

September 21, 2009

**INTEL RESPONSE TO THE EC'S "PROVISIONAL NON-CONFIDENTIAL  
VERSION OF THE COMMISSION DECISION OF 13 MAY 2009"**

**Introduction**

On May 13, 2009, the European Commission (“Commission”), announced its finding that Intel had violated Article 82 of the EC Treaty (“Decision”). Intel is convinced that the Commission, which serves as investigator, prosecutor and decision maker in European Community (“EC”) proceedings of this type, reached indefensible conclusions in its Decision – conclusions that are wrong as a matter of fact, law, economics, and elementary fairness. The Decision punishes innovation, risk-taking and strong price competition, and rewards failure. It seeks to take market competition out of the capable hands of the buyers and sellers that participate at every level of this market, and place it in the hands of European government regulators.

Most importantly, it essentially ignores the remarkable achievements that competition has produced in the microprocessor market over the past decade: dramatically lower prices, significantly greater output of product, and exponentially improved performance. It seeks to impose an artificial parity between Intel and its main competitor, AMD, in a market that, over and over again, has shown that it knows how to reward accomplishment, whether by Intel or AMD, and to punish failure, again regardless of which market participant failed.

Intel has exercised its right to appeal the Commission’s Decision to an independent tribunal, the Court of First Instance of the European Community. The purpose of this paper is to address the accusations levelled at Intel in the redacted version of the EC’s Decision which was recently made public. In doing so, we are hampered by the fact that much of the evidence Intel would like to rely on – documents and testimony of employees of AMD and the Original Equipment Manufacturers (“OEMs”) – remains subject to confidentiality protection and cannot be cited publicly. While the Commission has obtained waivers from the OEMs to make public much of the evidence it cited in the Decision, Intel is not in a position to insist that the OEMs waive confidentiality more broadly, to allow Intel to cite evidence that places the materials the Commission cited into context, proves that the accusations the Commission makes are unsupportable, and demonstrates that the market is

highly competitive. As a result, at this juncture Intel's response to the Commission Decision must be general in nature.

However, one important OEM, Dell, which the Decision says was coerced by fear of Intel "punishment" to buy exclusively from Intel, has confirmed publicly that it always considered itself entirely free to choose to buy from AMD, without fear of reprisal or punishment. The record before the Commission contains sworn testimony of Dell executives that contradicts this essential premise of the Commission's case. The Decision nevertheless disregarded this evidence and instead relied on the speculation of a single lower level employee, who was not a decision maker and not even at Dell for much of the relevant period.

Dell's affirmation of its freedom to choose its suppliers, which undercuts the central premise of the Commission's case, serves as a caution that the Commission's one-sided depiction of the evidence will not withstand scrutiny. In this paper, we address the evidence that is publicly available and does not require the Commission's dispensation, or a breach of the confidentiality of a third party's information.

The Decision alleges that Intel implemented a strategy to foreclose AMD by engaging in two specific forms of anti-competitive conduct: (i) granting rebates<sup>1</sup> to five original equipment manufacturers ("OEMs") on condition that they purchase all, or almost all, of their x86 CPU requirements from Intel, and granting rebates to the German retailer, Media-Saturn-Holding GmbH ("MSH"), on condition that it only sold computers containing Intel's x86 CPUs; and (ii) imposing so-called "naked restrictions" upon three OEMs, by making payments to them to halt or delay the launch of, or limit the sales channels for, specific products containing AMD's x86 CPUs. These findings are not only factually wrong but also reflect a view of competition policy that would thwart the vigorous competition that sound antitrust policy should foster.

### **The Commission's Factual Findings About the Microprocessor Market Are At Odds With The Decision.**

As is obvious from a reading of the EC Decision, the Commission starts with a clear-eyed view of the competitive dynamics of the microprocessor market, then fails to reach the obvious conclusions compelled by those findings – *i.e.*, that this market needs no external, governmental intervention to be, and remain, competitive. Significantly, the Commission finds:

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<sup>1</sup> Here Intel follows the Commission's approach of using the terms "rebates" and "discounts" interchangeably.

- Intel invented the x86 microprocessor (¶ 121), and AMD makes its microprocessors only as a result of a license from Intel. (¶¶ 856, 858).
- IBM, in a competitive bidding process, selected Intel microprocessors, not those submitted by AMD or others, in the early 1980s to power the first personal computers (¶ 121), and, by “ingenuity, time, and capital,” Intel developed and perfected its microprocessor design over the subsequent twenty years (¶ 856).
- As a result of those Intel investments, innovation was rapid in the microprocessor market (¶ 140 – “Innovation is, together with price, one of the main factors that triggers demand in the x86 industry.,” ¶ 139), with transistor density doubling essentially every two years (¶¶ 141, 142). Intel also led the industry in manufacturing improvements, developing smaller circuitry, which led to markedly improved performance and lower prices (¶¶ 111-13).
- During this period of time, Intel also developed valuable “brand equity,” and as a result of Intel investments in capacity, while AMD invested little, Intel became a “must stock” item (¶ 870). Why? Because Intel’s products were highly desirable and Intel manufactured them in sufficient quantities and to high quality standards to meet increasing customer demand (¶¶ 871-73, 890).
- AMD, according to the Commission, became a competitive threat to Intel in about 2001 (twenty years after an Intel microprocessor was incorporated into the first IBM PC) (¶¶ 149-1693); Intel reacted to that competition by competing harder, in all aspects of the market: price, quality, manufacturing process, etc. (*see, e.g.*, ¶¶ 456, 1646-48, 1659, 1660).
- Microprocessor buyers, mostly large Original Equipment Manufacturers (“OEMs”), like Dell, HP, IBM, Gateway and Lenovo, saw great opportunity in this emerging AMD threat, and, as the Commission readily acknowledges, they played the two suppliers, Intel and AMD, off each other to obtain the lowest possible prices from each. (*See e.g.*, the following Commission finding, quoting Lenovo: “I want to insure that both Intel and AMD must compete for our business every day. This will lead to much a more competitive business model in the long term.” ¶ 517) As also observed by the Commission, these OEMs also operate in a very competitive environment, and thus, are motivated to squeeze every price concession possible out of Intel and AMD as they purchase what the Commission correctly understands to be the “most important component” of their products. (¶¶ 106, 288)
- The Commission seems to agree that the OEMs are to be trusted in making purchasing decision, when those decisions result in their purchasing *AMD* products:

"OEMs are the best-placed to come to the soundest judgment as regard their supply needs, the most appropriate products to fulfill those needs. . . . If a specific OEM considered purchasing a certain share of its x86 CPU needs for its corporate or notebook segment from AMD, that OEM did so in full awareness of the attributes of the AMD product, including the shortcomings that it might have had." (¶ 1698)

However, if AMD's shortcomings, or other competitive or brand factors resulted in an OEM's choosing Intel products, then, according to the Commission, they are not to be trusted, or their sworn testimony is ignored.

- As the Commission Decision illustrates, because much is at stake, the negotiations between OEMs, on the one hand, and Intel and AMD, on the other, are tough, and often involve uncertainty about the thinking of each side, and a lack of "transparency" on *both* sides, about the consequences of alternative courses of action. Indeed, the parties intensify that uncertainty, often by exaggerating their intentions, one way or the other (*see e.g.*, ¶ 1251). The intention of the OEMs is to get the best possible price, and the intention of the suppliers is to win business to keep their factories operating.

Importantly, as the Commission realizes, the ultimate agreements reached in these negotiations are typically very short-term, often no more than a quarter of a year (¶ 328), and, even at that, are subject to constant renegotiation. (¶¶ 1015-17) Thus, significant chunks of business are frequently available to be won. The OEMs are not locked into long term contracts, and neither are the microprocessor suppliers. Thus, the market is very fluid and dynamic – and the Commission realizes it ("One significant difficulty associated with entering into longer term commitments in the x86 CPU market is that the products that are sold today are likely to be replaced by new products in a very short time horizon." (¶ 1018)

- These are the market dynamics, all found to be true by the Commission, which resulted in falling microprocessor prices, increasing output, and dramatically improved performance. (¶¶ 906-10) Both Intel and AMD were on the "innovation treadmill," and had to constantly be looking forward to the next product, the next idea, the next material, the next manufacturing technique that would keep them competitive and win them more business.

- As AMD became a greater competitive threat to Intel in 2001, Intel fought to hang on to as much business as it could. That, of course, is expected, and is the way that competitive markets operate. But, despite Intel's efforts to retain its historical business, the Commission found that AMD made significant inroads into the microprocessor market throughout the relevant period (¶¶ 841-851):

During the period covered by the decision, between the second quarter of 1997 and the fourth quarter of 2006, AMD experienced an approximately five-fold increase in microprocessor market share – from 5.5% to 25.3%.

AMD’s penetration of the desktop segment was particularly striking during this time frame. Moreover, at the beginning of this time period, AMD had no notebook or server product. Yet by the end of the period, AMD was firmly entrenched in both markets.

AMD, throughout the period relevant to the case, moved from being an also-ran, a copier of Intel technology, to becoming a factor in the market, taking significant market share from Intel. How does the Commission turn these facts into a finding that Intel abused its market position? By arguing that it cannot know what AMD’s growth path would have been in the absence of the so-called Intel “abuses” that it found. (¶1613) However, elsewhere, the Commission admits that a new firm, challenging a well-established and successful 20-year incumbent, can realistically expect only slow and steady progress in gaining market share, .” . restricted to the limited part of the business where AMD’s advantageous features would have compensated any drawbacks it might have had.” (¶ 1691) AMD’s admitted market progress was certainly that.

Nevertheless, the Commission observes that it is uncertain whether AMD has achieved “sustainable success” (¶ 1735), and it is unknown what its market share would have been had Intel not competed so hard (¶ 1736). But, at the same time, the Commission recognizes that AMD, which successfully exported all of its manufacturing to Germany over the relevant period, has attracted significant new investment from Abu Dhabi (¶ 127); in other words, in reaching a finding that Intel’s conduct had supposedly made it impossible for AMD to find new investment (¶¶ 1613-14), the Commission seemed to have forgotten that it had also observed that AMD *had already, in fact, found* significant new, deep pocket investors: Moreover, AMD continues to sell significant quantities of microprocessors to large OEMs which the Commission recognizes would not buy from a company they did not expect to be in business indefinitely into the future. (¶ 865) As the OEMs have demonstrated over and over, *they* have total and complete power to ensure AMD’s continued presence as a competitor by simply continuing to give AMD orders.

All of these facts, as found by the Commission, are undisputed, and they show an industry characterized by competition, not dominance. Yet when the Commission turned to look to specific Intel transactions in this market (and reviewed just a handful of the thousands of transactions which occurred, during the relevant period), it largely ignored the market context in which they occurred.

The Commission made clear errors of factual assessment in making its findings concerning the Intel transactions at issue in the case. Over and over, it chose to accept less credible, and less numerous evidence – typically unauthenticated emails – while ignoring more credible, and more numerous evidence – such as written declarations (*see, e.g.*, ¶ 440), statements under oath (*see, e.g.*, ¶ 302), and even statements made by third parties under formal Commission procedures (*see, e.g.*, ¶ 573). It ignored, again and again, highly probative evidence, and intentionally failed to gather other readily available evidence, including evidence in *AMD v. Intel*, United States District Court for the District of Delaware, No. 05-441, where substantial evidence regarding AMD’s allegations has been adduced.

As a result of this exceptionally selective fact-finding, the Commission reached conclusions that were clearly erroneous on the issues material to its Decision. Specifically, and as will be shown below, it found Intel supply agreements, with five OEMs and one retailer, to be conditional and/or exclusive when they clearly were not. It also concluded that suppliers were paid not to introduce AMD products, when the evidence clearly showed that, for reasons of their own, the OEMs had simply chosen to buy Intel microprocessors because they found Intel’s discounted prices and products a better deal than what AMD offered. It found that Intel used threats of retaliation to retain the business of its customers, when there were no threats. It found that Intel “punished” disloyal customers, when clearly it did not.

The Commission found further that microprocessor consumers were denied choice between Intel and AMD-based products, when the record was clear that, at all times, and in all localities, consumers had – and exercised – abundant choice between Intel and AMD-based products in every category. (¶ 1604) And finally, it found that consumers were harmed by unfair pricing, but never explained how that could happen in a market where prices were declining, performance was improving, output was increasing, and that all large microprocessor buyers, at one time or another, bought from both Intel and AMD (and typically received better, not worse, prices when they did so). Indeed, apart from the lack of proof of *consumer* harm, it was not even clear how AMD, Intel’s *competitor*, was harmed when, throughout the relevant period of the case, AMD’s market share increased significantly each, year, in every single segment of the market.

It is significant that the Decision does not claim that Intel reached binding exclusivity agreements with its customers. Instead, the Decision rests upon a theory that Intel would retaliate against an OEM’s switch to AMD by offering “disproportionately” reduced

discounts, from which it inferred conditionality. This is an entirely novel theory of conditionality which is not, in any event, supported by the evidence.

The Decision is based on manifest errors of factual assessment by the Commission, which conducted a selective and one-sided exercise. The Decision routinely overlooks relevant evidence and cites documents selectively and inaccurately. When documents are equivocal or ambiguous, the Commission construes them in a manner adverse to Intel. When the Commission expresses uncertainty as to certain facts, it makes a finding against Intel. When documents do not suit the Commission's case, it dismisses them as insufficiently clear or contradicted by less authoritative documents. When an OEM's position is clarified (favourably to Intel) by direct testimony from key executives, the Commission finds a reason to ignore that evidence.

The Commission also refused to obtain numerous documents which Intel specifically requested the Commission to obtain from AMD, which were of direct relevance to Intel's defence. These documents concerned AMD's performance, capacity constraints, and relationships with the OEMs and retailer from which the Decision finds that it was foreclosed. The Commission was bound to obtain this evidence. Its refusal so to do reflects its unwillingness to accept exculpatory evidence.

The Commission also suppressed evidence that was likely to be exculpatory in relation to Dell. The Commission interviewed one key executive of an OEM. An agenda for that meeting reveals that the Commission discussed with him the very issues that are at the heart of the Decision's findings regarding the OEM. However, for wholly unsatisfactory reasons, the Commission failed to make any record of that interview, notwithstanding that it manifestly addressed highly relevant evidence which was overwhelmingly likely to be favorable to Intel. The Commission failed even to disclose the agenda as part of the case file. The Ombudsman has decided that this failing by the Commission amounted to maladministration in the conduct of this case.

The Commission also refused to obtain most of a set of documents requested by Intel that were relevant to its defense. These facts cast further doubt on the degree of objectivity with which the Commission has approached its investigation, and confirm that it has not proven the alleged abuses to the required standard.

Another critical shortcoming of the Commission is that it simply ignored critical features of the microprocessor market in rendering its Decision, including:

The OEMs wield considerable leverage in the price negotiation process. Many of Intel's customers are as large as or even larger than Intel. This is not a case where the alleged abuse flows from an inequality of bargaining power.

The average duration of Intel's microprocessor supply contracts is extremely short. It is well established that any potential for anticompetitive foreclosure arising from rebate agreements is a function of duration, with longer contracts exerting greater potential adverse effects. Due to the rapid innovation in CPU products, the life cycle of a contract is frequently 3 months, meaning that even if Intel is successful in one quarter of a year, it is forced to compete anew for each subsequent quarter. Intel and AMD thus compete for OEMs' business at numerous points during the year.

OEMs operate in a fiercely competitive market and strive to reduce their input costs as they seek to sell computers. Competition between Intel and AMD has enabled OEMs to negotiate larger discounts from Intel. The Decision repeatedly alleges "consumer harm," but nowhere does it set out evidence to substantiate this. On the contrary, during the period covered by the Decision CPU prices fell faster than in any other comparable sector, by around 36% per year. In addition, the rate and nature of innovation has been phenomenal. Nothing in the Decision casts doubt upon these facts.

Finally, during the relevant period AMD's share of x86 CPU sales increased nearly fivefold. Where AMD successfully innovated and matched technical skill with commercial acumen, the market received its product offerings well. But where it did not, OEMs were sceptical and preferred to purchase from Intel. The Commission has simply ignored AMD's performance.

In addition, the Commission's blatantly manipulated the cost and competitive conditions in applying its version of a cost-price test, the as efficient competitor ("AEC") test, to conclude that Intel's made sales below cost when in reality the sales were profitable.

### **Alleged Conditional Rebates**

The Decision states that a rebate agreement like those found here may be deemed unlawful by virtue *only* of its being conditional and without regard to its effects or capability to restrict competition. The Commission undoubtedly takes that position because here the Intel rebating practices it challenges occurred, at the latest, several years ago, and thus it is possible to actually determine whether they foreclosed competition. The Decision fails to do so, and it is apparent that competition was not foreclosed and that consumer benefited.



### **Alleged Naked Restrictions**

The Decision finds that certain “payments” were “naked restrictions.” However, there is no category of “payments” (read “discounts”) that may be deemed “abusive” without analysis of their effects or capability to restrict competition to the detriment of consumers. The Decision uses the pejorative phrase “naked restrictions” as a substitute for proper analysis.

### **Comity/extraterritoriality**

Case-law establishes that when conduct occurring outside the Community is in issue, the Commission must prove to the requisite high standard that the conduct was implemented within the Community and that any effects within the Community were “immediate, substantial, direct and foreseeable.” However, the Decision contains no such analysis, even though the preponderant part of the conduct complained of occurred outside the Community.

### **Intel’s agreements were not conditional on exclusivity**

The Decision finds that Intel concluded *de facto* conditional agreements with each customer whereby the customer was given discounts conditional upon that customer purchasing all or a significant portion of its requirements from Intel. The Decision finds that these conditions were unwritten and operated through a customer’s “understanding” that if it purchased from AMD it might lose a disproportionate volume of discounts. This is a novel theory of conditionality that has not previously been found to constitute an infringement.

**Dell.** The Commission ignores, misconstrues and distorts the substantial body of evidence which proves that until 2006 Dell unilaterally chose to source solely from Intel for objective and legitimate business reasons. The evidence presented to the Commission instead showed that Dell did not fear losing discounts disproportionately if it decided to purchase microprocessors from AMD, and did not experience such a disproportionate loss when it did buy from AMD. The Commission ignored this evidence and instead relied on speculation and hyperbole in the emails of an employee who was not involved in the negotiations.

**Lenovo.** The Decision finds that Intel granted “payments” to Lenovo in 2006 conditional on Lenovo delaying and finally cancelling its AMD-based notebook PCs. The Commission brands these as “naked restrictions.” The Decision also finds that Intel granted rebates to Lenovo for 2007 that were conditional on Lenovo obtaining its entire notebook CPU supply from Intel. Those findings reflect serious errors in the assessment of the evidence. This evidence shows that the agreements with Intel were based upon the

competitiveness of Intel's price and concerns about insufficient demand for AMD-based notebooks, and not upon conditionality.

**HP.** The Commission finds that HP and Intel entered into two Agreements, called HPA1 and HPA2, which contained "unwritten" conditions that HP would purchase 95% of its requirements of CPUs for commercial desktop PCs from Intel, delay HP's purchase of AMD products, and limit the distribution of AMD-based products to certain channels. The agreements were, in fact, the product of normal competition between HP's CPU suppliers, conducted on terms that HP established. To reduce its cost of buying CPUs, HP organised a bidding contest for the supply of desktop CPUs for its commercial PCs (previously supplied by Intel). HP instituted the bidding process by shifting 5% of its commercial desktop business from Intel to AMD and then putting a substantial additional portion of its requirements out for AMD and Intel to compete over. HP chose to source from Intel because of the superiority of Intel's offer, taking into account customer demand for Intel and AMD. The agreement did not incorporate true "unwritten conditions" because HP had no obligation to comply with any such conditions and could, in any event, terminate the agreements upon 30 days' notice.

**NEC.** The Commission finds that from October 2002 to November 2005, Intel granted NEC rebates that were *de facto* conditional upon NEC's agreement to purchase from Intel (i) 80% of its CPU requirements worldwide and (ii) 70% of the CPU requirements of its subsidiary NECCI, which sold NEC's products outside Japan. The Commission's findings are wholly unsustainable. For two quarters, Intel agreed to provide \$6m in market development funds ("MDF") that were linked to market segment share ("MSS") expectations, but there is no credible evidence that any other rebates were linked to such expectations or that those expectations extended beyond those two quarters. In fact, Intel's share of NEC's microprocessor purchases fell below the supposed 70% and 80% thresholds in the great majority of the quarters at issue, yet Intel did not reduce its rebates to NEC.

**Acer.** The Decision concludes that "Acer delayed the launch of its AMD x86 CPU-based notebooks" for four months at Intel's request, and that "Acer's understanding was that if it did not, the previously agreed ECAP [discounts] would be decreased." However, the evidence shows that Acer decided in the face of a worldwide shortage of AMD Athlon 64 CPUs that left it without enough CPUs to go to market. In fact, Intel's rebates to Acer remained steady or increased even as AMD's MSS at Acer climbed from 9% to 30%.

**MSH.** The Decision finds that MSH (a retailer) and Intel entered into an unwritten agreement under which Intel provided marketing funds to MSH in return for exclusivity and that MSH expected to suffer a disproportionate reduction in rebates from Intel if it broke the exclusivity. This finding is based on a selective and inaccurate reading of the evidence. The Decision fails to identify any document in which Intel threatened MSH with a loss of rebates. To reach a contrary conclusion, the Commission seriously misconstrues the Article 18 response submitted by MSH to the Commission.

**The Commission Failed to Show That Intel’s Discounts Failed its Price/Cost Test**

The Decision recognizes that a rebate cannot be deemed abusive unless it is capable of restricting competition, and that the as efficient competitor test can be used to determine whether a rebate is capable of restricting competition. Under that test, a discount is deemed to be incapable of restricting competition if the dominant firm is selling above its average avoidable costs (“AAC”), because an “as efficient competitor” could profitably match the discount.

The AEC test allocates the entire “conditional” portion of a discount to only a portion of the customer’s purchases, called the “contestable share.” Because a disproportionately large share of the discount (as much as its entirety) is allocated to the contestable share, which in the Commission’s findings is always a very small share of the purchase, the discount is magnified on a per-unit basis, and the resulting “effective price” is significantly lower than the average price paid by the customer.

In applying the test:

- A larger conditional portion of the discount decreases the effective price and makes it more difficult to pass the test, because a larger portion of the discount is attributed to just a fraction of the purchases.
- A smaller contestable share also decreases the effective price and makes it more difficult to pass the test, because the conditional portion of the discount is applied to a smaller number of purchased units and thereby magnifies the per-unit discount.
- A higher AAC makes it more difficult to pass the test, by increasing the cost level that the “effective price” must exceed to pass.

The Decision contains numerous serious errors in the analysis and assessment of the evidence relevant to the as efficient competitor test. In particular, the Decision systematically: (a) overstates the conditional portion of the discounts; (b) understates the contestable share; and (c) inflates Intel's costs (AAC).

When the evidence is properly appraised, Intel's discounts comfortably pass the Commission's AEC test and cannot possibly be deemed abusive.

**Dell.** The Decision finds that Intel's discounts to Dell passed the as efficient competitor test for the first 11 months of the relevant period, but unlawfully concludes that Intel's discounts infringed Article 82 even in those 11 months. Moreover, the Commission makes serious errors in assessing the evidence. It disregards compelling contemporaneous evidence of the contestable share; misreads Dell's Article 18 response; disregards evidence of the absence of conditionality; and improperly inflates Intel's sales and marketing costs. The discounts pass the AEC test by a significant margin if only some of these errors are corrected.

**Lenovo.** The Commission finds that Intel's CPU sales under the 2007 Intel-Lenovo MOU were below cost. This finding is based on a gross underestimate of the number of contestable Lenovo CPUs, and on an erroneously inflated value for Intel's discounts, which result in an erroneously low effective price. If either of these errors is corrected, the 2007 discounts clearly pass the as efficient competitor test. Moreover, the Commission fails to perform an AEC test for Intel's discounts to Lenovo in the second half of 2006. Intel's discounts in that period also pass a properly performed AEC test.

**HP.** The Commission's as efficient competitor analysis in respect of HP rests on a litany of errors. The Decision artificially depresses the contestable share, by disregarding evidence shows that HP communicated to Intel, and Intel relied upon, a much higher contestable share that the Commission used. The Decision incorrectly assumes that HP would have lost all of its discounts had it moved its contestable share to AMD, which makes no sense whatsoever. Abundant evidence – as well as what Intel actually did every time an OEM chose to buy from AMD – makes such a contention entirely unsupported. The Decision also miscalculates Intel's sales and marketing costs. Intel's discounts to HP pass the AEC test in every period, even if only one or two of these errors is corrected.

**NEC.** The Commission's as efficient competitor analysis in respect of NEC is based on serious errors of fact and reasoning. The Commission computes Intel's revenues by using a revenue figure that is far below the figure that the Decision *itself* gives for Intel's net

revenues, artificially depressing the effective price ascribed to Intel. The Commission also deems Intel's "ECAP" discounts conditional, even though they were not linked to any market share expectations, and Intel provided these discounts even when NEC's purchases fell below the asserted market share threshold. In addition, the Commission erroneously inflates Intel's sales and marketing costs. It exacerbates these errors by basing its analysis solely on the conditions of the fourth quarter of 2002 without assessing whether those conditions were valid for the entire 38-month relevant period.

**MSH.** The Commission's AEC analysis regarding the German retailer MSH finds that Intel's provision of marketing funds to MSH passes the as efficient competitor test, but then reaches the contrary result only by applying a "double conditional discount" test, which assumes that (i) MSH was subject to conditional rebates with respect to all or nearly all of the marketing funds that it received from Intel, and (ii) all OEMs supplying MSH were themselves subject to rebates that were 100% conditional. Those assumptions are unfounded. Indeed, the Decision identifies only one of MSH's suppliers (NEC) that was allegedly subject to conditional discounts, and for only a portion of the period of infringement for MSH. The Decision also errs in asserting that all or nearly all of the marketing funds to MSH were conditioned on exclusivity, given that Intel provided almost as much in marketing funds to the similarly situated European retailer, which included AMD CPUs in a large percentage of the PCs it sold. Intel's discounts pass the AEC test after correcting either the "double conditional discount" assumption or the conditional portion of the marketing funds.

#### **Refusal to Obtain and Assess Evidence pertaining to AMD**

The Decision fails to address meaningfully the evidence relating to AMD's performance. The Decision finds that AMD was foreclosed during 2002-2007, but during this period AMD substantially increased its market share and profitability. Indeed, AMD did so even more strongly in relation to the very OEMs from which the Decision finds it was foreclosed. The evidence also shows that AMD performed very well in certain areas but poorly in others, for reasons not attributable to Intel. Moreover, because of its success in certain areas, AMD became capacity constrained for a significant portion of the relevant period and thus could not have been foreclosed from selling more.

#### **Lack of Causation**

The Commission has failed to establish a causal link between what it deems conditional rebates and the OEMs' decisions not to source from AMD. The Decision wrongly

asserts that evidence of a causal link is irrelevant. In relation to HP, the Commission states (at ¶969) that “whether the rebates were in fact the cause for HP’s choice for staying nearly Intel-exclusive is not relevant for the application of Article 82.” With respect to Dell, the Decision likewise states (at ¶936) that its findings do “not preclude the fact that other reasons might have contributed to Dell staying Intel-exclusive during a certain period” or “the possibility that other reasons might have eventually outweighed the effect of the Intel rebates.” And regarding Lenovo, “the Commission does not dispute that Lenovo made its decisions only on the basis of pure business considerations,” or that Lenovo “took account in particular of the absolute level of Intel and AMD’s offered prices but also of the different pros and cons of each supplier’s offer” (Decision ¶556).

### **Lack of Evidence of Impact On Consumers**

The Decision acknowledges that the purpose of Article 82 is ultimately to protect consumers, not competitors. However, the Commission has failed to conduct any analysis of the evidence of the impact of Intel’s discounts upon consumers. This is a serious failure, as the findings in the Decision that consumers have been harmed are counter-intuitive given the substantial body of evidence which establishes that over the period prices dropped substantially and product innovation was rapid.

### **Failure to Establish a Single Strategy to Foreclose**

The Decision finds (at ¶1747) that Intel was engaged in a “long-term comprehensive strategy to foreclose AMD from the strategically most important sales channels in the market.” The Commission uses this finding as the basis for its conclusion that Intel engaged in a single continuous abuse. This finding makes no sense, as the “infringements” the Commission purported to find regarding the individual OEMs and MSH are fragmented in relation to both products covered and time period, precluding a claim that there was a “single” “comprehensive strategy.” Further, the Commission’s position is inconsistent with the actual evidence of AMD’s performance in the market over the 2002-2007 period covered by the Decision. The Commission does not provide *any* evidence of a consistent or coherent plan throughout that five and half year period – rather it cites instances of nothing more than individual competitions for specific OEM purchases.

### **Background Facts**

Intel and AMD are the main manufacturers of x86 CPUs. These CPUs are generally not sold directly to consumers, but rather to OEMs, who incorporate them into computers

along with a variety of other hardware and software components. The OEMs then sell their computers to consumers, either directly or through retailers.

**Industry Competitive Dynamics.** The Commission's case hinges on a simplistic model of Intel's interactions with a few leading OEMs. The Commission finds that Intel harmed consumers by offering discounts, allegedly conditioned on exclusivity (or near-exclusivity), which it enforced through an implicit threat to reduce discounts disproportionately if OEMs shifted purchases to AMD.

The Decision, however, rests on *inferences* concerning the OEMs' *understandings* of Intel's intentions, drawn from documentary fragments. These findings are just plain wrong.

The actual behavior of Intel and its counterparts in the market provides a real life test of the soundness of those findings. The performance of the microprocessor industry, especially in respect of price and innovation, is an obvious starting point in testing the Commission's conclusion that consumers have been harmed.

The competitive dynamics of the CPU industry contradict the Commission's hypotheses. The OEMs at issue are powerful, multi-national corporations that are sophisticated negotiators with both Intel and AMD.<sup>2</sup> They are well aware of the cost structure underlying the manufacture of CPUs and the resulting desire of both suppliers to maximize capacity utilization at their fabs. Endless evidence shows that OEMs routinely use the threat of shifting purchases to AMD as leverage to extract larger discounts from Intel. Intel typically responds to such tactics by *increasing* its discounts (rather than threatening to *reduce* discounts). The absence of credible examples of disproportionate reductions of discounts by Intel in response to an OEM's shift of purchases to AMD is a telling indicator that the Commission's reading of the evidence is not well-supported.

Overall trends in the CPU market during the relevant period also refute the Commission's predictions of competitive harm. CPU prices fell faster (on a quality-adjusted basis) over this period than those of any other product, including all other high-technology products. The pace of innovation, according to the Decision (at ¶140), was "rapid." AMD, far from being foreclosed by Intel's conduct, in fact grew rapidly, especially in sales to the very OEMs from which the Decision claims it was excluded.

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<sup>2</sup> Dell and HP together represent about 40% of Intel's net revenue.

**Negotiating Dynamics Between Intel and Its OEM Customers.** The CPU market is characterized by individual negotiations between suppliers and their major OEM customers. The Commission's theory that "loyalty" to Intel is rewarded and "disloyalty" (in the form of increasing purchases from AMD) is "punished" implies that OEMs should emphasize their "loyalty" in negotiations with Intel to maximize discounts conditioned on exclusivity or "near exclusivity." The reality, however, is different. OEMs instead threaten to shift purchases to AMD as a means for extracting more favorable discounts from Intel.

This point is recognised in the Decision itself. For example, the Decision finds (at ¶986) that "Lenovo recognised that pursuing a dual-source strategy ... would result in more advantageous business relationships and commercial terms." The reality – that OEMs increase their negotiating leverage by shifting sales from Intel to AMD – is inconsistent with the Commission's hypothesis that the OEMs expected to be "punished" for switching to AMD. If an OEM understood that a shift away from Intel would lead to a retaliatory reduction in discounts, it could not rationally conclude that it could secure more advantageous commercial terms from Intel by sourcing more from AMD or threatening to do so.

This observation holds true for the other OEMs. The record is replete with evidence that Dell, HP, IBM – all OEMs – constantly threatened to move business to AMD unless Intel failed to meet Dell's demands for lower prices.

This evidence from the OEMs directly contradicts the Commission's theory that OEMs feared "punishment" for not sourcing exclusively or "nearly exclusively" from Intel.

Moreover, the evidence shows that when the OEMs did *in fact* purchase from AMD, there was no "punishment" or retaliation" by Intel such as that asserted by the Commission. It is striking that, notwithstanding evidence of recurrent 'disloyalty', no actual examples of disproportionate 'punishment' are cited in the Decision."

The evidence reveals that during the relevant period, Intel responded to actual losses of OEM business to AMD by increasing rather than reducing its discounts. For example, as AMD's share at Acer increased from 9% in the third quarter of 2003 to 30% in the fourth quarter of 2005, Intel's discounts to Acer, as a percentage of purchases, *increased*. The Decision acknowledges this but claims (at ¶448) that "[t]he fact that AMD's share at Acer would have increased and/or that Intel's rate of discounts to Acer would have increased while AMD was gaining market share at Acer is ... irrelevant to the subject matter of the case." This is perverse; the evidence is plainly relevant when a central finding in the Decision is that



the OEMs understood or feared that Intel would “punish” them by reducing discounts disproportionately if they bought more from AMD.

It should be obvious that it would be counterproductive to “retaliate” against a customer who choose to buy more from AMD and less from Intel. To the contrary, Intel has every incentive to compete just as hard to retain as much of the OEMs business as it can.

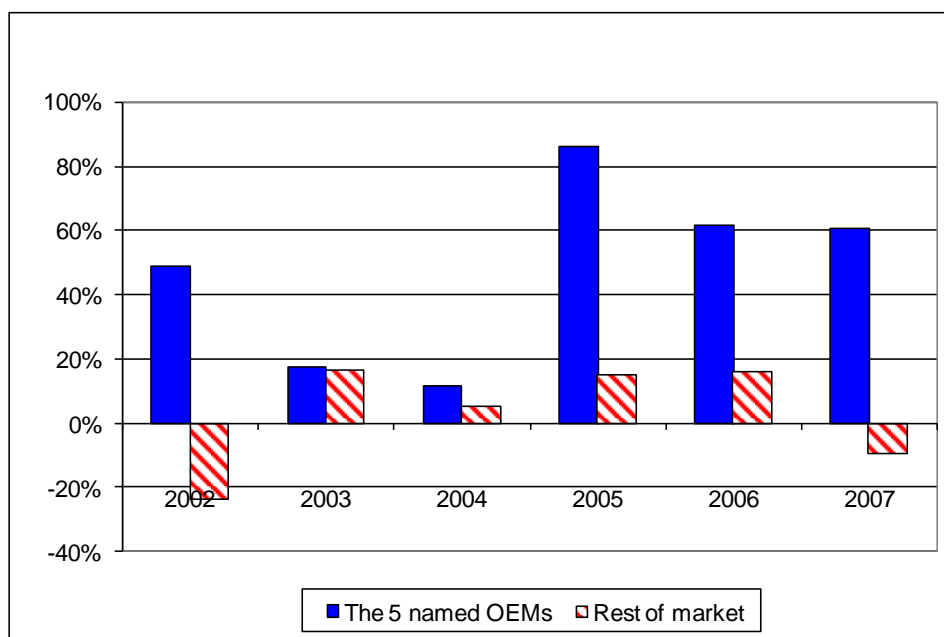
**Market Performance During the Relevant Period.** The Commission asserts (at ¶1741) that Intel adopted a “comprehensive strategy” to foreclose AMD from competing for business with the leading OEMs. Market developments over the relevant period therefore offer a particularly apt “natural experiment” against which to test the validity of this assertion. If the Commission’s assessment were correct, AMD should have exhibited severe economic stress during the period, in particular with respect to the five OEMs at which Intel’s allegedly foreclosing conduct was directed. In fact, however, AMD not only achieved its greatest commercial success during the period, but registered greater gains with these five OEMs than in the remainder of the market.

During the relevant period, the five OEMs increased their purchases of AMD CPUs by 533%. Indeed, in the latter years, at which time the impact of Intel’s “comprehensive strategy” to exclude AMD should have been the greatest, AMD’s gains at these OEMs accelerated, exceeding 60% in each of the years 2005 through 2007, as shown below:

AMD’s growth in sales to Acer, Dell, HP, Lenovo, and NEC

2002	2003	2004	2005	2006	2007
49%	17%	12%	86%	61%	61%

The growth in AMD’s sales to these OEMs substantially exceeded AMD’s growth in sales to all of its other customers, as shown in the graph below:



At the same time, the growth in AMD’s sales to *all* of its customers was impressive. During the period covered by the Decision, AMD’s share of x86 CPU sales increased nearly fivefold during the period covered by the Decision. In revenue terms, the increase was nearly eightfold. In the server segment, AMD’s share increase was even more dramatic, going from 0% to 26.2% in units and from 0% to 33.2% by revenues. Indeed, AMD was so successful that its CPU *profits* during the fourth quarter of 2005, at the height of the relevant period, were higher than its CPU *revenues* in the last quarter before that period.<sup>3</sup>

In October 2005, while Intel was allegedly “engaged in a single, continuous strategy aimed at foreclosing AMD” (Decision ¶917), AMD’s Chairman and CEO Hector Ruiz declared that AMD was performing “better than we ever have in the history of the company.” In November 2005, when the Commission’s narrative would have AMD foreclosed from the market, AMD’s Chief Financial Officer described AMD as “a growth engine” that was achieving “profitable growth” and “not just growth for the sake of growth.” And in early 2006, after Intel’s alleged strategy had been in effect for more than three years, Dr Ruiz declared that AMD had “more momentum and higher quality momentum than at any other time in our history.”

AMD also dramatically increased its investments in research and development (“R&D”) during the relevant period. AMD’s R&D expenditures more than doubled (from

<sup>3</sup> AMD’s microprocessor profits in 2005 were the highest in the company’s history. The Commission makes no claims of infringement after 2005 in respect to four of the five OEMs discussed.

\$852m in 2002 to \$1.771bn in 2007), and grew by 55% in the last three years of that period alone.

AMD's unparalleled success during the alleged foreclosure period resulted in severe capacity constraints. AMD's executives repeatedly reported that AMD was facing manufacturing capacity constraints. For example, in January 2005, AMD's CFO told financial analysts that "in the microprocessor business, we run every wafer we can run." In November 2006, AMD's Chairman told analysts that "right now we've been and we expect to continue to be very challenged by being able to meet the needs of our microprocessor customers, just from the capacity standpoint." And at the end of 2006, after AMD had allegedly suffered from Intel's foreclosure strategy for four entire years, AMD's CFO reported that "we're steadily growing that capacity, from the 60 to 65 million units which we've talked about in the past in '06, which we're selling all that out as we continue to increase our penetration in the microprocessor base and gain share. We're selling all of our capacity."

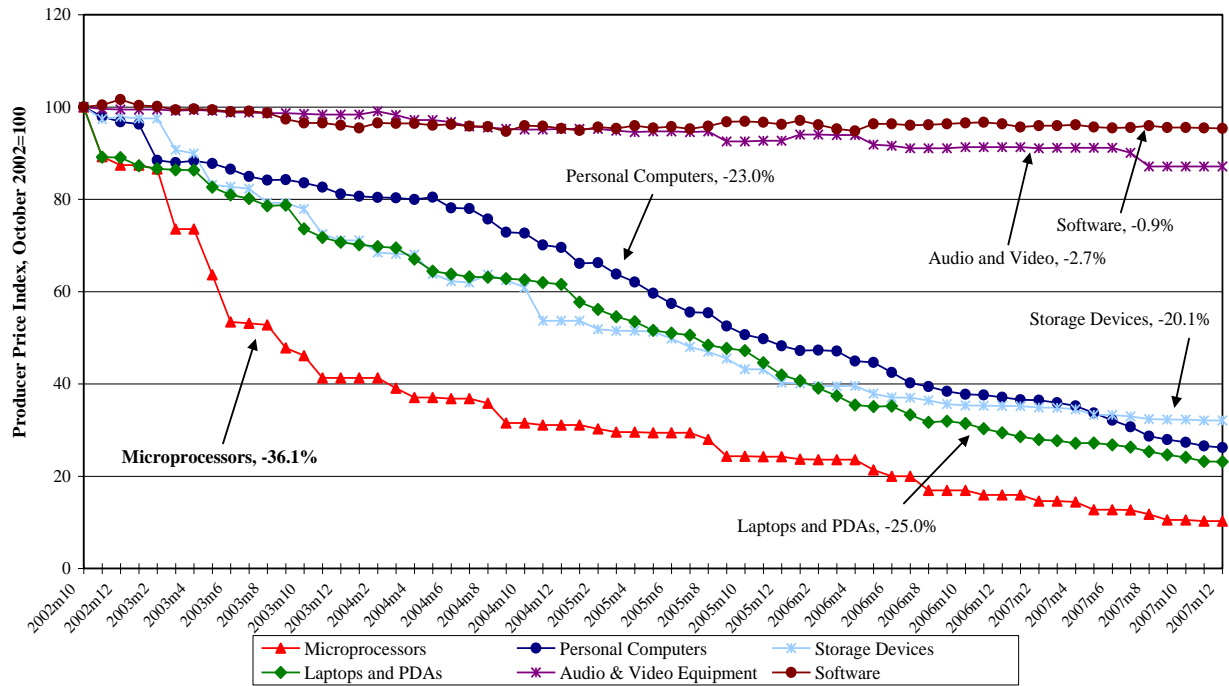
Thus, during the relevant period, AMD: (a) reaped the greatest commercial success in its history;<sup>4</sup> (b) reported uniquely rapid growth rates with the very OEMs deemed to be the target of abusive behaviour; (c) faced manufacturing capacity constraints that hampered its ability to satisfy demand for its CPUs; and (d) grew its investments in R&D. This tension between what the Commission's theory predicts *should* have happened and what *actually* happened strongly supports the conclusion that the Commission's findings about Intel's conduct are mistaken.

**Competition Delivered Real Benefits for Consumers.** The Decision concludes that Intel's conduct "had a direct and negative impact on those customers who would have had a wider price and quality choice" yet presents no evidence to support this assertion (¶1603). In fact, key economic indicators establish that the reverse is true. As set out below, according to data published by US government's Bureau of Labor Statistics ("BLS"), the quality adjusted price of CPUs has fallen 36.1% *annually* over the period covered by the Decision:

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<sup>4</sup> AMD's fortunes turned for the worse in 2007, after AMD failed to supply many of its customers with promised microprocessors.

**BLS Producer Price Indices, October 2002 - December 2007**  
**Microprocessors, Personal Computers, Storage Devices,**  
**Laptops and PDAs, Audio & Video Equipment, and Software**



Source: Bureau of Labor Statistics PPI, 1/2002-12/2007, downloaded on 6/15/2009. All series rebased to October 2002. Series include: MOS Microprocessors (PCU33441333441312), Personal Computers (PCU33411133411173), Storage Devices (PCU3341123341121), Laptops and PDAs (PCU33411133411172), Audio and Video Equipment (PCU334310334310), and Software (PCU511210511210).

The Commission dismisses the significance of this market performance by asserting that as a result of “Moore’s law,” “falling prices are an intrinsic feature of this industry given its technical characteristics irrespective of the state of competition in the market.”<sup>5</sup> However, this claim entirely misses the point that quality-adjusted CPU prices have declined more rapidly than *any* of the 1,200 product categories monitored by the BLS, including all other high-technology products.<sup>6</sup>

Moreover, the Commission’s reliance upon Moore’s law misses the obvious point that it is only because of competition that Moore’s law is transformed from a prediction into reality: “transistor density generally doubles every two years” (Decision ¶908) *because of* competition not in its absence. The fact that “[t]he pace of innovation is rapid” (Decision ¶140) is not a matter of fate; it is the result of continued and intensive competition-driven investment in R&D by both Intel and AMD over a number of years.

<sup>5</sup> Decision ¶908. Moore’s Law, named after a prediction made by Intel co-founder Gordon Moore in 1965, posits that the number of transistors on a semiconductor chip will double every two years.

<sup>6</sup> The Commission also questions the data, claiming that the concept of quality adjusted prices is a subjective notion (Decision ¶909) but it has failed to point to any flaw in the methodology used by the US government to measure quality adjusted prices, which it uses as one of the elements for gauging inflation at the wholesale level.

### **Alleged Foreclosure of Competition**

On the facts of this case, it is not possible merely to assume, without analysing the relevant circumstances, that Intel's discounts were capable of foreclosing the market. First, the shorter the duration of any period covered by the rebates, the less the ability of such rebates to foreclose competitors. The rebates granted by Intel generally related to periods of months rather than years and some were terminable on 30 days notice. The business of the OEMs was consistently open for bids from both Intel and AMD, which is a normal aspect of competition. This aspect of competition was further heightened by the fact that this was not a case in which a dominant supplier offered rebates to far weaker counter-parties. The OEMs are powerful, multi-national corporations that are sophisticated negotiators, able to exert considerable pressure on both Intel and AMD to drive attractive terms.

In analysing whether the offer of a rebate to a particular customer is capable of foreclosing the market, the capability to foreclose must be viewed in its overall market context. Even if all the Commission's findings are accepted, the foreclosure claimed is well under 1% of the x86 CPU market segment during half of the relevant period, and never exceeds 2% during that entire period. Moreover, the two years in which it reaches its highest level of 2%, 2004 and 2005, were particularly successful years for AMD's CPU business:

#### *Affected Share of x86 Microprocessors*

*if all of Commission's Findings were correct (which they are not)*

2002	2003	2004	2005	2006	2007
0.3%	1.3%	2.0%	2.0%	0.4%	0.7%

It is also significant that the Intel rebates the Commission challenged related to quite different segments of the market for different OEMs at different times. Moreover, many leading OEMs (e.g., IBM, Toshiba, Sony, Fujitsu-Siemens) are not alleged to be recipients of what the Commission incorrectly labels abusive rebates. In these circumstances, foreclosure is very far from obvious and cannot simply be assumed as the Commission did.

Finally, over the period at issue here, AMD significantly increased its CPU revenues, profitability, and grew its market share. At the same time, quality adjusted CPU prices declined substantially, and Intel and AMD both increased their investments in R&D. These facts are inconsistent with the expected features of a market supposedly characterized by foreclosure of one of the two main competitors.

### **The Commission's Concept of Naked Restrictions**

The second category of alleged abuse is what the Decision (at ¶1641) refers to as “naked restrictions.” The Commission appears to be hiding behind semantics in order to establish a breach of Article 82. However, the use of pejorative terminology cannot conceal that the Commission is attempting to fashion a novel category of exclusionary abuse for which, the Commission claims, no analysis of foreclosure (even a capability or likelihood to foreclose) is required. However, under Article 82, abuse of a dominant position is an objective concept based upon the effect on competition. Alleged exclusionary conduct can amount to an abuse only if it “tends to” or is “capable of” foreclosing competitors.

### **Dell**

While confidentiality requirements, at least at this moment, have made it exceptionally difficult to explore the evidence regarding the various third parties in much more detail than we have done at the outset of this paper, the public record is more complete with respect to Dell, and so we are in a position to set forth a broader picture of the actual facts regarding Dell.

The essence of the Commission Decision in relation to Dell is as follows: (i) from December 2002 to December 2005, Intel granted Dell rebates under Intel’s “meet competition program” or “MCP”; (ii) these were *de facto* conditional on Dell sourcing its CPUs and chipsets exclusively from Intel; (iii) “[t]he mechanism or premises of the Dell MCP rebate would have led to a disproportionate reduction in Dell’s rebate if Dell had not fulfilled the condition to source only from Intel”;<sup>7</sup> and (iv) Dell’s belief, expectation, or “understanding” was that the rebate arrangement was subject to this condition.

The Commission’s finding of conditionality is not based upon a reading of any terms and conditions of any actual agreement between Intel and Dell, but solely upon inferences drawn by the Commission. The facts refute the Commission’s novel theory of conditionality. There is no evidence that Intel ever told Dell that it would impose disproportionate rebate reductions or that Dell believed that Intel would do so if Dell sourced from AMD. The evidence shows instead that Dell chose to source solely from Intel for reasons of its own self-interest that have nothing to do with conditionality.

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<sup>7</sup> Decision ¶306 and ¶311: “Dell was free to start sourcing x86 CPUs also from AMD, but this would have entailed the loss of a *significant and disproportionate* part of the Intel MCP rebates.” (emphasis added).

The Commission's finding of conditionality rests on internal speculation by a lower-level Dell employee. Dell witnesses testified under oath that Dell's rebates during 2002-2005 were not conditioned upon exclusivity, that Intel never threatened Dell with disproportionate reductions if it switched to AMD, and that Dell never rejected AMD out of fear of Intel "retaliation." Dell in fact did switch to AMD in 2006 and suffered no retaliation.

The file contains extensive deposition testimony from Dell executives which refutes the allegation that Dell feared disproportionate rebate reductions if it switched to AMD. The Commission ignores or misrepresents the deposition testimony given by Dell witnesses. The testimony from Dell witnesses confirms the following facts with respect to Dell:

- Dell always had a choice to use multiple microprocessor vendors. Dell did not have an exclusive relationship with Intel and Dell never agreed with Intel to buy microprocessors exclusively from Intel. Dell did not understand that the rebates Dell received from Intel were conditioned upon Dell not using AMD or any other brand of microprocessors in the computers it sold.

- Dell constantly negotiated with Intel as it does with all of its suppliers. Although Dell maintained a business model of sole-sourcing CPUs until May 2006, it regularly sought to get better pricing from Intel. Dell believed that its volume of purchases from Intel gave Dell bargaining leverage with Intel. Dell was aware that its volume of purchases would have a dramatic impact on the capacity utilization for a semiconductor manufacturer, which Dell believed put Dell in a good negotiating position with Intel.

- Intel never threatened Dell with retaliation if Dell bought microprocessors from AMD or any other supplier. Dell's senior executives did not understand that Intel was prepared for all out war if Dell were to purchase microprocessors from AMD or any other supplier.

The Commission refers to testimony from a Dell executive that if the competitive threat to Intel were to change, then the competitive response "may indeed change." The Commission (at ¶294) interprets this as implying that Intel would provide no discounts if Dell switched to AMD, but that interpretation is plainly mistaken. The testimony indicates only that some aspects of the discount program from Intel would change if Dell were to source from AMD. The Commission repeatedly cites Dell's statements that a shift to AMD would lead to "a reduction" of its rebates. But a shift of volume to AMD would in the ordinary

course of business be expected to result in *some* reduction in total rebates as Dell's purchases from Intel declined. This is normal competition and very far from proof that the reduction would be *disproportionate*. The fact that a discount may change or reduce if the circumstances change does not necessarily render it conditional or disproportionate.

The Decision also erroneously suggests (at ¶¶942-945) that the lack of "transparent and objective criteria" with respect to future discounts from Intel is somehow probative of an abuse by Intel. That suggestion is mistaken, for three reasons. First, there is no claim that in any given quarter Dell did not know what discounts it would receive from Intel if it were to source from AMD. Rather, the claim is that the lack of transparency as to the level of rebates in *future* periods, during which the volume and mix of CPUs that Dell would source from Intel was unknown, is itself evidence of "conditionality."

Surely a violation of competition law cannot be based on the internal expectations or uncertainties of a company's powerful customers. Uncertainty is inherent in negotiations for both sides, yet the Commission essentially decided that it was unlawful for Intel not to have affirmatively dispelled any uncertainty Dell (or other OEMs) 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. Dell (as did all OEMs) pitted AMD against Intel, threatening to move purchases to AMD, in a quest to drive the best deal it could from Intel, and Intel competed to win the business the OEM was putting up for bid in a state of uncertainty about the OEM's actual intentions. The OEM did not ask Intel what discounts it would provide if the OEM decided to buy from AMD rather than Intel. Intel was competing for all the business at risk.

The documents do not address *actual* changes in Dell's discounts. Rather, they simply speculate on what *might* happen should Dell switch to AMD. Such speculation is to be expected from a company that was evaluating its options at all times, but it does nothing to show that Dell understood that its discounts *would* be reduced disproportionately if it were to start sourcing from AMD. Mere speculation falls far short of knowledge or understanding.

Moreover, these documents reflect only the ruminations of lower-level Dell employees, which are of no probative value on the question of Dell's corporate views when contrasted with the sworn testimony of Dell's executives. An example of the Commission's selectivity is highlighted by the Decision's treatment of an internal email sent in February 2004, claiming that Intel were "prepared for [all out war] if Dell joins the AMD exodus." This



email is cited no less than four times in the Decision (at ¶229, ¶248, ¶250 and ¶1180). On each occasion, the Commission fails to mention that the Dell testimony indicates that no one at Intel had threatened Dell with war or retaliation if Dell chose to source from AMD. The Commission similarly ignored the testimony of Dell's senior executives that they did not understand Intel to be prepared for all out war if Dell went with AMD.

The Commission necessarily acknowledges (¶930) that Dell "continuously evaluated technology options, including the possibility of introducing products utilizing processors from AMD," in order to determine whether it was in Dell's interest to change its low-cost single-source strategy and switch to AMD. This is inconsistent with the Commission's assertion that Dell feared retaliation and believed it would suffer punitive rebate reductions if it switched to AMD. Dell would not rationally have devoted substantial time and money to testing and evaluating AMD's CPUs if it believed that any switch to AMD would be unprofitable because it would trigger disproportionate reductions in Intel rebates. Dell's rejections of AMD prior to 2006 were not the result of any fear of retaliation, but instead the result of Dell's perception of AMD's weaknesses and of the benefits of having a single CPU supplier.

After Dell did switch in 2006, Intel continued to offer discounts aggressively to Dell, even as Dell rapidly expanded its business with AMD. Indeed, Intel agreed to an increase in its discounts to Dell in June 2006, only a month after Dell had announced that it would purchase AMD CPUs. In a contemporaneous email message that directly refutes the Commission's conditionality theory, the then General Manager of Intel's Sales and Marketing Group explained that Intel did so because "all of these moves help us with MSS [market segment share]" and "if we do not do it - they will run faster with AMD." This evidence further refutes Commission's conclusion that Dell "would have" suffered "disproportionate" discount reductions if it switched to AMD, because (i) if Dell had feared a disproportionate reaction it would not have switched, and (ii) when Dell did switch, no disproportionate loss of discounts ensued.

The Commission attempts (at ¶268) to dismiss this evidence as "of minor importance" compared to the supposed 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." In fact, however, as set out above, Dell did *not* know or believe that it would lose a disproportionate amount of its rebates if it switched to AMD. The Commission does not have *any* contemporaneous documents that it even claims as support for its allegations of conditional rebates after March 2004.

The Dell depositions confirm that Dell does not believe that Intel retaliated against Dell for buying AMD microprocessors in 2006. While the Dell discount did decline during the fiscal year 2007, this was not caused by Dell sourcing from AMD but primarily by a dramatic reduction in Intel's list prices to align them more closely with transactional prices and by a substantial reduction in the volumes of CPUs purchased by Dell from Intel.

As to the other evidence explaining the decline in Dell's rebate during fiscal year 2007, the Commission's first response (at ¶¶272-274) is to rely upon a drop in discounts between the first and third quarters of that year (Q1FY07 and Q3FY07). That response is unpersuasive. First, the Commission fails to take into account the significant decrease in Intel's list prices, which would have resulted in a reduction in discounts under any circumstances. Second, the Commission fails to account for the very substantial decrease in Dell's purchases from Intel. The combined effect of the list price reductions and the reduction in Dell's purchases from Intel gave the appearance of a decrease in Dell's discounts.

Third, the Commission concedes that Dell entered into a new discount agreement with Intel during this time period, but concludes that "[t]he real question is not whether the new rebate agreement justifies the decline of rebates but whether the decline of rebates would have happened similarly under the agreement prevailing when Dell was Intel-exclusive" (¶289). The Commission ignores, however, that the new agreement was adopted at the request of Dell, not Intel. Thus any reductions in discounts resulting from that new agreement cannot reflect retaliation by Intel. This fundamentally undermines the Commission's case on conditionality.

For these reasons, it is clear that Intel did not reduce Dell's discounts disproportionately in retaliation for Dell's decision to source from AMD. This evidence of what *actually* occurred further undermines the Commission's findings of conditionality, which are based upon inferences as to how Intel *might* have reacted upon a switch by Dell to AMD.

### **Conclusion**

In the end, the Commission has simply released its version of the facts of the decade long competitive, worldwide struggle between Intel and AMD – from documents it carefully selected, while generally ignoring the evidence that did not support its case. Based on the Commission's rules of confidentiality, Intel is not in a position to respond to the Commission's Decision with evidence that was not in the decision, and, of course, the

Commission got to choose what was in the decision and what was not. Consequently, Intel has a very limited ability, at this time, to make tell the full story – to make the hidden record public. But all of the evidence, over time, will become public, and then all the facts – all of the documents and testimony that was ignored or distorted will become known. And, based on that record, Intel is convinced that the it will become apparent that Intel has been accused of nothing more than competing vigorously to hold and win every sale that it could in this highly competitive marketplace.