

## **Why the European Commission's Intel Decision is Wrong**

On May 13, the European Commission announced that Intel had violated competition laws in Europe. The EC, which serves as the investigator, prosecutor, and decision-maker in EC proceedings of this type, asserted that Intel competed in a manner that transgressed the antitrust laws of the European Community, by discounting its prices, purportedly at below cost levels, to win all or most of the business of five major computer manufacturers, on the implied condition that those customers buy all or most of their microprocessors from Intel.

Intel is convinced that the Commission's conclusions regarding our business practices are wrong – both factually and legally – and we have appealed the Commission's decision.

Intel is committed to ethical business behavior and compliance with all applicable laws and regulations governing business practices when competing in the global marketplace. We are convinced that we've adhered to those standards and acted legally at all times in this matter.

So, how could the Commission come to wrong conclusions? Intel has reluctantly concluded that the Commission initiated the investigation with a predisposed view to alter the results of competition, and consequently tended to assess the evidence with a prosecutorial bent to confirm its point of view. In doing so, it ignored or minimized – and indeed at times even refused to obtain – important evidence that contradicted its view of the world. The result was a consistently one-sided and result-oriented selection and interpretation of the evidence.

The Commission has now released a redacted version of its decision. Intel cannot provide a detailed response to the redacted decision immediately, because it must first obtain permission from the third parties who submitted evidence to the Commission, which the Commission decision ignored, but which presents the complete story.

Intel is convinced that a fair and complete evaluation of all the evidence invariably shows a pattern of vigorous competition by Intel at discounted but above-cost prices that benefited customers and consumers – exactly what sound global antitrust policy should encourage, not punish. For that reason, we welcome the opportunity to present our case – including the facts ignored or given short-shrift by the Commission – to an independent tribunal, in this case the Court of First Instance of the European community.

Under established Commission procedures, much of the evidence before the Commission continues to be deemed confidential, and Intel is not free to elaborate on it publicly. However, we can observe that the Commission relied heavily on emotional exchanges and speculation found in emails if they favored the Commission's case, while ignoring or minimizing hard evidence of what actually happened, including highly authoritative documents, written declarations and testimony given under oath by senior individuals who negotiated the transactions at issue. At the same time, the Commission consistently

construed ambiguous documents in a manner adverse to Intel, while overlooking or dismissing authoritative documents as “insufficiently clear” when they contradicted the Commission’s case. This pattern occurred across the board with respect to documents and statements submitted not only by Intel but also by third parties. The result was that the Commission dismissed or ignored extensive exculpatory evidence.

The Commission also suppressed evidence. In August of 2006, the Commission interviewed a senior executive of Dell. All indications are that this individual provided evidence favorable to Intel on key points of the case. No official record of the meeting was kept or placed in the Commission’s file, however, in contravention of the Commission’s obligations. When Intel asked about the meeting the Commission first denied it had happened, and later denied any obligation to inform Intel about the meeting. Intel took the matter to the Commission's Ombudsman, who concluded in a decision on July 14 that the failure to record and preserve the evidence produced at this key meeting amounted to maladministration on the part of the Commission.

As the investigation progressed, the Commission failed to require AMD, the complainant in the investigation, to provide the Commission with much in the way of AMD's own internal documents. The Commission then compounded this failure by refusing to honor Intel's request that it obtain the rich collection of AMD documents produced by AMD in its ongoing civil suit against Intel in U.S. District Court in Delaware, even though Intel specifically identified the categories of highly relevant evidence that the Commission should request from AMD. The Commission’s lack of interest in obtaining evidence from AMD supportive of Intel’s position further undermined the objectivity of the Commission’s conclusions.

It is perhaps most remarkable that the Commission's decision essentially ignored the undisputable fact that microprocessor prices have declined significantly year over year, while innovation has proceeded at a stunning pace, and output has been expanding rapidly, more than tripling in recent years. The U.S. Bureau of Labor Statistics, which tracks the price/performance of more than 1200 industrial segments, reports that while most prices have increased, microprocessor prices have fallen, and indeed fallen more rapidly than any other segment's prices – at a rate averaging 36% annually over the six years covered by the Commission's decision, 2002 - 2007. And microprocessor production has tripled in recent years. This is not the picture of a stagnant monopolized market. It is the picture of a fiercely competitive market and customers have been the winners year after year.

The Commission also paid little heed to the fact that when AMD, the alleged victim in this case, fielded a genuinely competitive product and executed well, it achieved remarkable success, growing its sales and profits to unprecedented levels. Indeed, AMD's share of sales to the five OEMs the Commission addressed in its decision, actually grew rapidly, increasing from about 8% in early 2002 to a high of almost 22% by the end of 2007. On the other hand, the Commission failed to recognize that the reason AMD's successes were limited to discrete segments of the microprocessor market, and

not sustained year after year, was that AMD stumbled more often than not in its attempts to satisfy the many critical requirements of microprocessor customers.

All of these observable realities of the marketplace are fundamentally inconsistent with the Commission's theory that Intel's practices raised prices and reduced consumer choice.

The Commission's conclusion that Intel sold products below cost in order to harm AMD was achieved by blatantly manipulating cost and competitive conditions in a result-oriented manner. In reality, Intel never sells products below cost and did not do so in the instances cited by the Commission. What we are able to do – legally and to the benefit of consumers – is to discount products significantly to compete in our highly competitive marketplace, where AMD also competes aggressively on price. Our ability to discount springs from ongoing investments in the latest manufacturing technology and the efficiencies gained from being the leading volume manufacturer of microprocessors.

When Intel did offer discounts in the form of rebates, it did not offer them on the condition that customers purchase all or most of their microprocessors from Intel (as the Commission found) nor did Intel condition rebates on a customer not using AMD microprocessors. The Commission acknowledged in its report that it has no written evidence of this in the form of actual contracts. In a typical example of the evidence the Commission relied on, a lower-level employee of a customer company speculates that Intel might retaliate against that customer by disproportionately reducing its discounts if that customer bought (or bought more) from AMD. Intel does not reduce discounts disproportionately for such reasons. The proof is in the pudding. All of the microprocessor customers covered by the Commission decision purchased from AMD as well as Intel during some or all of the time period selected by the Commission (2002-2007), and none of them suffered disproportionate rebate reductions as a result. To the contrary, Intel continued to compete aggressively with discounted prices to retain as much of their business as it could.

The Commission failed to understand the competitive setting involving Intel and AMD (the only two major providers of x86 microprocessors for computers) and the large computer OEMs in what was a three-way dynamic, where large and powerful OEMs pitted Intel and AMD against each other to obtain the best products for the lowest price on the best terms. While natural, such pressure on sales personnel can cause high emotions and an atmosphere of suspicion. Uncertainty is inherent on both sides in the negotiations. The Commission essentially decided that it was unlawful for Intel not to have affirmatively dispelled any uncertainty that an OEM might have had about the level of discounts Intel would provide if the OEM chose to buy less from Intel and more from AMD. In doing so, the Commission ignored the dynamics of these negotiations. The OEM typically threatened to move purchases to AMD in its quest to drive the best bargain it could with Intel, and Intel competed in a state of uncertainty to win all the business the OEM was putting up for bid. The OEM did not ask Intel what discounts it would provide if the OEM decided to buy from AMD rather than Intel. Intel had every incentive to compete for all the business.

The Commission also ignored the reality that, in a competitive market with two major suppliers, when one company makes a particular sale, the other one does not. This natural consequence of vigorous competition is clearly not evidence of anticompetitive behaviour by the larger company when it wins. Furthermore, the Commission's view of the microprocessor market does not match the reality that microprocessor supply contracts are very short – three months on average – and there are many times in a calendar year when Intel and AMD compete for some part of each computer OEM's business, with continual new opportunities to win contracts.

The Commission has established clear procedures protecting the confidentiality of evidence provided to the Commission, and Intel respects the Commission's procedures. However, since the Commission selects what evidence to present and discuss in its decision, and much of the evidence Intel would like to refer to in response either is not addressed in the EC's decision or is subject to confidentiality, Intel cannot discuss it publicly. This means that we cannot do much more than summarize publicly the general nature of our objections to the Commission's decision. But Intel is bringing all the evidence to the attention of the Court of First Instance, to show not only why the EC's decision is wrong, but also why it should be annulled to ensure the continuing vigorous competition in the global marketplace that benefits customers and ultimately consumers.