be found in emails and internal presentations.

---

<sup>30</sup> For instance, emails often reflect streams of consciousness rather than accurate and elaborated thinking.

<sup>31</sup> The treatment of evidence by the Commission is quite distinct from the way evidence is treated by antitrust agencies in other jurisdictions. First, firms investigated by the European Commission have no right to subpoena documents and testimony from any relevant third party and challenge the evidence on which the Commission staff is relying. Thus, it is hard for respondents to effectively undercut third parties' claims. Second, firms investigated by the European Commission have no right to cross-examine witnesses, including expert witnesses. This is an unfortunate limitation as cross-examination significantly contributes to the emergence of the truth in any legal proceeding. Thus, although the Commission's investigation appears very extensive, the evidentiary standards to which the Commission is bound are considerably lower than in some other jurisdictions. That is particularly concerning given the speculative nature of the Commission's theory of harm.

Second, while the Commission seems confident in relying on emails, despite the obvious limitations of such documents, it sounds, at least to the outside observer, incredibly defensive when it comes to the probative value of sworn testimonies made by Dell executives in US private litigation, and the question of whether these depositions confirm or contradict its theory that OEMs understood that Intel's rebates would be disproportionately reduced should they buy CPUs from AMD.<sup>32</sup> For instance, while the Commission acknowledges that the depositions provided by Intel "attempt to interpret several pieces of contemporaneous evidence provided by Dell and relied on by the Commission" in its analysis,<sup>33</sup> it continues to say that:

"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."<sup>34</sup>

The Commission thus seems to introduce a probative hierarchy between Dell's submissions to the Commission and testimonies of senior Dell executives in a US court. Although it is difficult to tell whether these testimonies could have entirely exculpated Intel and I thus will not even try to respond to that question, this hierarchy does not seem justified. Because of the extremely serious consequences US law attaches to perjury (including civil and criminal sanctions), testimonies represent the most objective source of information as to Dell's understanding of Intel's intentions should it purchase CPUs from AMD.

Finally, the EU Ombudsman's 14 July 2009 decision (report forthcoming) that concludes the Commission's failure to record and preserve the evidence produced at a

---

<sup>32</sup> Some parts of the testimony are redacted, but the Commission does make clear that it has essentially rejected the testimony. In a public statement following the decision, Intel noted that while it could not disclose the testimony, the EC file contained extensive deposition testimony from Dell executives that refuted the allegation that Dell feared disproportionate rebate reductions if it switched to AMD. See Intel Response to the EC's "Provisional Non-Confidential Version of the Commission Decision of 13 May 2009", 21 September 2009, available at: [http://www.intel.com/pressroom/legal/docs/Intel\\_Response\\_to\\_Redacted\\_Decision.pdf](http://www.intel.com/pressroom/legal/docs/Intel_Response_to_Redacted_Decision.pdf)

<sup>33</sup> Decision, ¶ 302.

<sup>34</sup> Id.

meeting it held with a senior Dell executive in 2006 amounted to maladministration on the part of the Commission is rather disturbing as it gives the impression that the Commission may not have been entirely fair in its collection and assessment of the evidence.<sup>35</sup> That impression is of course unfortunate, especially when it applies to the European Commission, given the insufficient “checks and balances” in an agency that combines prosecutorial and decision-making function.<sup>36</sup> While I am not suggesting that Commission officials lack independence of mind or integrity, yet that incident, combined with the other evidentiary issues noted above, should incentivize CFI judges to have a particularly close look at the way evidence has been handled in this case.

In sum, the Intel decision stands for the dangerous proposition that any dominant firm is at risk under Article 82 if there exists evidence that one or more employees of a customer believes that reducing present purchases from it could have repercussions with regard to the availability and terms of future purchases, even if the belief is ambiguous, equivocal or contrary to written assurances of the firm, and without any showing, either visceral or economic, of foreclosure. While the Commission might respond that the foregoing is an overstatement and that an “agreement” on conditions (not a mere unilateral belief on the part of the customer) is necessary to find a violation, the Commission accords itself so much latitude on how it collects, interprets and weighs evidence that the distinction is illusory.

### 3. The “as efficient competitor” analysis

As seen above, while the Commission considers that, pursuant to the case-law of the Community courts it need not show foreclosure, the Commission nevertheless applies an “as efficient competitor” test, acknowledging that this is “one possible way of determining whether exclusivity rebates are capable or likely to cause anticompetitive

---

<sup>35</sup> See Charles Forelle, “EU Draws Rebuke In Intel Case Lapse”, *Wall Street Journal*, 9 August 2009.

<sup>36</sup> See, Wouter Wils, “The Combination of the Investigative and Prosecutorial Function and the Adjudicative Function”, 27 (2004) *World Competition*, 202; See also the Report on “The Decisional and Enforcement Structure in Antitrust Cases and The Commission’s Fining System” prepared for the Fifth Annual Conference of the Global Competition Law Centre: The Commission’s Review of Regulation 1/2003, 11-12 June 2009, (“As often stressed, the Commission is vested with wide powers in performing its various roles as investigator, prosecutor, decision-maker and enforcer of the EC Treaty’s rules on competition. These roles inevitably involve conflicts with one another. Whilst the Commission is required to undertake an objective investigation, the reality is that lack of objectivity can creep into the investigative and decision-making processes at any stage.”).

foreclosure.”<sup>37</sup> While the “as efficient competitor” standard is an appropriate test under EU law, it is the *application* of this standard by the Commission, which creates a problem.

The “as efficient competitor standard is a generic term to indicate that as long as a dominant firm sells its products at an effective (or net) price (standard price minus the rebate it grants to its customers) that is above a certain measure of its costs, the rebate in question should be legal even if it has the effect of eliminating weaker (i.e., less efficient) competitors. In its decision, the Commission applies what has sometimes been referred to as a “suction effect” test, which seeks to determine whether “a competitor as efficient as Intel ..., but which would not have as broad a sales base as Intel would be foreclosed from entering.”<sup>38</sup>

The logic and the objectives of the test relied upon by the Commission are straightforward. According to the Commission, the competition concern is that, given that Intel is an “unavoidable trading partner” (in that OEMs “need” to source a certain percentage of their CPUs from Intel in any event), its rebates may enable it to “use the inelastic or ‘non-contestable’ share of the 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.”<sup>39</sup>

The Commission explains that this test relies on three parameters: (i) the contestable share of a given customer’s demand; (ii) the relevant time horizon on which the customer in question bases its decision on whether to change suppliers; and (iii) the relevant measure of viable cost for an as efficient competitor (in this case average avoidable costs or “AAC”).<sup>40</sup> Intel conducted an “as efficient competitor” test during the Commission investigation and concluded that its rebates met the test and were thus not capable of foreclosing as efficient competitors. However, the Commission reaches the opposite conclusion in its decision.

While both the Commission and Intel conceptually apply the “as efficient competitor” in the same manner, they strongly disagree over the ways in which the

---

<sup>37</sup> Decision § 1002.

<sup>38</sup> Decision ¶ 1002.

<sup>39</sup> Decision, ¶¶1005

<sup>40</sup> Decision, ¶¶ 1006 et seq.

variables essential to the application of this test should be determined. A particularly problematic issue relates to the determination of the so-called “contestable share”. While a relatively broad “contestable share” (e.g., 50%) will be favorable to the investigated firm as the test will probably be easy to pass, a narrow “contestable share” (e.g., 10%) will make the test very hard to pass. But large differences, such as those indicated above, are not necessary to significantly impact the outcome of the test. Even variations of a few percentage points (3-5%) can affect that outcome and make the investigated firm fail the test.

A number of factors can be used to determine the scope of the contestable share, such as the significance of the dominant firm’s brand, the presence of switching costs; the existence of substitutes, product quality and market acceptability; preference of some customers for single-source supply, etc. Competition authorities may also decide to rely on documents produced by the dominant firm and its rivals to determine the scope of the contestable share. In this respect, one issue of considerable importance, which seems to have been overlooked by the Commission, is that the determination of the contestable share must be based on documents or data that the dominant firm, in this case Intel, had access to at the time it set its rebates.<sup>41</sup> The reason is quite obvious: a corporation can only determine the legality of its price/rebates on the basis of information that is available to it. That is the very rationale of the “as efficient competitor” test: dominant firms should sell their products at an effective price that is above a certain measure of *their* costs, not their competitors’ costs, as otherwise they could never determine whether their prices are in compliance with EC competition law requirements.

Thus, the Commission’s determination of the “contestable share” – a key variable to the test by the Commission to find Intel has foreclosed its competitors – on the basis of documents Intel had no access to is in fundamental contradiction with the principle of legal certainty that is protected in the *Deutsche Telekom* case: “[i]f the lawfulness of the pricing practices of a dominant undertaking depended on ... information which is generally not known to the dominant undertaking the latter would not be in a position to assess the lawfulness of its own activities.”<sup>42</sup>

---

<sup>41</sup> For instance, at ¶¶ 1202-12 of its Decision, the Commission relies on Dell internal documents apparently not available to Intel to calculate the share of Dell’s demand that was “contestable”.

<sup>42</sup> See judgment of the Court of First Instance, 10 June 2008, Case T-271/03 *Deutsche Telekom* (not yet published) at § 192.

The “as efficient competitor” test performed by the Commission is thus flawed. It appears that had the Commission used the contestable share that Intel reasonably believed to have been at issue, Intel would have easily passed the “as efficient competitor” test. In addition, assuming the Commission had performed the test correctly and had found that Intel’s rebates nonetheless failed it, this would not necessarily mean that Intel committed an abuse. While the “as efficient competitor” test offers a useful “safe harbor” to the dominant firm that passes it (hence, the reason why Intel conducted it), failure to meet this test does not necessarily mean that the firm has foreclosed its competitors. As is made clear in the Guidance Paper: “If ... the data suggest that the price charged by the dominant undertaking has the potential to foreclose as efficient competitors, then the Commission will integrate this in the general assessment of anticompetitive foreclosure (see Section B above), taking into account other relevant quantitative and/or qualitative evidence.”<sup>43</sup>

The reference to Section B of the Guidance Paper is important as it indicates that the foreclosure analysis should be grounded on a number of factors that have not necessarily been taken into account by the Commission in the analysis that led to its decision, such as, for instance, possible evidence of actual foreclosure:

“If the conduct has been in place for a sufficient period of time, the market performance of the dominant firm and its competitors may provide direct evidence about anticompetitive foreclosure; for reasons attributable to the allegedly abusive conduct, the market share of the dominant firm may have risen or a decline in market share may have been slowed; for similar reasons, actual competitors may have been marginalised or may have exited, or potential competitors may have tried to enter and failed.”<sup>44</sup>

If anything, the performance of AMD (which had increased its sales, profit and market share tremendously during the investigated period and has even suffered from capacity constraints) tends to disprove, or at least very seriously question, the presence of foreclosure. How can a firm that is able to sell all its CPUs be considered foreclosed?

Moreover, Section B of the Guidance Paper requires the carrying out of a counterfactual analysis, i.e. what would have happened but for the alleged abuse. Given AMD’s performance as well as its capacity constraints, the likely answer is that the

---

<sup>43</sup> Guidance Paper, supra note 7, at ¶ 27.

<sup>44</sup> Decision, ¶ 20.

situation would have been exactly the same.<sup>45</sup> At least, nothing in the Commission's decision suggests it would have been significantly different. Although the Commission denies the presence of capacity and performance constraints,<sup>46</sup> it has nevertheless failed to conduct a proper counterfactual analysis in disregard of its own Guidance Paper.<sup>47</sup>

#### 4. Harm to competition and consumers

The Decision invokes two kinds of harms to competition and consumers: (i) reduction of consumer choice and (ii) the longer impact due to the weakening of Intel's main competitor.

First, the Commission does not address what is in fact the fundamental question when it comes to assessing harm to competition, which is whether the rebates in question foreclosed an as efficient competitor to such an extent that it was not able to profitably operate on the market for x86 CPUs (by for instance not being able to reach sufficient scale).<sup>48</sup> That question is of course particularly relevant in the present case considering the fact that AMD seems to have operated at full capacity for at least a period of time.

As to the argument of the Commission regarding reduced consumer choice, the question is not so much whether Intel's rebates had an impact on consumer choice as every rebate regime that is designed to win the business of one or several customers surely does have that impact in that the customer(s) in question will carry – or use as input – rival's products to a lesser extent (hence reducing their availability) that they

---

<sup>45</sup> Here again, Intel's Response to the EC's "Provisional Non-Confidential Version of the Commission Decision of 13 May 2009" contains some rather interesting public statements from AMD senior executives during the period of the alleged infringement in which they state that AMD was doing extremely well and growing and that a bright future lied ahead. These statements seem inconsistent with the theory that AMD would have been foreclosed by Intel's rebates.

<sup>46</sup> Decision, ¶ 1613

<sup>47</sup> Guidance Paper, supra note 7, at ¶ 20.

<sup>48</sup> See Hovenkamp, supra note 9 ("Are there any circumstances in which an above-cost single-item discount is anticompetitive? Perhaps. One can imagine situations in which a discount increases the dominant firm's sales so much that it denies rivals economies of scale because they cannot get their own output high enough. Although that might be true as a matter of fact, any antitrust remedy must be denied on grounds of both principle and application. On grounds of principle, there is no way of drawing boundaries around the point. In any industry subject to significant economies of scale in production or distribution, a firm with a high volume of sales may be able to undersell firms that have a lower volume of sales. But no firm, not even a monopolist, is a trustee for another firm's economies of scale. To force such a firm to hold a price umbrella over its rivals, selling at above-cost prices in order to protect the rivals' inefficiently small production, would be a blatant example of protecting competitors at the expense of consumers.")

would have without the rebates, but whether this regime deprives customers of *reasonable access* to such products. Clearly, many of us would like to buy a given automobile with a different engine than the one selected by the manufacturer or would like to buy a different brand of yogurt than the one selected by our favorite supermarket. The question is whether consumers have sufficient access to these products (whether our favorite engine is available on other cars and our favorite yogurt is available from other supermarkets or shops). That important issue is not convincingly addressed in the Decision.

As to the “longer term impact to weakening of Intel’s main competitor”, the Commission’s argument is as follows:

“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.”<sup>49</sup>

This claim is dependent on the ability of the Commission to demonstrate that Intel’s rebates had the effect of foreclosing “as efficient competitors”, which as noted above is to be questioned given the methodological flaws in its application of the “as efficient competitor” test. Moreover, the Commission does not provide any evidence that should Intel rebates go unchecked they would negatively impact prices and innovation. That is a critical question considering the undeniable fact that prices have substantially decreased while innovation has continued to increase over at least the last decade. Finally, the benefits of preventing dominant firms from cutting their prices on the ground that this may preserve competitors that may later force the dominant firms to provide for even lower prices are speculative as they penalize customers in the short term for hypothetical benefits that may not ever emerge in the long term.<sup>50</sup>

---

<sup>49</sup> Decision, ¶ 1612.

<sup>50</sup> See *Barry Wright Corp. V. ITT Grinnell Corp.*, supra note at 234. See also Einer Elhauge, “Why Above-Cost Price Cuts To Drive Out Entrants Are Not Predatory--and the Implications for Defining Costs and Market Power” (2003) 112 *Yale Law Journal*, 681; Aaron S. Edlin, “Stopping Above-Cost Predatory Pricing” (2002) 111 *Yale Law Journal*, 941.

## V. Objective justification and efficiencies

It is hard to deny that rebates are an important source of efficiencies in terms of price reduction, economies of scale and faster fixed cost recovery, economies of scope and reduction of transaction costs, avoiding double marginalization, providing incentives for customers to supply complementary services, risk-sharing between suppliers and customers, etc. As pointed out in a report commissioned by the United Kingdom Office of Fair Trading on Selective Price Cuts and Fidelity Rebates: “The pervasive use of ... non-cost-related discounts by firms without market power demonstrates that there are many non-exclusionary motives for using discount schemes.”<sup>51</sup>

However, the test put forward by the Commission in its decision (and in its Guidance Paper) is very difficult to meet:

“In order to objectively justify its conditional rebates, Intel would have to show that there is an efficiency ..., 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.”<sup>52</sup>

It may indeed be extremely difficult for a dominant firm to demonstrate (often several years after it adopted the conduct that is subject to investigation) that there were “no equally effective alternative in achieving the legitimate goal with a less restrictive or less exclusionary effect.” First, as we have seen above, rebates are generally negotiated with large customers rather than imposed by the supplier even when it is dominant. Moreover, competition authorities generally tend to consider that economies of scale are the only legitimate source of efficiencies and that only “volume rebates” can be a source of such efficiencies. That is confirmed in the Commission’s Decision, which claims that “the conditional rebates in question ... 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.”<sup>53</sup>

---

<sup>51</sup> See “Selective Price Cuts and Fidelity Rebates”, Economic Discussion Paper, July 2005, OFT804, § 1.7.

<sup>52</sup> Decision ¶ 1624.

<sup>53</sup> Decision ¶ 1621.

But that narrow view is certainly misguided. Assuming the Commission was correct and that Intel offered market share or exclusive rebates (an issue that seems to have been in dispute at least with respect to some of the challenged deals), such rebates may be needed to reach objectives that cannot be achieved through volume-based rebates. While volume-rebates tend to incentivize buyers to purchase larger quantities (hence allowing the supplier to achieve economies of scale, etc.), they may represent a risk for buyers in industries where it is hard to predict in advance how a given line of products will sell. In such industries, customers may indeed fail to obtain the rebate at the end of the period for reasons that may be independent of their will and efforts. Customers may thus ask suppliers for a market-share rebate since they ensure customers will collect the rebate by purchasing their requirements up to the percentage level needed to reach the threshold. Hence, market-share or percentage-based rebates amount to a risk-sharing mechanism between the suppliers and their customers.

When demand is uncertain, risks can also be shared between suppliers and customers through the adoption of a retroactive rebate. Rather than setting in advance the price and the volume of the products to be purchased (which guarantees volumes to the supplier, but places a lot of pressure on the buyer), the supplier and the buyer may agree that a retroactive rebate will be granted above a certain threshold. The supplier knows that the buyer will have a strong financial incentive to meet the threshold (which should in turn guarantee some volumes to the supplier), but the buyer will not be forced to meet the threshold on pain of breaching its contractual obligations. In the worst case scenario, failing to meet the threshold will only translate in not obtaining the rebate and thus suffering a price penalty.

## **VI. Conclusions**

While the Commission is keen to show that it has devoted and lot of time, energy and resources to investigate Intel's rebates during the past eight years (the initial complaint was submitted in 2000), the adequacy of its assessment these rebates can however be called into question for the following reasons:

First, the Commission decision could be read as endorsing the formalistic, quasi-*per se* case-law of the Community courts on rebates. This approach is based on the (fundamentally unsound) proposition that it is not necessary for the Commission to

demonstrate the presence of foreclosure effects to find that rebates granted by a dominant firm constitute an abuse incompatible with Article 82 EC.

Second, the Commission's argument that it does not have to conduct an effects-based analysis on the ground that the Guidance Paper "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" is again formalistic and wrong.

Third, the Commission theory of harm whereby the harm to competition would arise from the OEM's understanding that the rebates they receive from Intel would be disproportionately reduced should they decide to purchase AMD CPUs, and the impact of this understanding on their actual purchasing strategy, is highly speculative and not a sound basis for an antitrust investigation.

Fourth, some aspects of the way the Commission is assessing the evidence at its disposal are troubling and might create the impression that the Commission's analysis may have been biased. Every doubtful question is resolved against Intel; every inference goes against Intel; the decision speaks broadly in terms of Intel's failure to "disprove" something "conclusively"<sup>54</sup> This also raises questions about who bears the burden of proof. While the Commission bears that burden, some passages of the decision seem to suggest the opposite.

Fifth, while it is impossible for an outside observer to determine whether the Commission's "as effective competitor" analysis is adequate, the Commission's determination of the "contestable share" of the respective demands of the OEMs is flawed. Moreover, this test is insufficient to form the basis of a decision to condemn a given rebates regime. The Commission should have complemented its analysis by a broader foreclosure analysis, including a counterfactual analysis, as provided for in its Guidance Paper.

Finally, the Commission's analysis of the "harm to competition and consumers" is entirely theoretical. The concrete effects of Intel's rebates on competition and consumers are not demonstrated, and yet it is clear based on price and performance trends over the

---

<sup>54</sup> See, e.g., Decision at ¶ 500.

last decade that the microprocessor market is very healthy. The same comment applies to the Commission's analysis of efficiencies, which not only places a very heavy burden of proof on the firm invoking efficiencies, but also takes an excessively narrow view as to the type of efficiencies that will be acceptable for the Commission as justification for conditional rebates.