

## **EuG: Harte Haltung gegen Geschäftspraktiken marktbeherrschender Unternehmen bestätigt**

**EuG**, Urteil vom 12.6.2014 – T-286/09, Intel Corp. gegen European Commission

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### **Nicht amtlicher Leitsatz**

Non einem Unternehmen in marktbeherrschender Stellung gewährte Exklusivitätsrabatte sind bereits ihrer Art nach geeignet, den Wettbewerb zu beschränken und die Wettbewerber aus dem Markt zu drängen. Es braucht daher nicht anhand der Umstände jedes Einzelfalls nachgewiesen zu werden, dass sie tatsächlich geeignet sind, den Wettbewerb zu beschränken.

*EG Art. 82; EWR-Abkommen Art. 54*

### **AUS DEN GRÜNDEN**

#### **Background to the dispute**

1 The applicant, Intel Corp., is a US-based company that designs, develops, manufactures, and markets central processing units ('CPUs'), 'chipsets', and other semiconductor components, as well as platform solutions for data processing and communications devices.

2 At the end of 2008, Intel employed about 94 100 people worldwide. In 2007, Intel had net revenues of USD 38 334 million and a net income of USD 6 976 million. In 2008, Intel had net revenues of USD 37 586 million and a net income of USD 5 292 million.

#### *1 – Administrative procedure*

3 On 18 October 2000, Advanced Micro Devices ('AMD') submitted a formal complaint to the Commission of the European Communities under Article 3 of Council Regulation (EEC) No 17 of 6 February 1962, First Regulation implementing Articles [81 EC] and [82 EC] (OJ, English Special Edition, 1959–1962(I), p. 87), which it further supplemented by putting forward new facts and allegations, in the context of a supplementary complaint of 26 November 2003.

4 In May 2004, the Commission launched a round of investigations relating to elements in AMD's supplementary complaint. Within the framework of that investigation, in July 2005, the Commission, assisted by several national competition authorities, carried out on-the-spot inspections under Article 20(4) of Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 [EC] and 82 [EC] (OJ 2003 L 1, p. 1) at four Intel locations, in the United Kingdom, Germany, Italy and Spain, as well as at the locations of several Intel customers, in France, Germany, Italy, Spain and the United Kingdom.

5 On 17 July 2006, AMD filed a complaint with the Bundeskartellamt (German Federal Cartel Office), in which it claimed that Intel had engaged inter alia in exclusionary marketing arrangements with Media-Saturn-Holding GmbH ('MSH'), a European retailer of microelectronic devices and the largest desktop computer distributor in Europe. The Bundeskartellamt exchanged information with the Commission on this subject, pursuant to Article 12 of Regulation No 1/2003.

6 On 23 August 2006, the Commission held a meeting with Mr D1 [*confidential*] (2) of Dell Inc., a customer of Intel. The Commission did not place the indicative list of topics for the meeting ('the indicative list of topics') on the case file and did not take minutes of it. A member of the team responsible for the file at the Commission drafted a note which was described as internal by the Commission ('the internal note') concerning that meeting. On 19 December 2008, the Commission provided the applicant with a non-confidential version of that note.

7 On 26 July 2007, the Commission notified to the applicant a statement of objections ('the Statement of Objections of 2007') concerning its conduct vis-à-vis five major original equipment manufacturers ('OEMs'), namely Dell, Hewlett-Packard Company (HP), Acer Inc., NEC Corp. and International Business Machines Corp. (IBM). Intel replied to that statement of objections on 7 January 2008, and an oral hearing was held on 11 and 12 March 2008. Access to the file was granted three times to Intel, namely on 31 July 2007, 23 July 2008 and 19 December 2008.

8 The Commission undertook several investigative measures relating to AMD's allegations, including on-the-spot inspections at the sites of several computer retailers and of Intel in February 2008. In addition, several written requests for information were addressed, pursuant to Article 18 of Regulation No 1/2003, to a number of major OEMs.

9 On 17 July 2008, the Commission issued to the applicant a supplementary statement of objections concerning its conduct vis-à-vis MSH. That statement of objections ('the Supplementary Statement of Objections of 2008') also covered Intel's conduct vis-à-vis Lenovo Group Ltd ('Lenovo') and included

new evidence on Intel's conduct vis-à-vis some of the OEMs covered by the Statement of Objections of 2007, which had been obtained by the Commission after the publication of the latter.

10 The Commission originally set Intel a deadline of eight weeks to submit its reply to the Supplementary Statement of Objections of 2008. On 15 September 2008, that deadline was extended to 17 October 2008 by the Hearing Officer.

11 Intel did not reply to the Supplementary Statement of Objections of 2008 within the prescribed period. However, on 10 October 2008, Intel lodged an application with the General Court, registered under reference T-457/08, requesting the Court, first, to annul two decisions of the Commission relating to the setting of the period for replying to the Supplementary Statement of Objections of 2008 and to the Commission's refusal to obtain several categories of documents emanating inter alia from the file of the private litigation between Intel and AMD in the US State of Delaware and, second, to extend the deadline for lodging its reply to the Supplementary Statement of Objections of 2008 in order to have a period of 30 days from the day on which it obtained access to the relevant documents.

12 Intel further lodged an application for interim measures, registered under reference T-457/08 R, by which it sought to obtain the suspension of the Commission's procedure pending the judgment on its substantive application, as well as the suspension of the period set for lodging its reply to the Supplementary Statement of Objections of 2008 and, in the alternative, that it be allowed a period of 30 days from the date of that judgment in order to reply to the Supplementary Statement of Objections of 2008.

13 On 19 December 2008, the Commission sent Intel a letter drawing its attention to a number of specific items of evidence which the Commission intended to use in a potential final Decision ('the Letter of Facts'). Intel did not reply to that letter by the deadline of 23 January 2009.

14 On 27 January 2009, the President of the Court dismissed the application for interim measures (order of the President of the Court of 27 January 2009 in Case T-457/08 R *Intel v Commission*, not published in the ECR). Following that order, on 29 January 2009, Intel proposed to file its reply to the Supplementary Statement of Objections of 2008 and to the Letter of Facts within 30 days of the order of the President of the Court.

15 On 2 February 2009, the Commission informed Intel by letter that the Commission services had decided not to grant an extension of the deadlines to reply to the Supplementary Statement of Objections of 2008 or to the Letter of Facts. The letter of 2 February 2009 also stated that the Commission services were nevertheless willing to consider the possible relevance of belated written submissions, provided that Intel served such submissions by 5 February 2009. Finally, the Commission took the view that it was not obliged to grant a request for a hearing lodged out of time and that its services considered that the proper conduct of the administrative procedure did not necessitate an oral hearing.

16 On 3 February 2009, Intel withdrew its action in the main proceedings in Case T-457/08 and the case was removed from the register by order of the President of the Fifth Chamber of the Court of 24 March 2009.

17 On 5 February 2009, Intel served a written submission including observations relating to the Supplementary Statement of Objections of 2008 and the Letter of Facts, which it classed as a 'reply to the Supplementary Statement of Objections [of 2008]' and a 'reply to the [Letter of Facts]'.

18 On 10 February 2009, Intel wrote to the Hearing Officer and asked to be granted an oral hearing in relation to the Supplementary Statement of Objections of 2008. The Hearing Officer rejected the request by letter of 17 February 2009.

19 On 13 May 2009, the Commission adopted Decision C(2009) 3726 final relating to a proceeding under Article 82 [EC] and Article 54 of the EEA Agreement (Case COMP/C-3/37.990 — Intel) ('the contested decision'), a summary of which appears in the *Official Journal of the European Union* (OJ 2009 C 227, p. 13).

## *II – Contested decision*

20 According to the contested decision, Intel committed a single and continuous infringement of Article 82 EC and Article 54 of the Agreement on the European Economic Area (EEA), from October 2002 until December 2007, by implementing a strategy aimed at foreclosing a competitor, AMD, from the market for x86 CPU microprocessors ('x86 CPUs').

### *A – Relevant market*

21 The products concerned by the contested decision are CPUs. The CPU is a key component of any computer, both in terms of overall performance and cost of the system. It is often referred to as a computer's 'brain'. The manufacturing process of CPUs requires expensive high-tech facilities.

22 CPUs used in computers can be sub-divided into two categories, namely x86 CPUs and CPUs based on another architecture. x86 architecture is a standard designed by Intel for its CPUs. It can run both the Windows and Linux operating systems. Windows is primarily linked to the x86 instruction set. Prior to 2000, there were several manufacturers of x86 CPUs. However, most of these manufacturers have since exited the market. The contested decision states that, since then, Intel and AMD have been essentially the only two companies still manufacturing x86 CPUs.

23 The Commission's inquiry led to the conclusion that the relevant product market was not wider than the market of x86 CPUs. The contested decision leaves open the question whether there is a single x86 CPU market for all computers or whether it is necessary to draw a distinction between three separate x86 CPU markets, namely the market for desktop computers, the market for notebook computers and the market for servers. According to the contested decision, given Intel's market shares for each segment, there is no difference to the conclusion on dominance.

24 The geographical market has been defined as worldwide.

#### *B – Dominant position*

25 In the contested decision, the Commission finds that, in the 10-year period which was examined (1997-2007), Intel consistently held market shares in excess of or around 70%. Furthermore, according to the contested decision, there are significant barriers to entry and expansion in the x86 CPU market. They arise from sunk investments in research and development, intellectual property and the production facilities that are necessary to produce x86 CPUs. In consequence, all Intel's competitors, except AMD, have exited the market or are left with an insignificant share.

26 On the basis of Intel's market shares and the barriers to entry and expansion in the relevant market, the contested decision concludes that at least in the period covered by that decision, that is to say from October 2002 to December 2007, Intel held a dominant position in that market.

#### *C – Abuse and fine*

27 The contested decision describes two types of Intel conduct vis-à-vis its trading partners, namely conditional rebates and 'naked restrictions'.

28 First, according to the contested decision, Intel awarded four OEMs, namely Dell, Lenovo, HP and NEC, rebates which were conditioned on these OEMs purchasing all or almost all of their x86 CPUs from Intel. Similarly, Intel awarded payments to MSH, which were conditioned on MSH selling exclusively computers containing Intel's x86 CPUs.

29 The contested decision concludes that the conditional rebates granted by Intel constitute fidelity rebates. With regard to Intel's conditional payments to MSH, the contested decision establishes that the economic mechanism of these payments is equivalent to that of the conditional rebates to OEMs.

30 The contested decision also conducts an economic analysis of the capability of the rebates to foreclose a hypothetical competitor as efficient as Intel (as-efficient-competitor test; 'the AEC test'), albeit not dominant. More precisely, the test establishes at what price a competitor as efficient as Intel would have had to offer CPUs in order to compensate an OEM for the loss of an Intel rebate. The same kind of analysis was conducted for the Intel payments to MSH.

31 The evidence gathered by the Commission led it to the conclusion that Intel's conditional rebates and payments induced the loyalty of the key OEMs and of MSH. The effects of these practices were complementary, in that they significantly diminished competitors' ability to compete on the merits of their x86 CPUs. Intel's anti-competitive conduct thereby resulted in a reduction of consumer choice and in lower incentives to innovate.

32 Second, with regard to naked restrictions, the Commission states that Intel awarded three OEMs, namely HP, Acer and Lenovo, payments which were conditioned on these OEMs postponing or cancelling the launch of AMD CPU-based products and/or putting restrictions on the distribution of those products. The contested decision concludes that Intel's conduct also directly harmed competition, and did not constitute normal competition on the merits.

33 The Commission concludes in the contested decision that, in each instance, Intel's conduct vis-à-vis the OEMs mentioned above and MSH constitutes an abuse under Article 82 EC, but that each of those individual abuses are also part of a single strategy aimed at foreclosing AMD, Intel's only significant competitor, from the market for x86 CPUs. Those individual abuses are therefore part of a single infringement of Article 82 EC.

34 By applying the Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003 (OJ 2006 C 210, p. 2; 'the 2006 Guidelines'), the Commission imposed on the applicant a fine of EUR 1.06 billion (as regards the calculation of the fine, see paragraphs 1554 to 1558 below).

#### *D – Operative part*

35 The operative part of the contested decision reads as follows:

##### *'Article 1*

Intel ... has committed a single and continuous infringement of Article 82 [EC] and Article 54 of the EEA Agreement from October 2002 until December 2007 by implementing a strategy aimed at foreclosing competitors from the market of x86 CPUs which consisted of the following elements:

- (a) Granting rebates to Dell between December 2002 and December 2005 at a level that was conditional on Dell obtaining all of its x86 CPU supplies from Intel;
- (b) Granting rebates to HP between November 2002 and May 2005 at a level that was conditional on HP obtaining at least 95% of its corporate desktop x86 CPU supplies from Intel;
- (c) Granting rebates to NEC between October 2002 and November 2005 at a level that was conditional on NEC obtaining at least 80% of its client PC x86 CPU supplies from Intel;
- (d) Granting rebates to Lenovo between January 2007 and December 2007 at a level that was conditional on Lenovo obtaining all of its notebook x86 CPU supplies from Intel;
- (e) Granting payments to [MSH] between October 2002 and December 2007 at a level that was conditional on [MSH] selling only computers incorporating Intel x86 CPUs;
- (f) Granting payments to HP between November 2002 and May 2005 conditional on: (i) HP directing HP's AMD-based x86 CPU business desktops to Small and Medium Business and Government, and Educational and Medical customers rather than to enterprise business customers; (ii) precluding HP's channel partners from stocking HP's AMD-based x86 CPU business desktops such that such desktops would only be available to customers by ordering them from HP (either directly or via HP channel partners acting as sales agent); and (iii) HP delaying the launch of its AMD-based x86 CPU business desktop in the [Europe, Middle East and Africa] region by six months;
- (g) Granting payments to Acer between September 2003 and January 2004 conditional on Acer delaying an AMD-based x86 CPU notebook;
- (h) Granting payments to Lenovo between June 2006 and December 2006 conditional on Lenovo delaying and finally cancelling its AMD-based x86 CPU notebooks.

##### *Article 2*

For the infringement referred to in Article 1, a fine of EUR 1 060 000 000 is imposed on Intel ...

##### *Article 3*

Intel ... shall immediately bring to an end the infringement referred to in Article 1 in so far as it has not already done so.

Intel ... shall refrain from repeating any act or conduct described in Article 1, and from any act or conduct having the same or equivalent object or effect.

...'

#### **Procedure and forms of order sought**

36 By application lodged at the Court Registry on 22 July 2009, the applicant brought the present action.

37 By document lodged at the Court Registry on 14 October 2009, AMD sought leave to intervene in the present proceedings in support of the Commission. However, on 16 November 2009, AMD informed the Court that it was withdrawing its application to intervene in the case. In consequence, by order of the President of the Eighth Chamber of the Court of 5 January 2010, AMD was removed from the case as intervener.

38 By document lodged at the Court Registry on 30 October 2009, the Union fédérale des consommateurs — Que choisir (UFC — Que choisir) ('UFC') sought leave to intervene in the present proceedings in support of the Commission. By order of 7 June 2010, the President of the Eighth Chamber of the Court granted leave. By letter lodged at the Court Registry on 22 September 2010, UFC informed the Court that it would not be lodging a statement in intervention but that it would make oral submissions at the hearing.

39 By document lodged at the Court Registry on 2 November 2009, the Association for Competitive Technology ('ACT') sought leave to intervene in the present proceedings in support of Intel. By order of 7 June 2010, the President of the Eighth Chamber of the Court granted leave. ACT submitted its

statement in intervention within the prescribed period and the main parties submitted their observations on that statement.

40 Following a change in the composition of the Chambers of the Court, the Judge-Rapporteur was assigned to the Seventh Chamber, to which the present case was accordingly allocated.

41 By decision of 18 January 2012, the Court referred the case to the Seventh Chamber sitting in extended composition, pursuant to Article 14(1) and Article 51(1) of its Rules of Procedure.

42 Upon hearing the Report of the Judge-Rapporteur, the Court decided to open the oral procedure and, by way of measures of organisation of procedure provided for in Article 64 of the Rules of Procedure, put written questions to the parties and requested the applicant and the Commission to produce certain documents. The applicant, the Commission and ACT replied to the written questions and produced the documents requested within the period prescribed.

43 UFC's reply to a written question put by the Court having been lodged at the Court Registry outside the prescribed period, by decision of 1 June 2012, the President of the Seventh Chamber decided that that reply would nevertheless be placed on the file.

44 By order of 16 April 2012, the Court ordered the Commission, pursuant to Article 65(b), Article 66(1) and the second subparagraph of Article 67(3) of the Rules of Procedure, to produce the confidential version of the internal note concerning the meeting between Commission agents and Mr D1, [*confidential*] of Dell of 23 August 2006. The Commission complied within the prescribed period. That document was not initially communicated to the applicant or the interveners.

45 Intel and the Commission requested that certain confidential matters contained in their pleadings and annexes, including replies to the written questions of the Court, not be communicated to the interveners. Only the non-confidential versions of those pleadings and annexes produced by the applicant and the Commission were communicated to the interveners. The interveners raised no objections in that regard.

46 On 7 June 2012, the applicant, the Commission and ACT attended, in the presence of the five Members of the Seventh Chamber sitting in extended composition, an informal meeting concerning the confidential treatment of certain information and the organisation of the hearing.

47 By letter registered at the Court Registry on 2 July 2012, the applicant stated that the various OEMs concerned as well as MSH and AMD agreed to information concerning them previously identified as confidential being disclosed during the part of the hearing which would be conducted in public and in the public version of the future judgment, subject to certain exceptions.

48 The parties presented oral argument and their answers to the questions put by the Court at the hearing which took place, partly *in camera*, from 3 to 6 July 2012.

49 By order of 29 January 2013, the oral procedure was reopened. By way of measures of organisation of procedure, the Commission, which had in turn consulted Dell, having been heard and not having raised any objections, the Court notified to the applicant and the interveners the full version of the internal note concerning the meeting with Mr D1, [*confidential*] of Dell, and requested that they submit their observations on the parts of that note which had not been sent to them previously. The applicant and ACT complied with that request within the prescribed period. UFC did not submit observations within the prescribed period. The Court then requested the Commission to submit its comments on the applicant's observations. The Commission complied with that request within the prescribed period. The Court also requested the applicant and the Commission to submit their comments on ACT's observations. The applicant and the Commission did so within the prescribed period. The oral procedure was then closed on 6 May 2013.

50 The applicant, supported by ACT, claims that the Court should:

- annul the contested decision in whole or in part;
- in the alternative, annul or substantially reduce the amount of the fine imposed;
- order the Commission to pay the costs.

51 The Commission contends that the Court should:

- dismiss the action;
- order the applicant to pay the costs;
- order ACT to pay the costs relating to its intervention.

52 UFC concurs in essence with the form of order sought by the Commission and contends that the applicant should be ordered to pay the costs.

## Law

### *I – Admissibility of certain annexes*

53 The Commission claims that certain documents submitted by the applicant as annexes to the application, which consist of testimonies made before the Delaware court before which the United States proceedings were brought ('the Delaware court', see paragraph 11 above), are inadmissible under Article 43(5) of the Rules of Procedure, according to which '[w]here in view of the length of a document only extracts from it are annexed to the pleading, the whole document or a full copy of it shall be lodged at the Registry'.

54 The Commission states that the applicant has not provided or lodged at the Registry the annexes to the depositions made before the Delaware court. The Commission states moreover that, in respect of some of those testimonies, the applicant provided only extracts from the transcript instead of the full transcript.

55 It is necessary to reject at the outset the Commission's line of argument in so far as it concerns the testimonies the transcript of which was submitted in its entirety, but without their annexes. According to Article 43(5) of the Rules of Procedure, it is sufficient to lodge the full document at the Registry. That article does not require that all the other documents to which a document annexed to a pleading refers also be lodged at the Registry. In cases where certain parts of the testimonies on which the applicant relies are not comprehensible without access to the documents to which the witnesses refer, that would concern only the probative value of the parts of the testimonies concerned. However, that cannot call in question the admissibility of the testimonies produced by the applicant in annex to its application.

56 As regards the testimonies in respect of which the applicant only produced extracts annexed to its pleadings, the Court makes the following observations.

57 Even if Article 43(5) of the Rules of Procedure were to be interpreted as imposing an obligation on the parties to lodge a full version at the Registry of any document of which they submit extracts annexed to a pleading, any infringement of that obligation could in any event be rectified.

58 In that regard, it should be observed that, according to point 57(d) of the Practice directions to parties adopted by the General Court on 5 July 2007 (OJ 2007 L 232, p. 7), as amended, even a failure to produce annexes mentioned in the schedule is capable of being rectified. The production of only an extract of a document by a party instead of the full document constitutes a fortiori a defect which is capable of being rectified.

59 In the present case, the Court requested the applicant, by way of a measure of organisation of procedure, to produce the full versions of all the testimonies of which the applicant had submitted only extracts and of which it had not lodged a full version at the Registry. The applicant complied with that request within the prescribed period and the Court gave the Commission an opportunity to submit its observations on those documents in writing.

60 The Commission's argument that some of the documents produced by the applicant are inadmissible under Article 43(5) of the Rules of Procedure must therefore be rejected.

### *II – The heads of claim for annulment of the contested decision*

#### *A – Horizontal questions concerning the legal assessments carried out by the Commission*

##### 1. The burden of proof and the standard of proof required

61 The applicant refers to the case-law of the European Union Courts and states, inter alia, that competition cases of the same nature as the present case are of a penal nature, which means that a high standard of proof and the presumption of innocence apply.

62 According to Article 2 of Regulation No 1/2003, in any proceedings for the application of Article 82 EC, the burden of proving an infringement of that article rests on the party or the authority alleging the infringement, namely, in the present case, the Commission. Furthermore, according to well settled case-law, any doubt in the mind of the Court must operate to the advantage of the undertaking to which the decision finding an infringement was addressed. The Court cannot therefore conclude that the Commission has established the infringement at issue to the requisite legal standard if it still entertains any doubts on that point, in particular in proceedings for annulment of a decision imposing a fine (Joined Cases T-67/00, T-68/00, T-71/00 and T-78/00 *JFE Engineering and Others v Commission* [2004] ECR II-2501, paragraph 177, and Case T-112/07 *Hitachi and Others v Commission* [2011] ECR II-3871, paragraph 58).

63 In the latter situation, it is necessary to take account of the principle of the presumption of innocence resulting in particular from Article 6(2) of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), signed in Rome on 4 November 1950, and from

Article 47 of the Charter of Fundamental Rights of the European Union. Given the nature of the infringements in question and the nature and degree of severity of the ensuing penalties, the principle of the presumption of innocence applies in particular to the procedures relating to infringements of the competition rules applicable to undertakings that may result in the imposition of fines or periodic penalty payments (Case C-199/92 P *Hüls v Commission* [1999] ECR I-4287, paragraphs 149 and 150; and Case C-235/92 P *Montecatini v Commission* [1999] ECR I-4539, paragraphs 175 and 176; *JFE*, paragraph 62 above, paragraph 178).

64 Although the Commission must produce sufficiently precise and consistent evidence to support the firm conviction that the alleged infringement took place, it is important to emphasise that it is not necessary for every item of evidence produced by the Commission to satisfy those criteria in relation to every aspect of the infringement. It is sufficient if the body of evidence relied on by the institution, viewed as a whole, meets that requirement, as held by the case-law concerning the implementation of Article 81 EC (see, to that effect Joined Cases C-238/99 P, C-244/99 P, C-245/99 P, C-247/99 P, C-250/99 P to C-252/99 P and C-254/99 P *Limburgse Vinyl Maatschappij and Others v Commission* [2002] ECR I-8375, paragraphs 513 to 523). That principle applies also in cases concerning the implementation of Article 82 EC (Case T-321/05 *AstraZeneca v Commission* [2010] ECR II-2805 ('*AstraZeneca*'), paragraph 477).

65 With respect to the probative force of the evidence used by the Commission, a distinction should be drawn between two situations.

66 First, where the Commission finds that there has been an infringement of the competition rules on the basis that the established facts cannot be explained other than by the existence of anti-competitive behaviour, the Courts of the European Union will find it necessary to annul the decision in question where those undertakings put forward arguments which cast the facts established by the Commission in a different light and thus allow another plausible explanation of the facts to be substituted for the one adopted by the Commission in concluding that an infringement occurred. In such a case, it cannot be considered that the Commission has adduced proof of an infringement of competition law (see, to that effect, Joined Cases 29/83 and 30/83 *Compagnie royale asturienne des mines and Rheinzink v Commission* [1984] ECR 1679, paragraph 16, and Joined Cases C-89/95, C-104/85, C-114/85, C-116/85, C-117/85 and C-125/85 to C-129/85 *Ahlström Osakeyhtiö and Others v Commission* [1993] ECR I-1307, paragraphs 126 and 127).

67 Second, when the Commission relies on evidence which is in principle sufficient to demonstrate the existence of the infringement, it is not sufficient for the undertaking concerned to raise the possibility that a circumstance arose which might affect the probative value of that evidence in order for the Commission to bear the burden of proving that that circumstance was not capable of affecting the probative value of that evidence. On the contrary, except in cases where such proof could not be provided by the undertaking concerned on account of the conduct of the Commission itself, it is for the undertaking concerned to prove to the requisite legal standard, on the one hand, the existence of the circumstance relied on by it and, on the other, that that circumstance calls in question the probative value of the evidence relied on by the Commission (see, to that effect, Case T-141/08 *E.ON Energie v Commission* [2010] ECR II-5761, paragraph 56 and the case-law cited).

68 It is in the light of the foregoing considerations that it is necessary to consider whether the Commission proved to the requisite legal standard the circumstances relied on in the contested decision in the light of the applicant's pleas.

## 2. The legal characterisation of the rebates and payments in consideration of exclusive supply

69 At recital 924 of the contested decision, the Commission found that the level of the rebates granted to Dell, HP, NEC and Lenovo was de facto conditional upon those companies purchasing all or almost all of their x86 CPU requirements, at least in a certain segment, from Intel and that, consequently, those undertakings' freedom to choose was restricted. As regards the payments granted to MSH, the Commission found, at the same recital, that those payments were conditional upon MSH selling only PCs based on Intel x86 CPUs and that they thereby restricted MSH's freedom to choose. The Commission stated, at recital 925 of the contested decision that, in the absence of objective justification, those findings are sufficient to establish an infringement of Article 82 EC.

70 The applicant contests the Commission's legal characterisation of the payments granted. The applicant maintains in essence that the Commission was required to carry out an assessment of all the surrounding circumstances to see whether the rebates and payments complained of were capable of restricting competition. Before finding that the grant of a rebate is contrary to Article 82 EC, the Commission must prove that those rebates are actually capable of foreclosing competition to the detriment of consumers. Where the conduct is historic, the Commission must prove that the agreements complained of actually led to the foreclosure of competitors.

71 The Commission maintains that the rebates at issue amounted to 'fidelity rebates within the meaning of *Hoffmann-La Roche*' as resulting from Case 85/76 *Hoffmann-La Roche v Commission* [1979] ECR 461 ('*Hoffmann-La Roche*'). It contends that, for this type of practice, it is not necessary to establish actual or potential foreclosure effects on a case-by-case basis.

a) The rebates granted to the OEMs in consideration of exclusive or quasi-exclusive supply

1) Legal characterisation

72 According to settled case-law, 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 that 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 (*Hoffmann-La Roche*, paragraph 71 above, paragraph 89, and Case T-155/06 *Tomra Systems and Others v Commission* [2010] ECR II-4361 ('Case T-155/06 *Tomra*'), paragraph 208).

73 The same applies where that undertaking, without tying the purchasers by a formal obligation, applies, either under the terms of agreements concluded with these purchasers or unilaterally, a system of loyalty rebates, that is to say, discounts conditional on the customer's obtaining — whether the quantity of its purchases is large or small — all or most of its requirements from the undertaking in a dominant position (*Hoffmann-La Roche*, paragraph 71 above, paragraph 89, and Case C-549/10 P *Tomra Systems and Others v Commission* [2012] ECR ('Case C-549/10 P *Tomra*'), paragraph 70).

74 As regards in particular whether the grant of a rebate by an undertaking in a dominant position can be characterised as abusive, a distinction should be drawn between three categories of rebates (see, to that effect, Case 322/81 *Nederlandsche Banden-Industrie-Michelin v Commission* [1983] ECR 3461 ('*Michelin I*'), paragraphs 71 to 73, and Case C-95/04 P *British Airways v Commission* [2007] ECR I-2331 ('Case C-95/04 P *British Airways*'), paragraphs 62, 63, 65, 67 and 68).

75 First, quantity rebate systems ('quantity rebates') linked solely to the volume of purchases made from an undertaking occupying a dominant position are generally considered not to have the foreclosure effect prohibited by Article 82 EC. If increasing the quantity supplied results in lower costs for the supplier, the latter is entitled to pass on that reduction to the customer in the form of a more favourable tariff. Quantity rebates are therefore deemed to reflect gains in efficiency and economies of scale made by the undertaking in a dominant position (see Case T-203/01 *Michelin v Commission* [2003] ECR II-4071 ('*Michelin II*'), paragraph 58 and the case-law cited).

76 Second, there are rebates the grant of which is conditional on the customer's obtaining all or most of its requirements from the undertaking in a dominant position. That type of rebate, to which the Commission refers by the expression 'fidelity rebates within the meaning of *Hoffmann-La Roche*', will subsequently be referred to as 'exclusivity rebates'. It should be noted that that expression will also be used for rebates which are not conditional on exclusive supply but on the customer's obtaining most of its requirements from the undertaking in a dominant position.

77 Such exclusivity rebates, when applied by an undertaking in a dominant position, are incompatible with the objective of undistorted competition within the common market, because they are not based — save in exceptional circumstances — on an economic transaction which justifies this burden or benefit but are designed to remove or restrict the purchaser's freedom to choose his sources of supply and to deny other producers access to the market (see, to that effect, *Hoffmann-La Roche*, paragraph 71 above, paragraph 90, and Case T-155/06 *Tomra*, paragraph 72 above, paragraph 209). Such rebates are designed, through the grant of a financial advantage, to prevent customers from obtaining their supplies from competing producers (*Hoffmann-La Roche*, paragraph 71 above, paragraph 90, and Case T-155/06 *Tomra*, paragraph 72 above, paragraph 210).

78 Third, there are other rebate systems where the grant of a financial incentive is not directly linked to a condition of exclusive or quasi-exclusive supply from the undertaking in a dominant position, but where the mechanism for granting the rebate may also have a fidelity-building effect ('rebates falling within the third category'). That category of rebates includes inter alia rebate systems depending on the attainment of individual sales objectives which do not constitute exclusivity rebates, since those systems do not contain any obligation to obtain all or a given proportion of supplies from the dominant undertaking. In examining whether the application of such a rebate constitutes an abuse of dominant position, it is necessary to consider all the circumstances, particularly the criteria and rules governing the grant of the rebate, and to investigate whether, in providing an advantage not based on any economic service justifying it, that rebate tends to remove or restrict the buyer's freedom to choose his sources of supply, to bar competitors from access to the market, or to strengthen the dominant position by distorting competition (see, to that effect, *Michelin I*, paragraph 74 above, paragraph 73; Case C-95/04 P *British Airways*, paragraph 74 above, paragraphs 65 and 67; and Case C-549/10 P *Tomra*, paragraph 73 above, paragraph 71).



79 The rebates granted to Dell, HP, NEC and Lenovo to which the Commission referred, in particular in Article 1(a) to (d) of the contested decision, are rebates falling within the second category, namely exclusivity rebates. According to the Commission's findings set out in the contested decision, those rebates were conditional upon customers' purchasing from Intel, at least in a certain segment, either all their x86 CPU requirements, in the case of Dell and Lenovo, or most of their requirements, namely 95% in the case of HP and 80% in the case of NEC.

80 The Court would point out that, contrary to the applicant's claim, the question whether an exclusivity rebate can be categorised as abusive does not depend on an analysis of the circumstances of the case aimed at establishing a potential foreclosure effect.

81 It follows from *Hoffmann-La Roche*, paragraph 71 above (paragraphs 89 and 90), that that type of rebate constitutes an abuse of a dominant position if there is no objective justification for granting it. The Court of Justice did not require proof of a capacity to restrict competition depending on the circumstances of the case.

82 In addition, it follows from *Michelin I*, paragraph 74 above, and from Case C-95/04 P *British Airways*, paragraph 74 above, that it is necessary to assess all the circumstances of the case only in the case of rebates falling within the third category. In paragraph 71 of *Michelin I*, paragraph 74 above, the Court of Justice drew attention to the case-law according to which a rebate, which by offering customers financial advantages tends to prevent them from obtaining their supplies from competing manufacturers, amounts to an abuse within the meaning of Article 82 EC. Next, the Court held, in paragraph 72 of that judgment, that the rebate system at issue in that case did not amount to a mere quantity discount or to a system containing an obligation to obtain all or a given proportion of supplies from the undertaking in a dominant position. The Court lastly observed, in paragraph 73 of that judgment, that it is 'therefore' necessary to consider all the circumstances, particularly the criteria and rules governing the grant of the rebate.

83 In Case C-95/04 P *British Airways*, paragraph 74 above, the Court first of all recalled, in paragraph 62, the case-law resulting from *Hoffmann-La Roche*, paragraph 70 above, and then noted the difference between the facts forming the basis of the latter judgment and those underlying *Michelin I*, paragraph 74 above, stating, in paragraph 65, that *Michelin I* concerned discounts which did not contain any obligation on the part of the customers of the undertaking in a dominant position to obtain all or a given proportion of their supplies from that undertaking. Next, the Court held, in paragraph 67, that it followed from the case-law that it is necessary to consider all the circumstances in order to determine whether an undertaking in a dominant position has abused such a position by applying a system of discounts 'such as that described in paragraph 65 of this judgment'. Lastly, in paragraph 68, the Court held that the need to determine whether discounts can produce an exclusionary effect concerns a system of discounts or bonuses 'which constitute neither quantity discounts or bonuses nor fidelity discounts or bonuses within the meaning of the judgment in *Hoffmann-La Roche*'.

84 It follows that, according to the case-law, it is only in the case of rebates falling within the third category that it is necessary to assess all the circumstances, and not in the case of exclusivity rebates falling within the second category.

85 That approach can be justified by the fact that exclusivity rebates granted by an undertaking in a dominant position are by their very nature capable of restricting competition.

86 The capability of tying customers to the undertaking in a dominant position is inherent in exclusivity rebates. The grant by an undertaking in a dominant position of a rebate in consideration of a customer's obtaining all or most of its requirements implies that the undertaking in a dominant position grants a financial advantage designed to prevent customers from obtaining their supplies from competing producers. It is therefore not necessary to examine the circumstances of the case in order to determine whether that rebate is designed to prevent customers from obtaining their supplies from competitors.

87 It should moreover be noted that exclusivity rebates granted by an undertaking in a dominant position are by their very nature capable of foreclosing competitors. A financial advantage granted for the purpose of inducing a customer to obtain all or most of its requirements from the undertaking in a dominant position means that that customer has an incentive not to obtain, in respect of the part of its requirements concerned by the exclusivity condition, supplies from competitors of the undertaking in a dominant position.

88 In that context, it should be observed that a foreclosure effect occurs not only where access to the market is made impossible for competitors, but also where that access is made more difficult (see, to that effect, *Michelin I*, paragraph 74 above, paragraph 85; Case C-52/09 *TeliaSonera Sverige* [2011] ECR I-527 ('*TeliaSonera*'), paragraph 63, and *Michelin II*, paragraph 75 above, paragraph 244). A financial incentive granted by an undertaking in a dominant position in order to induce a customer not to obtain, in respect of the part of its requirements concerned by the exclusivity condition, supplies

from its competitors is by its very nature capable of making access to the market more difficult for those competitors.

89 Although exclusivity conditions may, in principle, have beneficial effects for competition, so that in a normal situation on a competitive market, it is necessary to assess their effects on the market in their specific context (see, to that effect, Case C-234/89 *Delimitis* [1991] ECR I-935, paragraphs 14 to 27), those considerations cannot be accepted in the case of a market where, precisely because of the dominant position of one of the economic operators, competition is already restricted (see, to that effect, Case C-310/93 P *BPB Industries and British Gypsum v Commission* [1995] ECR I-865 ('Case C-310/93 P *BPB Industries and British Gypsum*'), paragraph 11, and the Opinion of Advocate General Léger in that case, points 42 to 45).

90 That approach is justified by the special responsibility that an undertaking in a dominant position has not to allow its conduct to impair genuine undistorted competition in the common market and by the fact that, where an economic operator holds a strong position in the market, exclusive supply conditions in respect of a substantial proportion of purchases by a customer constitute an unacceptable obstacle to access to the market (see, to that effect, Case T-65/89 *BPB Industries and British Gypsum v Commission* [1993] ECR II-389 ('Case T-65/89 *BPB Industries and British Gypsum*'), paragraphs 65 to 68). In that case, the exclusivity of supply causes additional interference with the structure of competition on the market. Thus, the concept of abuse in principle includes any obligation to obtain supplies exclusively from an undertaking in a dominant position which benefits that undertaking (see, to that effect, *Hoffmann-La Roche*, paragraph 71 above, paragraphs 120, 121 and 123, Case C-310/93 P *BPB Industries and British Gypsum*, paragraph 89 above, paragraph 11, and the Opinion of Advocate General Léger in that case, paragraph 89 above, points 46 and 47).

91 Furthermore, it must also be stated that it is inherent in a strong dominant position, such as that occupied by the applicant, that, for a substantial part of the demand, there are no proper substitutes for the product supplied by the dominant undertaking. The supplier in a dominant position is thus, to a large extent, an unavoidable trading partner (see, to that effect, *Hoffmann-La Roche*, paragraph 71 above, paragraph 41; Case C-95/04 P *British Airways*, paragraph 74 above, paragraph 75; and Case T-155/06 *Tomra*, paragraph 72 above, paragraph 269). In the present case, the applicant does not contest the findings made in the contested decision that its position on the market during the period of the infringement found in this case was that of an unavoidable trading partner.

92 It follows from the position of unavoidable trading partner that customers will in any event obtain part of their requirements from the undertaking in a dominant position ('the non-contestable share'). The competitor of an undertaking in a dominant position is not therefore in a position to compete for the full supply of a customer, but only for the portion of the demand exceeding the non-contestable share ('the contestable share'). The contestable share is thus the portion of a customer's requirements which can realistically be switched to a competitor of the undertaking in a dominant position in any given period, as the Commission states at recital 1009 of the contested decision. The grant of exclusivity rebates by an undertaking in a dominant position makes it more difficult for a competitor to supply its own goods to customers of that dominant undertaking. If a customer of the undertaking in a dominant position obtains supplies from a competitor by failing to comply with the exclusivity or quasi-exclusivity condition, it risks losing not only the rebates for the units that it switched to that competitor, but the entire exclusivity rebate.

93 In order to submit an attractive offer, it is not therefore sufficient for the competitor of an undertaking in a dominant position to offer attractive conditions for the units that that competitor can itself supply to the customer; it must also offer that customer compensation for the loss of the exclusivity rebate. In order to submit an attractive offer, the competitor must therefore apportion the rebate that the undertaking in a dominant position grants in respect of all or almost all of the customer's requirements, including the non-contestable share, to the contestable share alone. Thus, the grant of an exclusivity rebate by an unavoidable trading partner makes it structurally more difficult for a competitor to submit an offer at an attractive price and thus gain access to the market. The grant of exclusivity rebates enables the undertaking in a dominant position to use its economic power on the non-contestable share of the demand of the customer as leverage to secure also the contestable share, thus making access to the market more difficult for a competitor.

94 Lastly, it should be noted that it is open to the dominant undertaking to justify the use of an exclusivity rebate system, in particular by showing that its conduct is objectively necessary or that the potential foreclosure effect that it brings about may be counterbalanced, outweighed even, by advantages in terms of efficiency that also benefit consumers (see, to that effect, *Hoffmann-La Roche*, paragraph 71 above, paragraph 90; Case C-95/04 P *British Airways*, paragraph 74 above, paragraphs 85 and 86; and Case C-209/10 *Post Danmark* [2012] ECR ('*Post Danmark*'), paragraphs 40 and 41 and the case-law cited). However, in the case in point, the applicant has put forward no argument in that regard.

## 2) The applicant's arguments

2.1) The arguments that the Commission is required to carry out an analysis of the circumstances of the case in order to establish at least a potential foreclosure effect

95 The applicant claims that the Commission is required to carry out an analysis of the circumstances of the case in order to establish at least a potential foreclosure effect.

96 First, the applicant relies on paragraph 73 of *Michelin I*, paragraph 74 above, and on paragraph 67 of Case C-95/04 P *British Airways*, paragraph 74 above. However, those paragraphs concern rebates falling within the third category and are therefore not relevant so far as concerns exclusivity rebates.

97 In that regard, it is necessary to reject the applicant's argument, raised at the hearing, that the Court of Justice abandoned the distinction between exclusivity rebates and rebates falling within the third category in Case C-549/10 P *Tomra*, paragraph 73 above. It is true that, in paragraph 70 of that judgment, the Court initially recalled what was stated in paragraph 73 above, namely that the application of a system of loyalty rebates by an undertaking in a dominant position constitutes an abuse, then added, in paragraph 71, that, '[i]n that regard, it is necessary to consider all the circumstances ...'. However, as the Commission rightly observed, it is apparent from the context of the judgment that, in so doing, the Court did not extend the scope of the analysis of the circumstances of the case to exclusivity rebates. The considerations set out in paragraphs 70 and 71 of that judgment in which the Court recalled the case-law are to be found in the examination of the third plea, which did not concern an exclusivity rebate system, but a rebate system falling within the third category, namely a system of individualised retroactive rebates (Case C-549/10 P *Tomra*, paragraph 73 above, paragraphs 73, 74, 77 and 78, and the Opinion of Advocate General Mazák in that case, point 27).

98 Second, the applicant relies on Case C-280/08 P *Deutsche Telekom v Commission* [2010] ECR I-9555 ('Case C-280/08 P *Deutsche Telekom*'), paragraph 175, *TeliaSonera*, paragraph 88 above, paragraph 28, and *Post Danmark*, paragraph 94 above, paragraph 26. In those judgments, the Court of Justice held that, 'in order to determine whether the undertaking in a dominant position has abused such a position by its pricing practices, it is necessary to consider all the circumstances ...'.

99 However, the scope of that case-law is limited to pricing practices and does not affect the legal characterisation of exclusivity rebates. Case C-280/08 P *Deutsche Telekom*, paragraph 98 above, and *TeliaSonera*, paragraph 88 above, concerned margin squeeze practices and *Post Danmark*, paragraph 94 above, concerned low price practices, so that those three cases concerned pricing practices. However, the present case does not relate to a pricing practice. As regards the rebates granted to the various OEMs, the complaint made against the applicant in the contested decision is not based on the exact amount of the rebates and thus on the prices charged by the applicant, but on the fact that the grant of those rebates was conditional on exclusive or quasi-exclusive supply. Different treatment of exclusivity rebates and pricing practices is justified by the fact that, unlike an exclusive supply incentive, the level of a price cannot be regarded as unlawful in itself.

100 In that regard, it is also necessary to reject the applicant's argument, put forward at the hearing, that *Post Danmark*, paragraph 94 above, deals with loyalty rebates comparable to those of the case in point. In that case, the proceedings before the Court of Justice concerned the practice of Post Danmark of charging its main competitor's former customers rates different from those that it charged its own pre-existing customers without being able to justify those significant differences in its rate and rebate conditions by considerations relating to its costs, a practice described by the Danish Competition Authority as 'primary-line price discrimination' (*Post Danmark*, paragraph 94 above, paragraph 8). That presentation of the anti-competitive practices contains no reference to an exclusivity rebate system. On the contrary, the proceedings which gave rise to the reference for a preliminary ruling concerned solely whether there was an abuse by means of selectively low prices (*Post Danmark*, paragraph 94 above, paragraphs 15 to 17). Thus, in reply to the question referred to it for a preliminary ruling, the Court only replied to the question in which circumstances a policy of charging low prices had to be considered to amount to an exclusionary abuse, contrary to Article 82 EC (*Post Danmark*, paragraph 94 above, paragraph 19).

101 The applicant's arguments must therefore be rejected.

2.2) The argument that the Commission is required to prove actual foreclosure effects

102 The applicant submits that, where the conduct at issue is historic, the Commission is required to prove actual foreclosure effects. The Commission was wrong not to take into account the absence of actual anti-competitive effects of the applicant's practices. Moreover, the applicant maintains that the Commission must establish a causal link between the practices complained of and effects on the market.

103 First of all, it must be stated that, even in the context of an analysis of the circumstances of the case, the Commission must only show that a practice is capable of restricting competition (see, to that effect, Case C-549/10 P *Tomra*, paragraph 73 above, paragraph 68, and *TeliaSonera*, paragraph 88 above, paragraph 64). The mechanism of an exclusivity rebate granted by an undertaking in a dominant position which is an unavoidable trading partner enables it to use the non-contestable share of the demand of the customer as leverage to secure also the contestable share (see paragraph 93 above). When such a trading instrument exists, it is unnecessary to undertake an analysis of the actual effects of the rebates on competition (see, to that effect, Case C-549/10 P *Tomra*, paragraph 73 above, paragraph 79).

104 Next, given that it is not necessary to prove actual effects of the rebates, it follows necessarily from this that the Commission is also not required to prove a causal link between the practices complained of and actual effects on the market. Thus, the circumstance claimed by the applicant that customers bought exclusively from it for business reasons which were entirely independent of the rebates, assuming that it were proved, does not mean that those rebates were not capable of inducing customers to obtain their supplies exclusively from it.

105 Lastly, the Court would point out that, a fortiori, the Commission is not required to prove either direct damage to consumers or a causal link between such damage and the practices at issue in the contested decision. It is apparent from the case-law that Article 82 EC is aimed not only at practices which may cause damage to consumers directly, but also at those which are detrimental to them through their impact on an effective competition structure (Case C-95/04 P *British Airways*, paragraph 74 above, paragraph 106).

### 2.3) The argument alleging absence of formal obligations

106 The applicant maintains that the rebates at issue in the present case did not involve formal or binding exclusivity obligations. However, it follows from *Hoffmann-La Roche*, paragraph 71 above (paragraph 89), that an undertaking in a dominant position abuses that position if it applies an exclusivity rebate system even 'without tying the purchasers by a formal obligation'. In that regard, the Commission correctly states that the anti-competitive incentive of exclusivity rebates results not from the imposition of a formal obligation to buy exclusively or almost exclusively from the dominant company but from the financial advantages obtained or the financial disadvantages avoided by making such purchases. Thus, it is sufficient that the undertaking in a dominant position indicates in a credible manner to its customer that the grant of a financial advantage depends on exclusive or quasi-exclusive supply.

### 2.4) The argument alleging the relevance of the amount of the rebate

107 The applicant states that the Commission failed to take account of the level of the rebates granted by Intel to the OEMs in return for exclusive or quasi-exclusive supply and that it is illogical to censure very small rebates (USD 1 for example) that AMD would have been able to exceed.

108 However, as the Commission correctly observes, it is not the level of the rebates which is at issue in the contested decision but the exclusivity for which they were given. Thus, the rebate must only be capable of inducing the customer to purchase exclusively, irrespective whether the competing supplier could have compensated the customer for the loss of the rebate if that customer switched supplier.

109 It is not therefore necessary to consider the question whether, in the purely theoretical example of a rebate in an amount of USD 1 only as put forward by the applicant, such a minimum rebate is capable of constituting an incentive for the customer to comply with the exclusivity condition. In the case in point, the Commission proved to the requisite legal standard that the applicant had granted rebates to the OEMs amounting to millions of USD annually. The Commission moreover proved to the requisite legal standard that those rebates were granted, at least in part, in consideration of exclusivity (see paragraphs 444 to 584, 673 to 798, 900 to 1017, 1145 to 1208 and 1381 to 1502 below). Those matters suffice to show that the exclusivity rebates at issue in the contested decision were capable of inducing the OEMs to purchase exclusively.

### 2.5) The argument based on the relevance of the duration

110 In the applicant's submission, account must be taken of the short duration of its supply contracts and of the fact that some of those contracts could be terminated at 30 days' notice.

111 That argument must also be rejected. In that regard, it must be borne in mind that, in principle, any financial incentive to purchase exclusively constitutes additional interference with the structure of competition on a market and must therefore be regarded as abusive to the extent that it is implemented by an undertaking in a dominant position (see paragraph 90 above).

112 As regards the argument based on the possibility of terminating certain contracts at short notice, the Court would point out that the right to terminate a contract in no way prevents its actual application

until such time as the right to terminate it has been exercised (Case T-65/89 *BPB Industries and British Gypsum*, paragraph 90 above, paragraph 73).

113 Moreover, it should be noted that, in the present case, for all the OEMs and for MSH, the total period during which exclusivity rebates were applied was not short. That period lasted from approximately one year, in the case of Lenovo, to more than five years, in the case of MSH. In that context, it must be stated that the incentive for customers to purchase all or almost all of their requirements from the undertaking in a dominant position continues to exist for as long as the latter grants exclusivity rebates, irrespective of whether a long-term contract has been concluded or whether there is a succession of several short-term contracts (see, also, paragraph 195 below).

2.6) The argument based on the small part of the market concerned by the conduct complained of

114 The applicant claims that the Commission ought to have taken into consideration the fact that the practices at issue in the contested decision concerned only a small part of the x86 CPU market, namely between 0.3% and 2% per year.

115 It should be observed as a preliminary point that, for the reasons which will be set out in paragraphs 187 to 194 below, such an argument has no factual basis, since the calculation method used by the applicant to reach those figures is erroneous.

116 In addition, the possible smallness of the parts of the market which are concerned by the practices at issue is not a relevant argument. Where the course of conduct under consideration is that of an undertaking occupying a dominant position on a market where for this reason the structure of competition has already been weakened, any further weakening of the structure of competition may constitute an abuse of a dominant position (*Hoffmann-La Roche*, paragraph 71 above, paragraph 123). The Court of Justice has therefore rejected the application of an 'appreciable effect' criterion or a *de minimis* threshold for the purposes of applying Article 82 EC (Opinion of Advocate General Mazák in Case C-549/10 P *Tomra*, paragraph 73 above, point 17).

117 Furthermore, the customers on the foreclosed part of the market should have the opportunity to benefit from whatever degree of competition is possible on the market and competitors should be able to compete on the merits for the entire market and not just for a part of it (Case C-549/10 P *Tomra*, paragraph 73 above, paragraphs 42 and 46). A dominant undertaking may not therefore justify the grant of exclusivity rebates to certain customers by the fact that competitors remain free to supply other customers.

118 It follows that the applicant's line of argument must be rejected.

119 That conclusion is not undermined by the fact that, in Case C-549/10 P *Tomra*, paragraph 73 above (paragraphs 41 to 45), the Court of Justice approved the General Court's reasoning that the part of the market which had been foreclosed in that case was 'significant'. That reasoning does not confirm the proposition that there can be no foreclosure effect where the foreclosed part of the market is not significant. In that regard, it should be noted that, according to Case T-155/06 *Tomra*, paragraph 72 above (paragraph 243), the General Court found that 'even accepting the applicants' proposition that foreclosure of a small portion of demand does not matter, that portion was far from being small in the present case'. The General Court did not therefore adopt a position on whether that proposition was correct.

120 It was sufficient for the Court of Justice to approve the finding of the General Court that, in that case, a significant part of the market had been foreclosed, without that being understood as meaning that the Court of Justice took the view that the foreclosure of a significant part of the market was a necessary condition for the finding of an abuse. Moreover, the Court of Justice expressly held, in Case C-549/10 P *Tomra*, paragraph 73 above (paragraph 46), that the determination of a precise threshold of foreclosure of the market beyond which the practices at issue had to be regarded as abusive was not required for the purposes of applying Article 82 EC and that, 'in any event', it had been proved to the requisite legal standard that the market had been closed to competition by the practices at issue.

121 That conclusion is also not undermined by Case T-65/98 *Van den Bergh Foods v Commission* [2003] ECR II-4653, paragraph 160, which is relied upon by the applicant and ACT. That judgment did not concern a practice by which a financial incentive was directly conditional on the customer's obtaining all or most of its requirements from the undertaking in a dominant position. In that case, the undertaking in a dominant position had supplied Irish ice-cream retailers with freezer cabinets free of charge, provided that they be used exclusively to stock ice creams supplied by the undertaking in a dominant position. However, the retailers remained free to sell ice creams supplied by competitors if they stocked them in their own freezer cabinets or in freezer cabinets made available by other ice-cream manufacturers.

122 It was in those circumstances that the Commission took the view that it was an abuse of a dominant position for the undertaking in a dominant position to induce retailers in Ireland not having a

freezer cabinet either procured by themselves or provided by another ice-cream manufacturer to enter into freezer-cabinet agreements subject to a condition of exclusivity by offering to supply to them one or more freezer cabinets for the stocking of single-wrapped items of impulse ice-cream, and to maintain the cabinets, free of any direct charge (*Van den Bergh Foods v Commission*, paragraph 121 above, paragraph 23). The Commission also found, in that case, that in some 40% of all outlets in Ireland the only freezer cabinet/s for the storage of impulse ice-cream in place in the outlet was or were provided by the undertaking in a dominant position (*Van den Bergh Foods v Commission*, paragraph 121 above, paragraph 19).

123 It was in those circumstances that the General Court held, in *Van den Bergh Foods v Commission*, paragraph 121 above (paragraph 160), that '[t]he fact that an undertaking in a dominant position on a market ties de facto — even at their own request — 40% of outlets in the relevant market by an exclusivity clause which in reality creates outlet exclusivity constitutes an abuse of a dominant position'.

124 It should be observed that, in that case, it was only in respect of those 40% of outlets that the condition that only products supplied by the undertaking in a dominant position could be stocked operated de facto as an exclusivity condition, since the other outlets had at their disposal other freezer cabinets in which they could stock ice creams supplied by other manufacturers. It cannot therefore be inferred from that judgment that, for rebates which are directly linked to an exclusive or quasi-exclusive supply condition, it is necessary to determine the share of the market which is foreclosed.

2.7) The argument that the alleged exclusivity conditions did not cover a significant portion of certain OEMs' requirements

125 The applicant states that, as regards certain OEMs, namely HP, NEC and Lenovo, the exclusivity condition found by the Commission in the contested decision did not concern the entire x86 CPU demand of those OEMs, but, in the case of HP, only 95% of its corporate desktop x86 CPU requirements, in the case of NEC, only 80% of its 'client' PC x86 CPU requirements, namely desktop computers and notebook computers, with the exception of servers, and, in the case of Lenovo, only its notebook x86 CPU requirements.

126 At the hearing, the applicant added that HP's x86 CPU corporate desktop requirements amounted to only 30% of HP's total x86 CPU requirements. Since the alleged condition covered only 95% of HP's corporate desktop x86 CPU requirements, that condition concerned only approximately 28% of HP's total x86 CPU requirements and could not therefore be regarded as an exclusivity condition.

127 By that argument, the applicant claims in essence that the rebates granted to HP, NEC and Lenovo cannot be regarded as exclusivity rebates, since the condition did not concern 'all or most', within the meaning of *Hoffmann-La Roche*, paragraph 71 above (paragraph 89), of those OEMs' x86 CPU requirements.

128 That line of argument must be rejected.

129 With respect to the rebates granted to HP, it should be noted that the conduct at issue is not linked to the condition that HP was required to purchase at least 28% of its total x86 CPU requirements from Intel, but to the condition that HP was required to purchase, in a certain segment of the market, 95% of its total x86 CPU requirements from Intel. The condition that HP was required to purchase, in a given sector, 95% of its requirements from the undertaking in a dominant position is neither identical to nor comparable to a hypothetical condition according to which HP was required to purchase 28% of its requirements in all segments from Intel.

130 HP's freedom to obtain its corporate desktop x86 CPU requirements from AMD was liable to be limited on account of the exclusivity rebates granted by Intel. If HP had decided to purchase more than 5% of its corporate desktop x86 CPU requirements from AMD and thus not to comply with the quasi-exclusivity condition, it would have risked losing the exclusivity rebate, and not only in respect of the units purchased from AMD. Thus, in order to be able to supply more than 5% of HP's corporate desktop x86 CPU requirements, AMD would not only have had to make a more attractive offer for x86 CPUs in respect of the contestable share of HP's demand, but also compensate HP for the loss of the exclusivity rebate. That is precisely the anti-competitive mechanism of exclusivity rebates.

131 That mechanism was not neutralised by the fact that AMD was able to supply HP with its x86 CPU requirements in respect of all consumer computers and in respect of corporate notebook computers. The fact that HP's freedom of choice was not limited in those segments of the market does not call in question the fact that HP's freedom of choice was liable to be limited in the corporate desktop segment.

132 In that context, it should be recalled that competitors of the undertaking in a dominant position must be able to compete on the merits for the entire market and not just for a part of it (Case C-549/10 P *Tomra*, paragraph 73 above, paragraph 42). An undertaking in a dominant position may not

therefore justify the grant of exclusivity rebates to certain customers by the fact that its competitors are free to supply other customers (see paragraph 117 above). Similarly, an undertaking in a dominant position may not justify the grant of a rebate subject to a quasi-exclusive purchase condition by a customer in a certain segment of a market by the fact that that customer remains free to obtain supplies from competitors in other segments.

133 In that context, it is of no relevance that — as argued by ACT at the hearing — when defining the relevant product market, the Commission did not draw a distinction between CPUs used in corporate computers and consumer computers, as is apparent from recital 831(2) of the contested decision. The anti-competitive mechanism of the exclusivity rebates which were applied in the present case operates irrespective of whether or not the CPUs used in corporate computers and consumer computers are interchangeable. In the present case, the condition was stipulated in relation to HP's corporate desktop requirements. HP was therefore required to use Intel CPUs in 95% of corporate desktops containing x86 CPUs that it produced. The question whether those CPUs are different from the x86 CPUs used for consumer computers is irrelevant in that context since, even if they were interchangeable, HP would not have been able to use competitors' CPUs in more than 5% of its corporate desktops without infringing the condition of the exclusivity rebate.

134 It follows that the rebates granted to HP must be regarded as exclusivity rebates, even though the quasi-exclusivity condition concerned only a segment of HP's requirements.

135 As regards the rebates granted to NEC, it must be observed that the percentage of 80% covered by the exclusivity condition is sufficient to constitute 'most' of its requirements within the meaning of *Hoffmann-La Roche*, paragraph 71 above (paragraph 89). In that context, it should be noted that, in that judgment, the conduct in question included purchasing obligations concerning inter alia 80% or 75% of a customer's requirements (*Hoffmann-La Roche*, paragraph 71 above, paragraph 83).

136 The fact that the exclusivity condition concerned only desktop computers and notebook computers, with the exception of servers, is irrelevant. In that regard, the points made in paragraphs 130 to 132 above apply *mutatis mutandis*.

137 Lastly, with respect to the rebates granted to Lenovo, the fact that the exclusivity condition concerned only notebook computers is irrelevant for the same reasons.

#### 2.8) The argument based on customers' buying power

138 The applicant states that customers' buying power precludes the abuse. In the present case, customers used their buying power as leverage to obtain larger rebates.

139 That argument must be rejected. The claim — even if it were established — that the rebates granted by the applicant represented a response to requests and to customers' buying power does not justify making them subject to an exclusive supply condition (see, to that effect, *Hoffmann-La Roche*, paragraph 71 above, paragraph 89; Case T-65/89 *BPB Industries and British Gypsum*, paragraph 90 above, paragraph 68; and Case T-66/01 *Imperial Chemical Industries v Commission* [2010] ECR II-2631, paragraph 305). As the Court of Justice held in *Hoffmann-La Roche*, paragraph 71 above (paragraph 120), the fact that the dominant undertaking's contracting partner is itself a powerful undertaking and that the contract is clearly not the outcome of pressure brought to bear by the dominant undertaking on its partner does not preclude the existence of an abuse of a dominant position, since such an abuse consists in the additional interference, due to the obligation to obtain supplies exclusively, with the structure of competition in a market in which in consequence of the presence there of an undertaking occupying a dominant position the degree of competition has already been weakened. Moreover, the OEMs' buying power does not alter the fact that they depended on the applicant as an unavoidable trading partner in the x86 CPU market.

#### 2.9) The line of argument concerning the relevance of the AEC test

140 The applicant submits that the AEC test (see paragraph 30 above) is an important factor when establishing the potential foreclosure effect of the rebates at issue. The AEC test is the only evidence that the Commission presented in the contested decision to show that Intel's rebates were capable of causing anti-competitive foreclosure. However, the Commission disputes that the AEC test forms part of the legal analysis of the contested decision. It follows, in the applicant's submission, that the legal assessment carried out by the Commission in the contested decision failed to establish the foreclosure capability of the rebates at issue. Moreover, in the applicant's submission, the Commission made numerous errors in applying that test. In its submission, proper application of the AEC test demonstrates that the rebates granted by Intel did not have a foreclosure capability.

141 It should be observed as a preliminary point that the AEC test carried out in the contested decision takes as a starting point the circumstance, noted in paragraph 93 above, that an as-efficient competitor, which seeks to obtain the contestable share of the orders hitherto satisfied by a dominant undertaking which is an unavoidable trading partner, must compensate the customer for the exclusivity

rebate that it would lose if it purchased a smaller portion than that stipulated by the exclusivity or quasi-exclusivity condition. The AEC test is designed to determine whether the competitor which is as efficient as the undertaking in a dominant position, which faces the same costs as the latter, can still cover its costs in that case.

142 As regards the relevance of the AEC test with respect to exclusivity rebates, the Court makes the following observations.

143 First of all, it should be recalled that a finding that an exclusivity rebate is illegal does not necessitate an examination of the circumstances of the case (see paragraphs 80 to 93 above). The Commission is not therefore required to demonstrate the foreclosure capability of exclusivity rebates on a case-by-case basis.

144 Next, it follows from the case-law that, even in the case of rebates falling within the third category, for which an examination of the circumstances of the case is necessary, it is not essential to carry out an AEC test. Thus, in *Michelin I*, paragraph 74 above (paragraphs 81 to 86), the Court of Justice relied on the loyalty mechanism of the rebates at issue, without requiring proof, by means of a quantitative test, that competitors had been forced to sell at a loss in order to be able to compensate the rebates falling within the third category granted by the undertaking in a dominant position.

145 Moreover, it follows from Case C-549/10 P *Tomra*, paragraph 73 above (paragraphs 73 and 74), that, in order to find anti-competitive effects, it is not necessary that a rebate system force an as-efficient competitor to charge 'negative' prices, that is to say prices lower than the cost price. In order to establish a potential anti-competitive effect, it is sufficient to demonstrate the existence of a loyalty mechanism (see, to that effect, Case C-549/10 P *Tomra*, paragraph 73 above, paragraph 79).

146 It follows that, even if an assessment of the circumstances of the case were necessary to demonstrate the potential anti-competitive effects of the exclusivity rebates, it would still not be necessary to demonstrate those effects by means of an AEC test.

147 Moreover, the applicant's argument that the AEC test is the only evidence that the Commission presented in the contested decision in order to demonstrate the foreclosure capability of the rebates at issue has no factual basis (see paragraphs 173 to 175 below).

148 With respect to the applicant's argument that it would have demonstrated by means of an AEC test carried out properly that the rebates at issue did not have a foreclosure capability, the Court makes the following observations.

149 First of all, it should be borne in mind that a foreclosure effect occurs not only where access to the market is made impossible for competitors. Indeed, it is sufficient that that access be made more difficult (see paragraph 88 above).

150 However, it must be stated that an AEC test only makes it possible to verify the hypothesis that access to the market has been made impossible and not to rule out the possibility that it has been made more difficult. It is true that a negative result means that it is economically impossible for an as-efficient competitor to secure the contestable share of a customer's demand. In order to offer a customer compensation for the loss of the exclusivity rebate, that competitor would be forced to sell its products at a price which would not allow it even to cover its costs. However, a positive result means only that an as-efficient competitor is able to cover its costs (in the case of the AEC test as carried out in the contested decision and proposed by the applicant, only the average avoidable costs). That does not however mean that there is no foreclosure effect. The mechanism of the exclusivity rebates, as described in paragraph 93 above, is still capable of making access to the market more difficult for competitors of the undertaking in a dominant position, even if that access is not economically impossible (see, as regards that distinction, point 54 of the Opinion of Advocate General Mazák in Case C-549/10 P *Tomra*, paragraph 73 above).

151 It follows from the foregoing that it is not necessary to consider whether the Commission carried out the AEC test in accordance with the applicable rules and that it is also not necessary to examine the question whether the alternative calculations proposed by the applicant were carried out correctly. Even a positive AEC test result would not be capable of ruling out the potential foreclosure effect which is inherent in the mechanism described in paragraph 93 above.

152 That conclusion is not undermined by *TeliaSonera*, paragraph 88 above, Case C-280/08 P *Deutsche Telekom*, paragraph 98 above, and *Post Danmark*, paragraph 94 above. The applicant submits that it follows from those judgments that the key criterion is whether a competitor as efficient as the dominant undertaking could continue to compete with the dominant undertaking. However, it should be borne in mind that those cases concerned margin squeeze practices (*TeliaSonera* and *Deutsche Telekom*) or low price practices (*Post Danmark*). The obligation resulting from those judgments to carry out price and cost analyses is attributable to the fact that it is impossible to assess whether a price is abusive without comparing it with other prices and costs. A price cannot be unlawful



in itself. However, in the case of an exclusivity rebate, it is the condition of exclusive or quasi-exclusive supply to which its grant is subject rather than the amount of the rebate which makes it abusive.

153 Moreover, it follows from Case C-549/10 P *Tomra*, paragraph 73 above (paragraphs 73, 74 and 80), which postdates the judgments cited in the previous paragraph, that it is not essential to examine whether a rebate system forces an as-efficient competitor to charge negative prices, even in the case of rebates falling within the third category. A fortiori, it is not necessary to do so as regards exclusivity rebates.

154 The conclusion is also not undermined by the Communication from the Commission entitled 'Guidance on the Commission's enforcement priorities in applying Article 82 [EC] to abusive exclusionary conduct by dominant undertakings (OJ 2009 C 45 p. 7; 'the Article 82 Guidance').

155 According to paragraph 2 of the Article 82 Guidance, '[t]his document sets out the enforcement priorities that will guide the Commission's action in applying Article 82 [EC]'. As the Commission observed at recital 916 of the contested decision, since the Article 82 Guidance 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. Since the Commission decision to initiate proceedings is dated 26 July 2007, the Commission was not therefore in any event required to follow the Article 82 Guidance in the present case.

156 The fact that the Article 82 Guidance was published before the adoption of the contested decision does not mean that it was applicable. The fact that the Commission provides indications on the enforcement priorities that will guide its action in the future cannot oblige it to reconsider whether it deal with a case as a priority that it had already decided to deal with as a priority and the treatment of which, moreover, is at an advanced stage.

157 It is not therefore necessary to consider whether the contested decision is in line with the Article 82 Guidance.

158 The mere fact that the Commission stated, at recital 916 of the contested decision, that it none the less considered that that decision was in line with the Article 82 Guidance is not capable of calling in question the lack of relevance of the Article 82 Guidance for this case. It is clearly a point that the Commission raised for the sake of completeness, having explained that the Article 82 Guidance was not applicable in the present case.

159 With respect to the circumstance, relied on by the applicant, that the Member of the Commission responsible for competition at the time stated, in a speech of 17 July 2009, that, in the Intel case, the Commission had applied the AEC test in accordance with the methodology set out in the Article 82 Guidance, it should be pointed out that it is clearly apparent from the contested decision, which was adopted by the College of Commissioners, that the Commission considered that the Article 82 Guidance was not applicable and that the AEC test did not constitute a necessary element to show that the practices at issue were illegal. It was therefore for the sake of completeness that the Commission carried out an AEC test and found that the contested decision was in line with the Article 82 Guidance. The fact that the Member of the Commission responsible for competition gave a speech after the adoption of the contested decision, in which that member stated that the Commission had carried out an AEC test in the Intel case, without specifying in that regard that that test had been carried out for the sake of completeness, is not such as to alter the interpretation to be given to the contested decision.

160 In reply to a question put at the hearing, the applicant stated that its reasoning relating to the relevance of the AEC test, which it claims played an important role during the administrative procedure, had to be understood as meaning that it was also relying on the principle of the protection of legitimate expectations.

161 In that regard, it must be recalled that, according to settled case-law, the right to rely on the principle of the protection of legitimate expectations, which is one of the fundamental principles of the European Union, extends to any individual in a situation in which it is clear that the European Union authorities, by giving him precise assurances, have caused him to entertain legitimate expectations. Such assurances, in whatever form they are given, are precise, unconditional and consistent information from authorised and reliable sources. However, a person may not plead breach of the principle unless he has been given precise assurances by the authorities (see Case T-273/01 *Innova Privat-Akademie v Commission* [2003] ECR II-1093, paragraph 26 and the case-law cited).

162 In the present case, the applicant did not show the existence of a precise assurance given during the administrative procedure that the AEC test was essential for the Commission in order to establish an infringement of Article 82 EC. On the contrary, as the Commission rightly noted at the hearing, according to the second paragraph of Section II 1 of the Final report of the Hearing Officer in this case

(OJ 2009 C 227, p. 7), 'during the Hearing the Commission made it clear to Intel, and Intel understood, that the economic assessment was not a condition for a finding of abuse'.

163 The applicant then made it clear, at the hearing, that it had fully understood the Hearing Officer's comments. The applicant claimed that it follows however from point 340 of the Statement of Objections of 2007 that, in the event that proof of a foreclosure capability were necessary, the Commission relies solely on the AEC test in order to prove that capability.

164 It must however be observed that the mere fact that the Commission stated, in point 340 of the Statement of Objections of 2007, that it would establish that the rebates in question had a foreclosure effect, since they prevented an as-efficient competitor from being able to compensate the OEM for the loss in potential rebate, cannot be regarded as a precise assurance that the Commission would not rely on any other ground in order to establish the foreclosure capability. Moreover, it is apparent from points 260 and 329 of the Supplementary Statement of Objections of 2008 that, in its analysis, the Commission did not rely exclusively on the AEC test, but also on other qualitative and quantitative evidence.

165 The Commission did not therefore infringe the principle of the protection of legitimate expectations by the approach that it followed in the contested decision.

166 It follows from the foregoing that the arguments put forward by the applicant are not capable of undermining the conclusion that it is not necessary to consider whether the Commission carried out the AEC test in accordance with the applicable rules or to examine in detail the applicant's arguments regarding the errors that the Commission allegedly made when carrying out that test, or the conclusion that it is also not necessary to examine the alternative calculations proposed by the applicant (see paragraph 151 above).

b) The payments granted to MSH

167 The Commission finds in essence, at recital 1000 of the contested decision, that the effect of the payments granted to MSH on condition that it sell exclusively the applicant's products was equivalent to that of an exclusivity rebate and that those payments therefore fulfilled the conditions laid down by the case-law for qualification as abusive.

168 At the hearing, the applicant claimed in essence that the Commission had wrongly applied the same test for the legal characterisation of the exclusivity rebates granted to the OEMs and for the characterisation of the payments granted to MSH. The applicant submitted inter alia that, unlike the OEMs, MSH was an operator that was present on the retail market. For the purposes of examining whether a competing producer is denied access to the retail market, the applicant claims that the case-law requires an analysis of the cumulative effects produced by a network of exclusive relationships. However, during the period at issue, MSH allegedly held only a very small portion of the relevant worldwide market, namely approximately 1%.

169 It must be stated that the applicant's argument amounts to an assertion that the Commission ought to have carried out an analysis of the circumstances of the case in the retail market in order to demonstrate that the applicant's practices vis-à-vis MSH were capable of restricting competition. However, that argument cannot be accepted. As the Commission rightly observed at the hearing, the anti-competitive mechanism of the applicant's practices vis-à-vis the OEMs and vis-à-vis MSH was the same, the only difference being that the exclusivity payment granted to MSH was not designed to prevent the supply of a direct customer of the applicant by a competitor, but rather the sale of competing products by a retailer further down the supply chain. OEMs incorporate CPUs in computers that are then sold to consumers by retailers such as MSH. By inducing a retailer to sell computers equipped exclusively with Intel CPUs, the applicant therefore deprived OEMs of a distribution channel for computers equipped with competing undertakings' CPUs. Thus, by depriving MSH of its freedom of choice as regards its sales, it restricted the OEMs' freedom of choice as regards their distribution channels. Given that that restriction was capable of having repercussions for OEMs' demand for AMD CPUs, inducing MSH into an exclusive sale tended to make it more difficult for AMD to gain access to the x86 CPU market. In both situations, the applicant used its economic power on the non-contestable share of the demand as leverage to secure also the contestable share of the demand, thus making access to the market more difficult for AMD (see paragraph 93 above).

170 Whilst it is true that, in the context of Article 81 EC, the Court of Justice has held that, in a normal situation on a competitive market, it is necessary to assess the exclusive relationships between a supplier and a retailer in their specific context, which has implied in particular an analysis of the cumulative effect of a network of such relationships, it is however clear that those considerations cannot be accepted in the context of the implementation of Article 82 EC, which relates to markets in which, precisely because of the dominant position of one of the economic operators, competition is already restricted (see paragraph 89 above).

171 Accordingly, also as regards the payments granted to MSH, the Commission was not required to examine the circumstances of the case, but was required only to demonstrate that the applicant had granted a financial incentive which was subject to an exclusivity condition.

c) Analysis of the capability of the rebates to restrict competition according to the circumstances of the case

172 For the sake of completeness, as regards whether, in the contested decision, the Commission established the capability of the exclusivity rebates and payments granted to Dell, HP, NEC, Lenovo and MSH to restrict competition also following an analysis of the circumstances of the case, the Court makes the following observations.

173 As a preliminary point, it must be observed that, at recital 924 of the contested decision, the Commission considered that the exclusivity rebates and payments granted to Dell, HP, NEC, Lenovo and MSH were part of a long-term strategy aimed at foreclosing competitors from the market. At recital 925 of the contested decision, the Commission stated that it had demonstrated, in sections VII.4.2.3 to VII.4.2.6 of that decision, that, on top of fulfilling the conditions set out in the case-law, Intel's practices were capable of producing or likely to produce a foreclosure effect. Although not indispensable for establishing an infringement of Article 82 EC, one possible way of showing that Intel's practices were capable of causing or likely to cause foreclosure of competitors is to conduct an as-efficient competitor analysis (see section VII.4.2.3 of the contested decision). On the basis of the results of this analysis and the qualitative and quantitative evidence (see sections VII.4.2.4 and VII.4.2.5 of the contested decision), and given the lack of objective justification and lack of efficiencies (see section VII.4.2.6 of the contested decision), the Commission concluded, at recital 925 of the contested decision, that Intel's conditional rebates to Dell, HP, NEC and Lenovo, as well as Intel's payments to MSH, were an abuse which deserved its particular attention.

174 Moreover, it must be observed that other parts of the contested decision, in particular those concerning the presentation of the products concerned and the conduct at issue in that decision, in sections V and VI of that decision, those concerning the definition of the market, in sections VII.1 and VII.2 of that decision, and the applicant's dominant position, in section VII.3 of that decision, together with the parts concerning the legal characterisation of the exclusivity payments, in section VII.4.2.2 of that decision, must be regarded as the basis of the Commission's conclusion that the payments at issue were capable of restricting competition.

175 Contrary to the applicant's submission, the AEC test is therefore not the only evidence presented in the contested decision in order to demonstrate that the exclusivity payments were capable of restricting competition (see paragraph 147 above).

176 As regards the assessment of the capability of the exclusivity rebates and payments at issue in the present case to restrict competition, it should be noted that, in the context of an analysis of the circumstances of the case, the Commission must examine, particularly in the light of the criteria and rules governing the grant of the exclusivity payments, whether, in providing an advantage not based on any economic service justifying it, those rebates and payments tend to remove or restrict the buyer's freedom to choose his sources of supply, to bar competitors from access to the market, or to strengthen the dominant position by distorting competition (see, to that effect, Case C-549/10 P *Tomra*, paragraph 73 above, paragraph 71).

177 It should be made clear that, even in the context of an analysis of the circumstances of the case, the Commission is not required to demonstrate the existence of an actual effect. The Commission may confine itself to establishing that the conduct complained of was capable of restricting competition (see paragraph 103 above).

178 In that regard, it should be observed that, even if the view were to be taken that the grant of an exclusivity rebate or payment by an undertaking in a dominant position is not, in itself, capable of restricting competition, the fact remains that the grant of such a financial incentive by an unavoidable trading partner, such as the applicant, provides at least an indication that it is capable of restricting competition. Where it is granted by an unavoidable trading partner, an exclusivity rebate enables the latter to use its economic power on the non-contestable portion of the demand as leverage to secure also the contestable share, thus making access to the market more difficult for the competitor (see paragraphs 91 and 92 above).

179 That inherent capability of exclusivity rebates and payments to make access to the market more difficult for a competitor is, in the case in point, confirmed by the findings made at recital 893 of the contested decision according to which the rebates were an important element for OEMs to consider on account of the strong competition on the OEM market and their low operating margins. The applicant does not contest those specific characteristics of the market on which the OEMs operate. The particular importance of rebates for their beneficiaries reinforces the incentive for those beneficiaries to

comply with the exclusive or quasi-exclusive purchasing conditions and thus contributes to the capability of the rebates to restrict competition.

180 In addition, proof that the financial incentive was indeed taken into consideration by its beneficiaries when deciding to obtain all or almost all of their requirements from the undertaking in a dominant position or not to sell competing products constitutes a factor confirming the capability of that financial incentive to restrict competition. In the present case, the Commission demonstrated that the exclusivity rebates and payments granted by the applicant were at least a factor that was taken into consideration by Dell, HP, NEC and Lenovo in their decision to obtain all or almost all of their requirements from the applicant, and by MSH in its decision not to sell competing products (see paragraphs 592 to 599, 882 to 890, 1027 to 1030, 1215 to 1220 and 1513 to 1521 below).

181 Moreover, the capability of the exclusivity rebates and payments granted to the four OEMs and to MSH to restrict competition is, in the case in point, confirmed by the findings made in the contested decision, according to which the applicant implemented two different types of abuse, namely, on the one hand, exclusivity rebates and payments and, on the other hand, naked restrictions. As the Commission rightly found at recitals 917, 1681, in conjunction with footnote 1999 (footnote 1990 in the public version), and 1747 of the contested decision, those two types of practices complement and reinforce one another.

182 Furthermore, it should be pointed out that the fact that an undertaking in a dominant position attempts to tie important customers is also a factor which can be taken into account when assessing the anti-competitive nature of its conduct (see, to that effect, Case C-549/10 P *Tomra*, paragraph 73 above, paragraph 75). It should be noted that, according to the contested decision, Dell and HP in particular can be distinguished from other OEMs by their high market shares, their strong presence in the more profitable segment of the market and their ability to legitimise a new x86 CPU in the market. In the contested decision, the Commission found, at recital 1597, that targeting such undertakings, which are particularly strategically important for market access, has a more significant impact on the overall market than would correspond to their aggregate market share alone, and the applicant did not contest this. Consequently, the Commission was entitled to conclude that the exclusivity rebates concerned important OEMs.

183 With respect to MSH, it will be demonstrated in more detail in paragraphs 1507 to 1511 below that that undertaking was particularly strategically important so far as concerned the distribution of consumer computers equipped with x86 CPUs in Europe.

184 Lastly, it must be stated that the fact that the practices at issue in the contested decision are part of an overall strategy aimed at barring AMD's access to the most important sales channels is also a circumstance which confirms the capability of the exclusivity rebates and payments to restrict competition (see, to that effect, Case C-549/10 P *Tomra*, paragraph 73 above, paragraphs 19 and 20). It will be demonstrated in more detail in paragraphs 1523 to 1552 below that the Commission proved the existence of such an overall strategy to the requisite legal standard.

185 First, the applicant attempts to demonstrate that its practices were not capable of restricting competition by arguing that, during the relevant period, AMD reaped the greatest commercial success in its history, reported uniquely rapid growth rates with the very OEMs deemed to be the target of abusive behaviour, faced manufacturing capacity constraints that hampered its ability to satisfy demand for its CPUs and grew its investments in research and development. Moreover, the quality-adjusted price of CPUs fell 36.1% annually over the period covered by the contested decision.

186 Those arguments cannot be accepted. Where an undertaking in a dominant position actually puts into operation practices which are capable of restricting competition, the fact that that capability does not produce actual effects cannot suffice to prevent the application of Article 82 EC (see, to that effect, Case T-219/99 *British Airways v Commission* [2003] ECR II-5917, paragraph 297). The fact that, over the period covered by the contested decision, AMD reaped great commercial success and, consequently, faced capacity constraints could at most show that the applicant's practices did not produce actual effects. However, that could not suffice to demonstrate that the practices implemented by the applicant were not capable of restricting competition. Moreover, neither the growth in the market shares of AMD and in its research and development investment, nor the decrease in the price of x86 CPUs over the period covered by the contested decision mean that the applicant's practices had no effect. In the absence of those practices, it may legitimately be considered that the increase in the competitor's market share and in its research and development investment and the decrease in the price of x86 CPUs might have been greater (see, to that effect, *Michelin II*, paragraph 75 above, paragraph 245, and *British Airways v Commission*, paragraph 298). Consequently, it is not necessary to adjudicate on the Commission's assertions that the applicant's arguments concerning the increase in AMD's market shares and the decrease in the price of x86 CPUs are factually incorrect.

187 Second, the applicant cannot usefully rely on the argument that the practices at issue in the contested decision allegedly concerned only a small part of the global x86 CPU market, namely between 0.3% and 2% per year. In addition to the arguments set out in paragraphs 116 to 124 above, it should be noted that the applicant relies on an erroneous calculation method in order to arrive at the conclusion that its practices affected only between 0.3% and 2% of the x86 CPU market. Those figures were calculated by taking account only of the contestable share (see paragraph 92 above) with respect to the OEMs concerned and MSH and not the entire market share held by those undertakings.

188 Such a calculation method has the effect of artificially reducing the figure arrived at, as the portion of the market which is foreclosed by an exclusivity rebate is not limited to the contestable share. On the contrary, the portion of a customer's requirements which is linked to an exclusivity rebate is foreclosed in its entirety vis-à-vis competitors.

189 It follows that, in order to determine the share of the market affected by the conduct of the undertaking in a dominant position, it is not possible only to take into consideration the contestable share of customers' demand.

190 In the present case, Dell's market share was 14.58% in the first quarter of 2003 and increased to 16.34% in the fourth quarter of 2005, as is apparent from recital 1580 of the contested decision. Given that, according to that decision, Intel granted rebates to Dell on condition that Dell purchase all its x86 CPU requirements from it, that means that between 2003 and 2005 Intel had already foreclosed between 14.58% and 16.34% of the market solely by the rebates granted to Dell.

191 That share of the market must be regarded as significant, in the light of the fact that competitors of the undertaking in a dominant position are entitled to benefit from competition on the merits for the entire market and not just for a part of it.

192 During 2006 and 2007, the share of the market affected was smaller, as the conduct found by the Commission in the contested decision concerned only MSH, by exclusivity payments, and Lenovo, by naked restrictions between June and December 2006 and exclusivity rebates during 2007.

193 In that regard, it should be pointed out that the Commission was right to conclude that there had been a single and continuous infringement, as will be explained in more detail in paragraphs 1561 to 1563 below. In the case of a single and continuous infringement, it cannot be required that, during the whole of the period covered, a significant part of the market was affected by the conduct at issue. It is sufficient in that regard to carry out a global assessment of the part of the market which was foreclosed on average (see, to that effect, Case T-155/06 *Tomra*, paragraph 72 above, paragraph 243).

194 In the present case, the expert report that the applicant provided as an annex to the reply and which bears the reference C.1 indicates, in paragraph 48, that the share of the global market concerned by the conduct described in the contested decision was approximately 14% on average during the total period of the infringement found by the Commission, if the calculation is not limited to only the contestable share of the demand of the customers concerned. The Court is of the view that such a share must be regarded as significant.

195 With respect, next, to the applicant's argument that its supply contracts were only of short duration or that they could be terminated at 30 days' notice, it should be noted that the relevant criterion is not the duration of the notice period for terminating a contract or the fixed duration of an individual contract which forms part of a series of successive contracts, but the overall period during which the applicant applies exclusivity rebates and payments vis-à-vis a customer (see paragraphs 112 and 113 above). In the present case, that period amounted to approximately five years in the case of MSH, approximately three years in the case of Dell and NEC, more than two years in the case of HP and approximately one year in the case of Lenovo. The grant of exclusivity rebates and payments during such periods is generally capable of restricting competition. That holds especially true in relation to a market such as the CPU market, which is characterised by a high level of dynamism and short product-life cycles.

196 Lastly, with respect to the applicant's arguments concerning the lack of formal exclusivity obligations, OEMs' buying power and the relevance of the AEC test for the assessment of the exclusivity payments, reference should be made to paragraphs 106, 138 and 139 and to paragraphs 140 to 166 above respectively.

197 Accordingly, on the basis of the foregoing considerations, it is permissible to conclude that, in the contested decision, the Commission demonstrated to the requisite legal standard and according to an analysis of the circumstances of the case that the exclusivity rebates and payments granted by the applicant to Dell, HP, NEC, Lenovo and MSH were capable of restricting competition.

3. The legal characterisation of the so-called 'naked restrictions'

198 In the contested decision, the Commission characterises as abuses three practices which it called 'naked restrictions'. According to the Commission, those three practices had a common strand, namely that the applicant granted payments to the OEMs in order that the OEMs delay, cancel or in some other way restrict the marketing of certain AMD-based products. More precisely, the grant of payments was subject to the following conditions:

- first, HP was to direct HP's AMD-based x86 CPU corporate desktops to small and medium-sized business (SMB) and Government, Educational and Medical ('GEM') customers rather than to enterprise business customers;
- second, HP was to preclude its channel partners from stocking HP's AMD-based x86 CPU corporate desktops so that such desktops would only be available to customers by ordering them from HP either directly or via HP channel partners acting as sales agent;
- third, Acer, HP and Lenovo were to delay or cancel the launch of computers equipped with AMD CPUs.

199 In order to provide a statement of reasons for characterising the naked restrictions as abusive, the Commission relied, at recitals 1643 and 1671 of the contested decision, on Case T-228/97 *Irish Sugar v Commission* [1999] ECR II-2969; '*Irish Sugar*'. In addition, the Commission found, at recital 1643, that an infringement of Article 82 EC may also result from the object of the practices pursued by a dominant undertaking. Moreover, the Commission stated, at recitals 1670, 1672, 1678 and 1679 of the contested decision, that the naked restrictions had had an effect on the OEMs' decision-making process, since those OEMs had delayed, cancelled or in some other way restricted the marketing of their computers equipped with AMD CPUs, notwithstanding consumers' demand for those products. Lastly, at recital 1642 of the contested decision, the Commission stated that the restrictions formed part of a single strategy to foreclose AMD from the market.

200 The applicant claims, first, that the Commission is required to demonstrate that the practices are capable of restricting competition 'in economic terms'. Second, the practices at issue in the case in point differ from those that gave rise to *Irish Sugar*, paragraph 199 above. Third, the Commission, by censuring naked restrictions, wrongly created a new type of abuse falling within Article 82 EC.

201 First of all, it should be recalled that a foreclosure effect occurs not only where access to the market is made impossible for competitors, but also where that access is made more difficult (see paragraph 88 above).

202 In the case in point, the grant of payments subject to the three conditions set out in paragraph 198 above was capable of making access to the market more difficult for AMD. The grant of payments subject to the first of those conditions was capable of making the marketing of AMD's products more difficult, since it induced HP not to proactively sell AMD-based x86 CPU corporate desktops to a predefined group of customers. The grant of payments subject to the second of those conditions was capable of making the marketing of AMD products more difficult, given that it induced HP not to sell AMD-based x86 CPU corporate desktops via its channel partners, unless the latter acted as sales agents. Lastly, the grant of payments subject to the third of those conditions was capable of making the marketing of AMD products more difficult, because it induced HP, Lenovo and Acer to refrain from any sale of a certain type of AMD-based x86 CPU computer, at least during a certain period and, in the case of HP, in a certain region, namely the Europe, Middle-East and Africa region ('the EMEA region'). The applicant's conduct of making the grant of payments subject to those conditions was therefore capable of making the marketing of computers equipped with x86 AMD CPUs more difficult for the OEMs concerned. Given that those OEMs were customers of AMD, the conduct was at the same time capable of making access to the market more difficult for AMD, thus causing interference with the structure of competition on the x86 CPU market in which, precisely because of the applicant's position, the degree of competition was already weakened.

203 Next, it should be pointed out that, for the purposes of applying Article 82 EC, showing an anti-competitive object and an anti-competitive effect may, in some cases, be one and the same thing. If it is shown that the object pursued by the conduct of an undertaking in a dominant position is to restrict competition, that conduct will also be liable to have such an effect (see Case T-340/03 *France Télécom v Commission* [2007] ECR II-107, paragraph 195 and the case-law cited).

204 That is so in the present case. The scope of the three conditions set out in paragraph 198 above was limited to AMD products, so that that undertaking must be regarded as the individual target of the applicant's practices. The only interest that an undertaking in a dominant position may have in preventing in a targeted manner the marketing of products equipped with a product of a specific competitor is to harm that competitor. Consequently, by applying naked restrictions vis-à-vis HP, Lenovo and Acer, the applicant pursued an anti-competitive object.

205 Lastly, it must be stated that an undertaking in a dominant position has a special responsibility not to impair, by conduct falling outside the scope of competition on the merits, genuine undistorted competition in the common market (see, to that effect, *AstraZeneca*, paragraph 64 above, paragraph 355 and the case-law cited). The grant of payments to customers in consideration of restrictions on the marketing of products equipped with a product of a specific competitor clearly falls outside the scope of competition on the merits.

206 Accordingly, it is permissible to conclude that the implementation of each of the so-called 'naked restrictions' amounted to an abuse of a dominant position within the meaning of Article 82 EC.

207 That conclusion is also confirmed by *Irish Sugar*, paragraph 199 above. In paragraphs 226 and 233 of that judgment, the General Court found that there was an abuse, since the dominant undertaking had agreed with one wholesaler and one retailer to swap competing retail sugar products for its own product. The Court found that the applicant in that case had undermined the competition structure which the market concerned might have acquired through the entry of a new product, by swapping the competing products on a market in which it held more than 80% of the sales volume. The reasoning underlying that judgment is also applicable to the case in point. A marketing restriction which targets a competitor's products undermines the competition structure, since it impedes in a targeted manner the placing on the market of that competitor's products.

208 The applicant's arguments cannot call that conclusion into question.

209 First, it is necessary to reject the applicant's argument that the Commission is required to demonstrate the capability of restricting competition 'in economic terms'. In that regard, it should be observed that the applicant does not even specify what it means by 'economic terms'. Given that the three so-called 'naked restrictions' practices clearly fall outside the scope of competition on the merits (see paragraph 205 above), the Commission was not required to demonstrate their capability of restricting competition in more detail. Moreover, it should be observed that, by relying on *Irish Sugar*, paragraph 199 above, and the anti-competitive object of the practices, the Commission explained how they were abusive to the requisite legal standard.

210 In that regard, it is also necessary to reject the applicant's argument that the Commission was required to demonstrate the possibility or probability of foreclosure of competition, rather than refer to the anti-competitive object of the practices. Given that the anti-competitive object is indissociable in the case in point from the potential effect of the so-called 'naked restrictions' practices (see paragraphs 203 and 204 above), it must be considered that the Commission did not err in relying on their anti-competitive object.

211 Moreover, it should be noted that, in the contested decision, the Commission did not rely exclusively on the anti-competitive object of the three naked restrictions. In addition to referring to *Irish Sugar*, paragraph 199 above, it relied on additional circumstances confirming the capability of the naked restrictions to restrict competition, even though reference to such circumstances is not essential in order to characterise them as abusive under Article 82 EC.

212 In the first place, the Commission demonstrated to the requisite legal standard that the payments which were subject to the conditions set out in paragraph 198 above were a factor which had been taken into account by HP (see paragraphs 882 to 890 below), Lenovo (see paragraphs 1215 to 1220 below) and Acer (see paragraphs 1367 to 1369 below) in their decisions to delay, cancel or in some other way restrict the marketing of their computers equipped with AMD CPUs. That confirms the capability of those payments to restrict competition. In that context, it should be noted that characterisation of a naked restriction as abusive depends solely on the capability to restrict competition, and that characterisation does not therefore require proof of an actual effect on the market or of a causal link (see, as regards exclusivity rebates, paragraphs 103 and 104 above).

213 In the second place, the Commission established that the naked restrictions were part of a long-term comprehensive strategy to foreclose AMD from the strategically most important sales channels (see paragraphs 1523 to 1552 below).

214 Lastly, in so far as the applicant submits, in paragraphs 307 to 311 of the application, that the payments concerning the naked restriction applied vis-à-vis Lenovo obtain a positive AEC test result, it must be stated that the AEC test does not constitute an instrument which is capable of proving that a naked restriction is not of an anti-competitive nature. Even if the applicant succeeded in demonstrating that the naked restriction applied vis-à-vis Lenovo would obtain a positive AEC test result, that would not deprive that practice either of its anti-competitive object or of its capability to make access to the market more difficult for the competitor.

215 Second, it is necessary to reject the applicant's argument that the naked restrictions at issue in the contested decision differ too much from the practice censured in the case which gave rise to *Irish Sugar*, paragraph 199 above, for the Commission to be able to characterise them as abusive. The

differences relied upon by the applicant between *Irish Sugar* and the present case are legally irrelevant.

216 First of all, whilst it is true that *Irish Sugar*, paragraph 199 above, relates to the arrival of a new product of a new undertaking on the market, the fact remains that Article 82 EC generally prohibits abusive practices capable of limiting markets, irrespective of whether new products of a new undertaking are prevented from entering the market or existing products of an established competitor are disadvantaged. In the present case, even if AMD were to be regarded as a competitor that was already established and even if the products concerned by the naked restrictions could not be characterised as new, those circumstances would not in any way alter the capability of the practices to make access to the market more difficult for AMD. Nor would those circumstances call in question the manner in which the practices concerned targeted AMD. Neither the capability of making access to the market more difficult for AMD nor the anti-competitive object of the naked restrictions depends on whether those restrictions concern a new product of a new undertaking on the market.

217 Next, in so far as the applicant claims that, in *Irish Sugar*, paragraph 199 above, the General Court relied on express financial threats, it must be stated that the fact that the applicant communicated to the OEMs that they risked losing preferential rebates, in the case of HP and Acer, or that it would refuse to increase funding, in the case of Lenovo, in the event of infringement of the anti-competitive conditions set out in paragraph 198 above provides a sufficient basis on which to conclude that the applicant's announcements were capable of inducing the OEMs concerned to comply with those conditions.

218 Lastly, the applicant submits that the case which gave rise to *Irish Sugar*, paragraph 199 above, can be distinguished from the case in point in so far as, in the latter case, AMD was not forced to leave the market and even increased its market share. In the applicant's submission, AMD's failure to achieve greater success was due to its own limitations. However, the question whether the naked restrictions implemented by the applicant were capable of restricting competition does not depend on AMD having actually been foreclosed. In order to demonstrate that capability, proof of an actual effect on the market is not necessary (see paragraph 212 above). Moreover, it should be observed that the various marketing channels concerned by the naked restrictions were barred to AMD CPUs during the periods concerned. Furthermore, to the extent that the applicant relies on AMD's commercial success and the commercial limitations of that undertaking, its line of argument must be rejected for the reasons set out in paragraph 186 above.

219 Third, it is necessary to reject the applicant's argument that the use of the concept of 'naked restriction' constitutes a novel type of abuse. It must be stated that the legal characterisation of an abusive practice does not depend on the name given to it, but on the substantive criteria used in that regard. Thus, the mere use of the concept of 'naked restriction' does not provide a sufficient basis on which to conclude that the substantive criteria applied are new. As regards the substantive criteria applied in the present case, it is clear from the wording of point (b) of the second subparagraph of Article 82 EC that limiting markets constitutes an abuse. Moreover, it is not novel in competition law that a practice which clearly does not come within competition on the merits is regarded as unlawful (see, to that effect, *Hoffmann-La Roche*, paragraph 71 above, paragraph 91, and Case C-62/86 *AKZO v Commission* [1991] ECR I-3359, paragraph 70).

220 Lastly, even if the characterisation as abusive of the practices at issue were indeed 'novel', that would not call in question the Commission's power to prohibit them. Even in the area of the calculation of fines, the General Court has already held that the fact that conduct with the same features has not been examined in past decisions does not exonerate an undertaking (see, to that effect, *Michelin I*, paragraph 74 above, paragraph 107, and *AstraZeneca*, paragraph 64 above, paragraph 901).

#### *B – The Commission's jurisdiction*

##### 1. Arguments of the parties

221 The applicant, supported by ACT, points out that Articles 81 and 82 EC do not have unlimited territorial scope and that, accordingly, in order to assume jurisdiction over conduct occurring outside the European Union, the Commission must establish a direct causal connection with the territory of the European Union, by adducing strong evidence of the actual implementation of the conduct at issue leading to a substantial effect on competition within the European Union. It is also established that where trade with third countries is involved, even where implementation of the practices at issue takes place within the European Union, the Commission must also prove that its effects within the European Union are immediate, substantial, direct and foreseeable.

222 The applicant claims that, by way of example, the contested decision fails to satisfy the criteria set out in the previous paragraph by challenging Intel's agreement with Lenovo in the second half of 2006 regarding a notebook computer for the domestic Chinese market.



223 Even if the Commission's approach — according to which, as regards the rebates and naked restrictions at issue, it could establish an abuse of a dominant position without demonstrating the effects of those rebates and restrictions — were correct, the Commission is none the less required to demonstrate that they have an effect in the European Union to establish its jurisdiction. The issue of territorial jurisdiction is separate and distinct, arising from public international law.

224 During the written procedure, the applicant claimed that, in relation to all the agreements involving entities located outside the European Union, namely Dell, HP, NEC, Acer, and Lenovo, the contested decision fails to establish that the Commission has jurisdiction.

225 At the hearing, the applicant stated that it was limiting that plea solely to the conduct vis-à-vis Acer and Lenovo, formal note of which was taken in the minutes of the hearing.

226 In relation to Acer and Lenovo, the applicant stated that their manufacturing facilities were outside the EEA, and that they did not purchase CPUs in the EEA from Intel or AMD. The conduct at issue concerned sales of CPUs to customers in Asia, namely in Taiwan as regards Acer and in China as regards Lenovo, and that conduct was implemented in Asia. The fact that a certain number of Acer and Lenovo computers might subsequently have been sold within the EEA is irrelevant to the question of the implementation of the conduct complained of.

227 Given that Intel's conduct in relation to Acer and Lenovo concerned sales of CPUs in Asia, the immediate effects of that conduct were felt in Asia and not in the EEA. Sales of computers, which constitute the only conduct that might have concerned the EEA, were carried out by third parties, namely Acer and Lenovo, which were not controlled by Intel.

228 The volume of computers concerned was very small and the effect in the EEA cannot be regarded as substantial.

229 At the hearing, the applicant also claimed that the conduct at issue was not capable of affecting trade between Member States.

230 The Commission contests the arguments of the applicant and of ACT.

## 2. Findings of the Court

### a) Preliminary observations

231 First of all, it should be noted that, in the case-law of the Court of Justice and the General Court, two approaches have been followed in order to establish that the Commission's jurisdiction is justified under the rules of public international law.

232 The first approach is based on the principle of territoriality. That approach was followed in Joined Cases 89/85, 104/85, 114/85, 116/85, 117/85 and 125/85 to 129/85 *Ahlström Osakeyhtiö and Others v Commission* [1988] ECR 5193, '*Woodpulp*'). In paragraph 16 of that judgment, the Court held that it was necessary to distinguish two elements of conduct, namely the formation of the agreement, decision or concerted practice and the implementation thereof. If the applicability of prohibitions laid down under competition law were made to depend on the place where the agreement, decision or concerted practice was formed, the result would obviously be to give undertakings an easy means of evading those prohibitions. The Court therefore held that the decisive factor is the place where it is implemented.

233 The second approach is based on the qualified effects of the practices in the European Union. That approach was followed in Case T-102/96 *Gencor v Commission* [1999] ECR II-753, '*Gencor*'. In paragraph 90 of that judgment, the Court held that application of Council Regulation (EEC) No 4064/89 of 21 December 1989 on the control of concentrations between undertakings (OJ 1989 L 395, p. 1), as corrected (OJ 1990 L 257, p. 13), is justified under public international law when it is foreseeable that a proposed concentration will have an immediate and substantial effect in the European Union.

234 By submitting that where trade with third countries is involved, even where implementation of the practices at issue takes place within the European Union, the Commission must also prove the existence of immediate, substantial, direct and foreseeable effects within the European Union, the applicant's reasoning amounts to an assertion that implementation and qualified effects in the European Union are cumulative conditions.

235 The Commission stated, at the hearing, that, in the present case, its jurisdiction was justified, first, under the doctrine of implementation of the practices at issue in the EEA, which was followed in *Woodpulp*, paragraph 232 above, and, second, under the effects doctrine, which was followed in *Gencor*, paragraph 233 above.

236 In that regard, the Court would point out that demonstrating the implementation of the practices at issue in the EEA or demonstrating qualified effects are alternative and not cumulative approaches for

the purposes of establishing that the Commission's jurisdiction is justified under the rules of public international law.

237 In *Woodpulp*, paragraph 232 above, the Court of Justice relied solely on the implementation of the conduct at issue in the territory of the European Union.

238 The applicant may not rely on the fact that Advocate General Darmon stated, in point 82 of his Opinion in *Woodpulp*, paragraph 232 above, that it would be for the Court 'to ascertain whether the effects of the conduct alleged by the Commission were substantial, direct and foreseeable in order to determine whether the Commission was right in exercising jurisdiction over the applicants'. The Advocate General proposed that the Court should rely on the effects of the conduct at issue in the territory of the European Union in order to establish the Commission's jurisdiction. The Court did not follow the Advocate General's proposal and relied on the implementation of the agreement in the European Union. It therefore follows from the judgment of the Court in that case that, where the Commission's jurisdiction can be established on the basis of the implementation of the conduct at issue in the European Union, it is not necessary to examine whether there were any effects in order to establish the Commission's jurisdiction.

239 The applicant relies in that context also on *Gencor*, paragraph 233 above.

240 However, in *Gencor*, paragraph 233 above (paragraphs 89 to 101), the General Court relied solely on the qualified effects in order to establish that the Commission's jurisdiction was justified under the rules of public international law.

241 It is indeed true that, in paragraph 87 of that judgment, the Court observed that, according to *Woodpulp*, paragraph 232 above, the criterion as to the implementation of an agreement is satisfied by mere sale within the European Union. However, paragraph 87 forms part of the reasoning of the Court by which the latter held that Regulation No 4064/89 did not, for the purpose of defining its territorial scope, ascribe greater importance to production operations than to sales operations (*Gencor*, paragraph 233 above, paragraphs 85 to 88). In that context, the Court rejected an argument of the applicant based on *Woodpulp*, paragraph 232 above, by holding that, according to that judgment, the criterion as to the implementation of an agreement is satisfied by mere sales. The Court therefore rejected the applicant's argument that it follows from *Woodpulp*, paragraph 232 above, that greater importance is ascribed to production activities than to sales activities.

242 Next, the Court examined, in paragraphs 89 to 101 of *Gencor*, paragraph 233 above, whether the application of Regulation No 4064/89 in that case was consistent with public international law. In that context, the Court confined itself to examining whether the criteria of immediate, substantial and foreseeable effect were satisfied.

243 It therefore follows from *Gencor*, paragraph 233 above, that, in order to justify the Commission's jurisdiction according to the rules of public international law, it is sufficient that the criteria of immediate, substantial and foreseeable effect in the European Union be satisfied.

244 It follows from the foregoing that, in order to justify the Commission's jurisdiction under public international law, it is sufficient to establish either the qualified effects of the practice in the European Union or that it was implemented in the European Union.

245 In another connection, it should be noted that, in the contested decision, the Commission does not deal expressly with the question whether the Commission's jurisdiction is justified under the rules of public international law. In that regard, the Commission states that it dealt, at recitals 1749 to 1753 of the contested decision, with the question whether trade was affected between Member States.

246 Furthermore, the Commission states, without being contradicted on that point by the applicant, that, during the administrative procedure, the applicant never questioned the Commission's international jurisdiction.

247 In that context, the Court notes that the wording of Article 82 EC contains two elements which relate to a link with the territory of the European Union. First, Article 82 EC requires the existence of a dominant position 'within the common market or in a substantial part of it'. Second, it requires that trade between Member States be capable of being affected by the conduct in question. In the contested decision, the Commission established the existence of a dominant position by the applicant at a worldwide level, which includes the common market. Moreover, at recitals 1749 to 1753 of that decision, it expressly examined the effect on trade between Member States.

248 It is true that the question whether the Commission's jurisdiction is justified under public international law is a question separate from that of the criteria laid down by Article 82 EC. In that regard, it should be observed that the criterion of the effect on trade between Member States is intended to define the sphere of application of Community rules in relation to national laws (see, to

that effect, Joined Cases 6/73 and 7/73 *Istituto Chemioterapico Italiano and Commercial Solvents v Commission* [1974] ECR 223, paragraph 31).

249 None the less, in the light of the fact, first, that the Commission took a view in the contested decision on the two criteria laid down in Article 82 EC concerning a link with the territory of the European Union and, second, that the applicant did not question, during the administrative procedure, the Commission's international jurisdiction, it was not essential for the Commission to provide an express statement of reasons in the contested decision regarding that question (see also, as regards the obligation to provide a statement of reasons for the Commission's jurisdiction, Case 48/69 *Imperial Chemical Industries v Commission* [1972] ECR 619, paragraphs 143 to 145). The applicant moreover specified, at the hearing, that its plea did not concern a failure to state reasons, formal note of which was taken in the minutes of the hearing.

#### b) Qualified effects

##### 1) Preliminary observations

250 The applicant claims that the Commission's failure to examine the existence of substantial, direct and foreseeable effects in the European Union is a particularly significant failing in circumstances where the Commission states, at recital 1685 of the contested decision, that it does not need 'to prove the actual effects of an abuse under Article 82 [EC]'.

251 In that regard, the Court would point out that the Commission is not obliged to establish the existence of actual effects in order to justify its jurisdiction under public international law. The criteria of immediate, substantial and foreseeable effects do not mean that the effect must also be actual. It is for the Commission to ensure that competition within the common market is protected against threats to the effective functioning thereof.

252 Accordingly, the view cannot be taken that the Commission is required to confine itself to pursuing and punishing abuse which achieved the intended result and in respect of which the threat to the functioning of competition materialised. The Commission cannot be expected to adopt a passive position where there is a threat to the effective competition structure in the common market and may therefore intervene also in cases in which the threat did not materialise or has not yet materialised.

253 In addition, in the present case, the conduct vis-à-vis Acer and Lenovo was intended to produce effects within the common market.

254 The conduct vis-à-vis Acer consisted in granting payments conditional upon Acer's delaying the launch of an AMD-based notebook worldwide. Such a financial incentive was intended to ensure that, during a given period, a certain Acer computer model would not be available on the market anywhere in the world, including in the EEA.

255 The conduct vis-à-vis Lenovo consisted, first, in granting payments to Lenovo conditional upon Lenovo's delaying and finally cancelling the launch of its AMD-based x86 CPU notebooks. That conduct was therefore intended to ensure that AMD-based computer models of Lenovo would not be available anywhere in the world, including in the EEA. Second, the conduct vis-à-vis Lenovo consisted in granting rebates at a level that was conditional upon Lenovo obtaining all of its notebook x86 CPU supplies from Intel. That conduct was intended to ensure that no Lenovo AMD-based notebook would be available on the market, including in the EEA. Intel's conduct was therefore intended to produce effects also in the EEA. Under these circumstances, the question whether the applicant achieved the intended result is irrelevant in the context of the examination of whether the Commission's jurisdiction is justified under public international law.

256 Moreover, the Court observes that the applicant itself relies on Case T-204/03 *Haladjian Frères v Commission* [2006] ECR II-3779, and in particular on paragraph 167 thereof, in which the Court stated:

'[I]n order to justify the application of the competition rules to an agreement concerning products purchased in the United States for sale in the Community, that agreement must, on the basis of a range of elements of fact and of law, make it possible to envisage with a sufficient degree of probability that it is capable of having a more than insignificant influence on competition in the Community and on trade between Member States (see, to that effect, [Case C-306/96] *Javico* [1998] ECR I-1983], paragraphs 16 and 18). The mere fact that conduct produces certain effects, no matter what they may be, on the Community economy does not in itself constitute a sufficiently close link to be able to found Community competence. In order to be capable of being taken into account, that effect must be substantial, that is to say, appreciable and not negligible.'

257 That judgment does not therefore require the existence of actual effects on competition in the European Union, but only that it be sufficiently probable that the agreement at issue is capable of having a more than insignificant influence there. In that regard, it should be noted that that finding did

not relate expressly to the question whether the Commission's jurisdiction was justified under public international law, but that it was made in the context of the examination of the question whether the criteria laid down in Article 81 EC were fulfilled. None the less, that judgment, which is relied on by the applicant, is an element confirming that the effects of conduct on competition do not necessarily have to be actual in order to constitute a sufficiently close link with the European Union capable of founding the Commission's jurisdiction.

258 It is therefore necessary to examine whether the three criteria of substantial, immediate and foreseeable effect are satisfied in the case in point.

2) Acer

### 2.1) Substantial effect

259 The applicant points out that the delay to which the Commission refers in the Decision concerned an AMD-based 64-bit technology notebook model. The applicant states that, in the fourth quarter of 2003, only 100 000 CPUs of that type were available worldwide. In the applicant's submission, Acer might have purchased at most approximately 4 000 units of that type, and most of Acer's computers concerned by the delayed launch would in any event have been sold outside the EEA. The effects in the EEA could not therefore in any case have been substantial.

260 The Commission challenges the figure of 4 000 units. However, it admitted at the hearing that the quantity of computers concerned was modest. It none the less stated at the hearing that, given that there was an overall strategy aimed at foreclosing Intel's sole important competitor and that there was a single and continuous infringement, it was not appropriate to view the effects of the various instances of conduct in isolation.

261 As regards the substantial nature of the effects, the Court would point out, first of all, that it is not necessary that the European Union or the EEA be more affected than other regions of the world (see, to that effect, *Gencor*, paragraph 233 above, paragraph 98).

262 Moreover, the EEA constitutes a significant part of the world market. By way of illustration, it should be noted that, according to recital 1775 of the contested decision, sales of computers incorporating Intel x86 CPUs in the EMEA region amounted to approximately 32% of world sales. Furthermore, the Commission found that the value of Intel's sales to undertakings established in the EEA amounted to approximately 80% of sales in the EMEA region.

263 It should also be noted that it is clear from the evidence cited in the contested decision, in particular from the email cited in paragraph 1240 below, that Acer had planned to sell in Europe the model concerned by the delayed launch. It is therefore necessary to reject the applicant's argument put forward at the hearing that it is possible that the computers in question would have all been sold outside the EEA.

264 The grant of a financial incentive, for the purpose of encouraging a customer to delay at a worldwide level the launch of a computer incorporating a competitor's CPU sales of which were planned in Europe, is capable of having at least potential effects in the EEA.

265 ACT maintained that it was apparent from the email cited in paragraph 1240 below that the naked restriction alleged by the Commission concerned only limitations on Acer's sales to countries outside of Europe.

266 In that regard, it is sufficient to note that, in the end, Acer committed to delaying the launch of the computer in question at a worldwide level (see paragraphs 1246, 1247, 1268 and 1269 below). ACT's argument that the Commission found an infringement that concerned only sales of Acer to countries outside of Europe therefore has no factual basis.

267 Moreover, it should be pointed out that the Commission was right in finding that the various instances of conduct described in the contested decision were part of a single and continuous infringement (see paragraphs 1561 to 1563 below).

268 In order to examine whether the effects are substantial, the various instances of conduct forming part of a single and continuous infringement must not be considered in isolation. It is on the contrary sufficient that the single infringement as a whole be capable of having substantial effects.

269 As regards the effect on trade between Member States within the meaning of Article 82 EC, it is clear from the case-law that it is necessary to take into consideration the consequences of an abuse of a dominant position for the effective competition structure in the common market (see Case 22/79 *Greenwich Film Production* [1979] ECR 3275, paragraph 11 and the case-law cited). The Court of Justice has also made clear that, in considering whether Article 82 EC is applicable, the performance of certain contracts cannot be assessed in isolation but must be viewed in the light of the activities of

the undertaking in question as a whole (see, to that effect, *Greenwich Film Production*, paragraph 12). As regards the criterion of the effect on trade between Member States, the Court has therefore expressly held that certain contracts must not be considered in an isolated manner.

270 The same conclusion applies, in the case of a single and continuous infringement, when considering whether the Commission's jurisdiction is justified under public international law. Undertakings cannot be allowed to escape application of the competition rules by combining several practices pursuing the same objective, when each practice viewed in isolation is not liable to produce a substantial effect in the European Union but the practices, taken together, are liable to produce such an effect.

271 In the present case, it should be recalled that the single and continuous infringement, viewed as a whole, affected on average, according to the calculations by the applicant's adviser, approximately 14% of the global market if those calculations are not limited to only the contestable share; this must be regarded as a significant share of the market (see paragraph 194 above).

272 That is sufficient to establish that the potential effects of the applicant's practices were substantial.

273 Moreover, the Court finds that the Commission demonstrated to the requisite legal standard that the applicant had pursued a long-term comprehensive strategy to foreclose AMD from the strategically most important sales channels (see paragraphs 1523 to 1552 below).

274 It is apparent from the case-law that, in relation to the criterion of the effect on trade between Member States, it is necessary to take into consideration the repercussions for the effective competition structure in the common market resulting from the elimination of a competitor (see, to that effect, *Istituto Chemioterapico Italiano and Commercial Solvents v Commission*, paragraph 248 above, paragraph 33, and Joined Cases T-24/93 to T-26/93 and T-28/93 *Compagnie maritime belge transports and Others v Commission* [1996] ECR II-1201, paragraph 203). Changes to the structure of the market must also be taken into consideration when it comes to determining whether there are substantial effects within the EEA in the context of the examination of the question whether the Commission's jurisdiction is justified under public international law (see, to that effect, *Gencor*, paragraph 233 above, paragraphs 94 and 96).

275 In that respect, the Court would point out that not only is the elimination of a competitor capable of having repercussions for the competition structure in the common market, but that conduct capable of weakening the applicant's sole significant competitor at the worldwide level, by foreclosing it from the most important sales channels, such as the conduct at issue in the present case, is also capable of having repercussions for the effective competition structure in the common market. Accordingly, the finding that the potential effects of the applicant's conduct must be regarded as substantial is also justified on account of the potential effects on the effective competition structure in the common market.

276 It follows from the foregoing that the potential effects of the applicant's conduct must be regarded as substantial.

## 2.2) Immediate effect

277 Intel's conduct was intended to produce an immediate effect in the EEA and was capable of doing so.

278 That conduct was intended to induce Acer and was capable of inducing it to delay the launch of an AMD-based notebook worldwide, including in the EEA. The delay in the launch means that, during a certain period, a certain AMD-based computer model is not available, including in the EEA. It is a direct effect and not merely a knock-on effect.

279 Contrary to the submissions of the applicant and ACT, the fact that Intel did not sell CPUs to Acer in the EEA does not mean that the effect in the EEA of Intel's conduct could only have been indirect. The condition to which those payments were subject, namely the postponement of the launch of a certain computer model worldwide, including in the EEA, concerned directly sales of computers by Acer.

280 Moreover, the single and continuous infringement committed by the applicant, viewed as a whole, was capable of having the immediate effect of weakening the applicant's sole significant competitor by foreclosing it from the most important sales channels and therefore of changing the effective competition structure in the common market.

## 2.3) Foreseeable effect

281 The effect that a certain AMD-based computer model would not be available during the postponement period, including in the EEA, was foreseeable for the applicant. Indeed, that was the intended effect of its conduct.

282 Similarly, the weakening of the applicant's sole significant competitor was foreseeable for it and intended by it.

### 3) Lenovo

#### 3.1) The naked restrictions

##### i) The postponement of the launch concerning the Chinese market

283 The applicant claims that the first postponement of the launch alleged by the Commission in the contested decision relates to the delayed launch of two AMD-based notebook models in China (see in that regard paragraphs 1035 and 1037 below). In the applicant's submission, that agreement only affected the Chinese market and was not implemented in the European Union.

284 In that regard, it is sufficient to note that, in the contested decision, the Commission does not make a finding of a breach of Article 82 EC in respect of the postponement of the launch of AMD-based notebooks in China (see paragraph 1042 below). The applicant's line of argument regarding the Commission's lack of jurisdiction to punish that conduct is therefore ineffective.

##### ii) The postponement of the launch concerning the worldwide market

285 The postponement of the launch at issue in the contested decision concerns the delayed launch of those computer models at the worldwide level. In that regard, the applicant stated, at the hearing, that it was apparent from Annex A.120 to the application that, for the two computer models concerned by the postponed launch, the planned level of sales was very low.

286 In that regard, it should be noted that it is apparent from that annex that, on 1 June 2006, the projected sales figures in the EMEA region in respect of the fourth quarter of 2006 for the two notebook models concerned by the postponement of the launch were 5 400 and 4 250 units.

287 At the hearing, the applicant suggested that it was possible that all those computers were intended for areas of the EMEA region outside the EEA.

288 In that regard, the Court observes that this suggestion is mere speculation by the applicant in support of which it has not put forward any argument. It is true that the exact volume of the planned sales in the EEA is not apparent from Annex A.120 to the application. It should however be pointed out that the EEA is a very important part of the EMEA region.

289 It is clearly apparent from Annex A.120 to the application that Lenovo had planned sales in the EMEA region. That is sufficient for a finding that there were at least potential effects in the EEA, in the absence of any specific indicia which might suggest that all the planned sales concerned parts of the EMEA region outside the EEA.

290 It is true that the number of units concerned in the EMEA region was modest. However, the Court would point out that the conduct vis-à-vis Lenovo formed part of a single and continuous infringement and that it is sufficient that that infringement, viewed as a whole, was capable of having substantial effects, which is the situation in the present case (see paragraphs 267 to 276 above).

291 As regards the immediate nature of the effect and of its foreseeability, the points set out in paragraphs 277 to 282 above apply *mutatis mutandis*.

#### 3.2) The exclusivity rebates

292 According to the contested decision, Intel granted rebates to Lenovo between January 2007 and December 2007 at a level that was conditional on Lenovo's obtaining all of its notebook x86 CPU supplies from Intel.

293 The contested decision thus refers to a financial incentive granted by Intel to Lenovo in order to encourage it to use exclusively x86 CPUs produced by Intel in its notebooks. That conduct was capable of having the immediate effect that no Lenovo notebook incorporating an x86 CPU of a competitor of Intel was available anywhere in the world, including in the EEA. The fact that Intel sells CPUs, whilst Lenovo sells computers, does not mean that the effect can be only indirect. If Lenovo obtains all its notebook x86 CPU requirements from Intel, that means directly and necessarily that it cannot manufacture or sell any notebook incorporating an x86 CPU of a competitor.

294 That effect was foreseeable for Intel and even intended by it.

295 As regards the substantial nature of the effect, it is sufficient to point out that the exclusivity rebates formed part of a single and continuous infringement which, viewed as a whole, was capable of having substantial effects in the territory of the European Union and the EEA, which is sufficient (see

paragraphs 267 to 276 above). It is not therefore necessary to examine whether the exclusivity rebates granted to Lenovo, viewed in isolation, were capable of having a substantial effect in that territory.

296 It follows from the foregoing that the conduct of Intel to which the Commission refers in the contested decision was capable of having a substantial, immediate and foreseeable effect within the EEA. Accordingly, the Commission's jurisdiction to punish that conduct is justified under the rules of public international law.

297 It is therefore for the sake of completeness that the implementation of the conduct at issue in the territory of the EEA will be examined below.

#### c) Implementation

298 The applicant claims that, according to case-law, direct sales into the European Union by the undertaking itself of the products covered by the conduct concerned are required to establish the Commission's jurisdiction. In the present case, the Commission has not established that each of the alleged acts of abuse encompassed direct sales of the relevant product, namely x86 CPUs, by Intel to purchasers in the European Union or the EEA.

299 The applicant states that it did not sell x86 CPUs to Acer or Lenovo in the EEA. Acer and Lenovo did not sell the products concerned by the contested decision, namely x86 CPUs, but computers incorporating x86 CPUs.

300 The Commission disputes the applicant's arguments.

#### 1) Acer

301 It should be borne in mind that the implementation of the practices at issue in the European Union is sufficient to justify the Commission's jurisdiction under public international law (see, to that effect, *Woodpulp*, paragraph 232 above, paragraph 16).

302 It is true that, in the case which gave rise to *Woodpulp*, paragraph 232 above, the Court of Justice found that the agreement in question had been implemented in the common market by means of direct sales, at prices which were actually coordinated, by the participants in the agreement to purchasers established in the European Union (paragraphs 12, 13, 16 and 17 of that judgment).

303 However, it does not follow from this that direct sales by addressees of the Commission's contested decision are the only means of implementing a practice in the European Union. The mere fact that the applicant did not sell CPUs to subsidiaries of Acer and Lenovo located in the EEA does not therefore preclude implementation of the practices at issue in the EEA.

304 In the present case, the Commission did not refer, in the contested decision, to action initiated by the applicant itself in the territory of the EEA in order to implement the naked restriction concerning Acer.

305 Nevertheless, the abuse of a dominant position consisted in the present case in the grant of a financial incentive in order to encourage Acer to postpone the launch of a certain notebook worldwide. The condition to which the payments granted by Intel were subject, namely the postponement of a certain AMD-based notebook, was therefore intended to be implemented worldwide by Acer, including in the EEA.

306 In such circumstances, it would be artificial merely to take into consideration the implementation of the practices at issue by the undertaking in a dominant position itself. On the contrary, it is also necessary to take into consideration the implementation of those practices by the customer of that undertaking.

307 In that context, the fact that the customer of the undertaking in a dominant position refrains from selling a certain computer model in the EEA for a certain period must be regarded as implementation of the naked restriction.

308 Moreover, it is apparent from the evidence cited in the contested decision that Acer took action in the EMEA region to postpone the launch of the computer at issue. It is apparent from the email cited in paragraph 1247 below, which was relied on in that respect by the Commission at the hearing, that the [confidential] at Acer was instructed to 'drop' the AMD CPU concerned for 2003, and that he would give effect to that instruction in the EMEA region.

309 It follows from the foregoing that the Commission's jurisdiction was justified also on account of the implementation of the infringement in the territory of the European Union and the EEA.

#### 2) Lenovo

310 As regards the naked restrictions, namely the rebates granted on condition that Lenovo postpone the launch of two computer models, it should be noted that they were intended to be implemented worldwide by Lenovo, including in the EEA. It follows that the Commission's jurisdiction was justified also on account of the implementation of the infringement in that territory. In that regard, the points made in paragraphs 304 to 307 above apply *mutatis mutandis*.

311 As regards the exclusivity rebates, the consideration for those rebates, namely Lenovo's sole sourcing from Intel for its notebook x86 CPUs, was intended to be implemented worldwide by Lenovo, including in the EEA, by Lenovo's selling exclusively notebooks incorporating Intel x86 CPUs. In that context, the Court would point out that the intended use of the CPUs, namely their use by Lenovo in notebooks, formed part of the consideration as that consideration had been defined. Accordingly, the applicant cannot usefully rely on the argument that the market at issue concerned x86 CPUs whereas Lenovo did not sell CPUs, but computers incorporating CPUs. The consideration as defined established a direct link with the computers which would be produced and sold by Lenovo.

312 The applicant's conduct was intended to ensure that the consideration provided by Lenovo would be implemented everywhere that Lenovo sold notebooks, including in the EEA.

313 Given that the consideration as defined concerned specifically CPUs intended to be used for a certain type of product, namely notebooks, the applicant cannot properly claim that Intel had no influence on the use made by Lenovo of the Intel CPUs. Moreover, the applicant has not claimed that it was not aware that Lenovo was present in the common market and sold notebooks in that market.

314 It follows from the foregoing that, concerning the applicant's conduct vis-à-vis Lenovo, the Commission's jurisdiction is also justified on account of the implementation of the infringement in the territory of the European Union and the EEA.

#### d) The effect on trade between Member States

315 At the hearing, the applicant also claimed that the conduct at issue was not capable of affecting trade between Member States.

316 As regards the criterion of the effect on trade between Member States, the Commission found, at recital 1750 of the contested decision, that abuses that have an impact on the competitive structure in more than one Member State are by their very nature capable of affecting trade between Member States.

317 According to case-law, if an agreement, decision or practice is to be capable of affecting trade between Member States, it must be possible to foresee with a sufficient degree of probability, on the basis of a set of facts and points of law, that they may have an influence, direct or indirect, actual or potential, on the pattern of trade between Member States in such a way as to cause concern that they might hinder the attainment of a single market between Member States. Moreover, that effect must not be insignificant (see *Javico*, paragraph 256 above, paragraph 16 and the case-law cited).

318 In the present case, the applicant has not claimed that its conduct vis-à-vis Acer and Lenovo concerned only the territory of a single Member State. In disputing that trade between Member States was affected, the applicant relied rather on the fact that the effects were felt outside the EEA and that, in any event, the volume of computers concerned would have been very small, so that the effects could not in any case have been significant.

319 Nevertheless, as was observed in paragraph 269 above, it is not appropriate to consider the effects of the applicant's conduct vis-à-vis Acer and Lenovo in isolation. Viewed as a whole, the single infringement committed by the applicant was capable of having a substantial effect in the European Union and the EEA.

320 The Court must therefore reject the applicant's line of argument disputing that trade between Member States was affected.

321 It follows from all the foregoing that the applicant's line of argument challenging the Commission's jurisdiction must be rejected.

#### C – Procedural irregularities

##### 1. The Commission's refusal to grant the applicant a second hearing

322 The applicant, supported by ACT, claims that the Commission unlawfully refused Intel a second oral hearing in relation to the Supplementary Statement of Objections of 2008 (see paragraph 9 above) and the Letter of Facts (see paragraph 13 above), even though those documents raised entirely new allegations concerning, in particular, conditional rebates and naked restrictions involving Lenovo and the granting of rebates to MSH.



323 In accordance with Article 10(2) of Commission Regulation (EC) No 773/2004 of 7 April 2004 relating to the conduct of proceedings by the Commission pursuant to Articles 81 [EC] and 82 [EC] (OJ 2004 L 123, p. 18), when notifying the statement of objections to the parties concerned, the Commission is to set a time-limit within which these parties may inform it in writing of their views. The Commission is not obliged to take into account written submissions received after the expiry of that time-limit.

324 In accordance with Article 12 of Regulation No 773/2004, the Commission is to give the parties to whom it has addressed a statement of objections the opportunity to develop their arguments at an oral hearing, if they so request in their written submissions.

325 As regards the Supplementary Statement of Objections of 2008, it is common ground between the parties that the applicant was in principle entitled to a second oral hearing pursuant to the abovementioned provisions. The Commission recognised the existence of that right in the covering letter to the Supplementary Statement of Objections of 2008. However, the Court finds that the applicant did not request in good time that a second hearing be held. In the Supplementary Statement of Objections of 2008, the Commission had initially granted the applicant a time-limit of eight weeks in which to present its submissions. On 15 September 2008, that time-limit was extended until 17 October 2008 by the Hearing Officer (see paragraph 10 above). The applicant did not reply to the Supplementary Statement of Objections of 2008 by that latter time-limit, and at the same time omitted to request a second oral hearing. Consequently, it was time-barred as regards its right to a second oral hearing.

326 That conclusion, which already flows from the wording of Article 10(2) and Article 12 of Regulation No 773/2004, is confirmed by the very purpose of those provisions. The obligation for the addressee of a statement of objections to request an oral hearing within the time-limit set by the Commission, failing which it is barred from the right to an oral hearing, is justified by reasons of procedural economy. The preparation of an oral hearing entails a non-negligible coordination effort by the Commission on account of the fact that, at an oral hearing, not only are the addressee of the statement of objections and the Commission's services present, but, as the case may be, also third parties and Member States' representatives. Moreover, the Commission must have sufficient time to be able to take account of the submissions made at an oral hearing in a final decision.

327 As regards, next, the Letter of Facts, it must be stated that the right to an oral hearing provided for in Article 12 of Regulation No 773/2004 exists only after the Commission has issued a statement of objections. The applicant did not therefore have any right to an oral hearing in relation to the Letter of Facts. In any event, the Court notes that, also as regards that letter, the applicant did not request a hearing in good time, since it did not reply to that letter within the time-limit set of 23 January 2009.

328 Consequently, the Commission was right to refuse to hold an oral hearing as regards both the Supplementary Statement of Objections of 2008 and the Letter of Facts. The arguments of the applicant and of ACT are not capable of calling in question that conclusion.

329 First, the applicant claims that, in its letter of 2 February 2009 (see paragraph 15 above), the Commission expressly agreed to consider the applicant's written submissions on the Supplementary Statement of Objections of 2008 and the Letter of Facts, if served by 5 February 2009. In the applicant's submission, the Commission thus extended the time-limit for lodging a request for an oral hearing until 5 February 2009.

330 That assertion must be rejected. The Commission correctly observes that, during the administrative procedure as well as in the contested decision, the Commission expressly ruled out that belated submissions would be accepted as a timely reply or that the consideration of these belated submissions could be construed as an extension of these time-limits. In particular in the letter of 2 February 2009, on which the applicant bases its line of argument, the Commission took the view that it was not obliged to grant a request for a hearing lodged out of time and that its services considered that the proper conduct of the administrative procedure did not necessitate an oral hearing. Contrary to the applicant's claim, in the letter of 2 February 2009, the Commission did not therefore extend the time-limit for lodging a request for an oral hearing until 5 February 2009.

331 Second, the applicant submits that it did not serve its reply to the Supplementary Statement of Objections of 2008 and to the Letter of Facts of 2008 before 5 February 2009 because at that time it was applying to the General Court for annulment of the Hearing Officer's decision of 15 September 2008 and for an interim order suspending the expiry of the time-limit.

332 However, the Court finds that the applicant could, as a precaution, have presented its submissions to the Commission on the Supplementary Statement of Objections of 2008, whilst exercising its right of access to the Court. As the President of the Court found in paragraph 87 of the order in *Intel v Commission*, paragraph 14 above, the applicant was in no way prevented, by bringing its action for annulment and its application for interim measures, from preparing and submitting, in

good time, its reply to the Supplementary Statement of Objections of 2008 on the basis of the information available to it, at least as a precaution, and that all the more so since the Hearing Officer had granted an extension of the deadline by four weeks. In any event, Intel could have requested a hearing by the deadline set by the Hearing Officer, that is to say by 17 October 2008, since such a request did not depend on additional information.

333 The same reasoning also applies as regards the Letter of Facts, without prejudice to the fact that Article 12 of Regulation No 773/2004 does not provide for a hearing following dispatch of a letter of facts (see paragraph 327 above). The applicant was not prevented from requesting an oral hearing in good time either by its application for annulment or by its application for interim measures.

334 Third, it is true that, in the conditions laid down in Article 10(2) and in Article 12 of Regulation No 773/2004, the Commission has no discretionary power regarding the right to an oral hearing. Article 12 of Regulation No 773/2004 provides that the Commission 'is to give' the parties to whom it has addressed a statement of objections the opportunity to develop their arguments at an oral hearing, if they so request in their written submissions. However, the applicant did not submit a request in good time, and that provision is therefore not applicable.

335 Fourth, the applicant submits that the Hearing Officer's decision of 17 February 2009, by which the Hearing Officer rejected a new request by the applicant for an oral hearing on the Supplementary Statement of Objections of 2008, is unreasonable and disproportionate.

336 In that regard, it should be recalled that the applicant did not request an oral hearing on the Supplementary Statement of Objections of 2008 in good time. As the Hearing Officer correctly stated, in her decision of 17 February 2009, a subjective right to have an oral hearing exists until the end of the deadline to reply to the statement of objections. After expiry of that deadline, there is no obligation on the Commission to organise an oral hearing.

337 By recognising that the Hearing Officer none the less had a discretionary power to grant an oral hearing, the Commission did not therefore infringe Article 12 of Regulation No 773/2004, but interpreted that regulation in a manner favourable to the applicant. Moreover, the Hearing Officer set out the reasons for her refusal to grant a second oral hearing in detail in her letter of 17 February 2009. The applicant merely submits, in that regard, that the Commission would not have been prejudiced by holding an oral hearing, since, in the applicant's submission, the delay in the conduct of the administrative procedure as a result of a second oral hearing would have been 'minimal'. However, the Court takes the view that the Hearing Officer did not err in finding, in essence, that undue delay in the conduct of the administrative procedure would have risked being detrimental not only to the rights of the third parties concerned by the procedure relating to the applicant, but also other parties' rights in parallel procedures, in which they had requested oral hearings in good time.

338 Fifth, ACT submits, in essence, that notwithstanding the fact that Article 12 of Regulation No 773/2004 provides for an oral hearing to be held only after the Commission has issued a statement of objections, the Commission was none the less required to grant an oral hearing following dispatch of the Letter of Facts on account of the applicant's fundamental right to have its right to be heard observed. That argument is not convincing. First of all, the Court observes that Chapter V of Regulation No 773/2004, entitled 'Exercise of the right to be heard', which includes Article 10(2) and Article 12 of that regulation, gives concrete expression to the applicant's rights of defence. Neither the applicant nor ACT has put forward any arguments alleging that those provisions may be unlawful. In so far as ACT submits that the Commission cannot rely on limitations which it sets itself in its own regulations to justify a breach of a party's fundamental right to be heard, it is clear that, in accordance with Article 33(1)(c) of Regulation No 1/2003, the Commission is authorised to adopt the detailed rules governing the conduct of hearings. Next, it should be noted, for the sake of completeness, that, even on the assumption that the rights of the defence may, in specific circumstances, require the Commission to hold a hearing following dispatch of a letter of facts, the fact remains that that hypothetical right is not unlimited. That right may be restricted by the Commission by the setting of time-limits within which to lodge a request for an oral hearing. However, in the present case, the applicant did not reply to the Letter of Facts in good time (see paragraph 327 above).

339 It follows from all the foregoing that the Commission did not err in law and did not infringe the provisions of Regulation No 773/2004 in refusing Intel an oral hearing in relation to the Supplementary Statement of Objections of 2008 and the Letter of Facts.

## 2. The Commission's refusal to obtain certain AMD documents

### a) Background to the dispute and the parties' positions

340 On 21 May 2008, following the publication online of the pre-trial briefs written by the applicant and AMD in the context of the proceedings between them in the State of Delaware (see paragraph 11

above), the Commission requested both Intel and AMD to submit to it all the documents written by or received by them and which were cited in their respective pre-trial briefs.

341 By letter of 6 August 2008, the applicant stated that it considered that the investigation conducted by the Commission was incomplete. It requested the Commission to ask AMD to produce all documents relevant to the allegations set out in the Supplementary Statement of Objections of 2008. Moreover, the applicant stated that a protective order by the court before which the case was brought in the State of Delaware of 26 September 2006 ('the Protective Order') prevented Intel from making use of the documents produced by AMD in the proceedings in the State of Delaware outside those proceedings.

342 In annex to a letter of 4 September 2008, the applicant sent the Commission a list of 87 points corresponding to documents or categories of documents which it asked the Commission to obtain from AMD ('the List').

343 By letter of 6 October 2008, the Commission informed the applicant that it had decided to request AMD to produce the documents in question in so far as they were described in the List in a manner that made it possible to identify them precisely and it sent the applicant a list indicating the seven documents that it had requested AMD to provide.

344 At recitals 61 to 74 of the contested decision, the Commission explains why it did not consider itself obliged to obtain the other documents identified in the List, by stating that the applicant's request was not specific enough, that it was disproportionate, that the applicant had failed to establish that it had exhausted all steps available to it to provide the Commission with more documents from the proceedings in the State of Delaware and that the documents that the applicant had requested the Commission to obtain were not exculpatory.

345 The applicant submits that the documents that it had requested the Commission to obtain from AMD were very relevant to its defence in order to demonstrate *inter alia* that, even in the absence of the conduct alleged against it, the OEMs would not have purchased more AMD CPUs and that AMD faced manufacturing capacity constraints. In refusing to obtain such additional documents from AMD, the Commission failed to address relevant evidence and infringed an essential procedural requirement. Thus, the Commission infringed Intel's rights of defence.

346 The applicant submits that the seven documents that the Commission requested AMD to provide were not the only documents clearly identified in the List. In reply to a written question put by the Court, the applicant moreover claimed that it would not have been able to identify the documents at issue more precisely than it had done in the List without breaching the Protective Order.

347 The Commission counters by saying that there was no legal basis for Intel's request because the documents at issue were not part of the investigation file.

348 Moreover, the elements put forward by the applicant could not have been exculpatory. Proof of actual foreclosure, of AMD's capacity constraints, of AMD's marketing, of AMD's technical performance or of harm to consumers is not required to establish the unlawfulness of Intel's conduct.

b) The conditions under which the Commission may be obliged to obtain certain documents

1) Existing case-law

349 The applicant relies on the case-law concerning access to the file, according to which it is not for the Commission alone to decide which documents are of use for the defence of undertakings in proceedings involving infringement of the competition rules (see, to that effect, Case T-30/91 *Solvay v Commission* [1995] ECR II-1775, '*Solvay*', paragraph 81).

350 According to settled case-law, the right of access to the file, which is a corollary of the principle of respect for the rights of the defence, means that the Commission must provide the undertaking concerned with the opportunity to examine all the documents in the investigation file that may be relevant for its defence (see, to that effect, Case C-199/99 P *Corus UK v Commission* [2003] ECR I-11177, paragraphs 125 to 128, and *Solvay*, paragraph 349 above, paragraph 81).

351 However, the Court would point out that that case-law concerns the right of access to documents which are part of the Commission's investigation file. It is true that it is clearly apparent from the case-law that the Commission is obliged to grant the parties access to all the documents in the administrative file, with the exception of internal or confidential documents, and that the Commission is not permitted to examine alone which documents may be of use for the defence of the undertakings. However, the obligation to grant access to all the documents in the administrative file does not mean that the Commission is obliged to obtain all types of document that might potentially be exculpatory.

352 The European Union Courts have already adjudicated on the conditions of access to documents in the Commission's possession, but which are not part of the actual investigation file. Thus, as

regards the replies to the statement of objections by other parties to a procedure, it is apparent from the case-law that, since they are documents which are not part of the file compiled at the time of notification of the statement of objections, the Commission is required to disclose those replies to other parties concerned only if it transpires that they contain new incriminating or exculpatory evidence (Case T-240/07 *Heineken Nederland and Heineken v Commission* [2011] ECR II-3355, paragraph 242) or if those replies are essential to put the applicant in a position to dispute the figures used by the Commission in the statement of objections (see, to that effect, Case T-199/08 *Ziegler v Commission* [2011] ECR II-3507, paragraph 118).

353 In that respect, the European Union Courts have had occasion to clarify that the consideration, resulting from Joined Cases C-204/00 P, C-205/00 P, C-211/00 P, C-213/00 P, C-217/00 P and C-219/00 P *Aalborg Portland and Others v Commission* [2004] ECR I-123, paragraph 126, that it cannot be for the Commission alone to determine the documents of use in the defence of the undertaking concerned relates to documents within the Commission's file and cannot apply to the replies given by other parties concerned to the statement of objections (*Heineken Nederland and Heineken v Commission*, paragraph 352 above, paragraph 254).

354 In Joined Cases T-25/95, T-26/95, T-30/95 to T-32/95, T-34/95 to T-39/95, T-42/95 to T-46/95, T-48/95, T-50/95 to T-65/95, T-68/95 to T-71/95, T-87/95, T-88/95, T-103/95 and T-104/95 *Cimenteries CBR and Others v Commission* [2000] ECR II-491, on which the applicant relies, the Court examined a series of arguments alleging that the Commission had not granted access to documents which, according to the undertakings concerned, would have been of use for the preparation of their defence during the administrative procedure. The documents concerned were, in addition to other addressees' replies to the statement of objections, the transcripts of the hearings relating to the national agreements and concerted practices, a Commission file on the notification of a certain system, the Commission's file on certain State aid, some internal notes of the Commission and the written statements of defence in the other cases concerning the same cartel (paragraph 380 of that judgment). Although not part of the investigation file, the documents concerned were in the Commission's possession.

355 The present situation can however be distinguished from the situation that formed the basis of the case-law cited in paragraphs 349 to 354 above. In the present case, the documents concerned were not even in the Commission's possession. The issue raised does not therefore relate to the scope of the right of access to the file.

356 The applicant claims that the reasoning followed by the case-law regarding the right of access to exculpatory documents already on the case file must apply a fortiori where the Commission not merely failed to disclose, but failed even to procure, relevant exculpatory documents. The logic of that line of argument seems to be that, if it cannot be accepted that only the Commission verifies which documents in the file may be of use for the defence of the undertakings concerned, the situation would be even more serious if certain documents do not appear at all in the file, so that even the Commission is unable to verify whether they contain exculpatory evidence.

357 That line of argument is not convincing. Such logic fails to take account of the fact that the idea underpinning the case-law as regards the right of access to the full case file is that equality of arms requires that the knowledge which the undertaking concerned has of the file used in the proceedings be the same as that of the Commission (see, to that effect, *Solvay*, paragraph 349 above, paragraph 83). With respect to documents that the Commission does not itself have in its possession, there is no risk that the Commission will rely on incriminating evidence which appears in those documents and fail to give sufficient consideration to the exculpatory evidence. The disparity observed in paragraph 83 of *Solvay*, paragraph 349 above, namely that the Commission was able to decide alone whether or not to use documents against the applicant, although the applicant did not have access to those documents and could not therefore have decided accordingly whether or not to use them for its defence, does not exist in the present case. Therefore, the same problem of equality of arms as in the case of documents in the Commission's administrative file does not arise.

358 The question which arises in the present case is in fact whether the Commission complied with its obligation to investigate the case carefully and impartially.

359 In that regard, it should be noted that the guarantees afforded by the European Union legal order in administrative proceedings include, in particular, the principle of sound administration, enshrined in Article 41 of the Charter of Fundamental Rights, which entails the duty of the competent institution to examine carefully and impartially all the relevant aspects of the individual case (Joined Cases T-191/98, T-212/98 to T-214/98 *Atlantic Container Line and Others v Commission* [2003] ECR II-3275, paragraph 404 and the case-law cited).

360 However, it should be noted that, in principle, it is for the Commission to decide how it wishes to conduct the investigation in a competition case and to decide what documents it must collect in order to have a sufficiently complete picture of the case.

361 It is not appropriate to impose on the Commission an obligation to obtain as many documents as possible in order to ensure that it obtain all potentially exculpatory evidence. Apart from the fact that the Commission's resources are limited, it would be impossible for the Commission to ensure that no potentially exculpatory evidence escapes its attention.

362 If an undertaking that is the subject of a procedure which may lead to the imposition of a fine for infringement of competition law requests the Commission to obtain certain documents, it is for the Commission to examine that request. It has a margin of discretion in deciding whether it should obtain the documents in question. The parties to a procedure have no unconditional right to the Commission's obtaining certain documents, since it is for the Commission to decide how it conducts the investigation of a case.

363 In that regard, it is apparent from the case-law that the Commission cannot be required to carry out further investigations where it considers that the preliminary investigation of the case has been sufficient (*Case 9/83 Eisen und Metall v Commission* [1984] ECR 2071, paragraph 32, and *Case T-141/94 Thyssen Stahl v Commission* [1999] ECR II-347, paragraph 110).

364 That does not preclude the possibility that, in certain circumstances, there may be an obligation on the Commission to examine a certain aspect of the file.

365 Thus, in *Thyssen Stahl v Commission*, paragraph 363 above, the General Court held in paragraph 97 that it follows from the principles of sound administration and equality of arms that the Commission was under an obligation to examine seriously the applicant's claims that officials from another Commission Directorate-General had encouraged it to implement the practices of which the Decision accused it, whilst specifying that it was for the Commission, and not for the applicants, to decide how to conduct such an examination. The Court relied on the circumstances that the Commission found itself facing allegations of importance for the defence of the undertakings in question, and that it was in a privileged position to establish whether those allegations were true or false, since the conduct of its own departments was involved (*Thyssen Stahl v Commission*, paragraph 363 above, paragraph 96). It should be noted that that judgment merely held that the Commission was obliged to examine a certain aspect of the case file by carrying out an internal investigation. That judgment did not concern an obligation on the Commission to obtain certain documents.

366 It is apparent from the case-law cited in paragraphs 363 and 365 above that the Commission has control over the investigation. First, it may in principle decide when the investigation of the case has been sufficient. Second, even in a situation in which the Commission has an obligation to examine a certain aspect of the file, it is for the Commission to decide how to conduct such an examination (see, to that effect, *Thyssen Stahl v Commission*, paragraph 363 above, paragraph 97).

367 The applicant also relies in support of its line of argument on *Case T-314/01 Avebe v Commission* [2006] ECR II-3085.

368 It is clear from paragraph 70 of that judgment that, in the case in question, Avebe submitted an exchange of correspondence between its counsel and the United States Department of Justice, from which it is apparent that Avebe had made a number of attempts to obtain from that department a copy of an alleged statement by another undertaking to the United States authorities, which, according to Avebe, was exculpatory for it. Avebe had wished to lodge it with the Commission as part of the administrative procedure. However, according to that exchange of correspondence, the United States authorities rejected those requests, stating that, if necessary, they would be prepared to supply the relevant document to the Commission if the Commission requested them to do so.

369 In that judgment, the Court rejected Avebe's line of argument that the Commission was required to obtain a copy of the document at issue from the competent United States authorities, relying on the fact that, during the administrative procedure, Avebe had not made an express request to the Commission to obtain that document (paragraph 72 of that judgment). The Court held expressly, in paragraph 71 of that judgment, that it was not necessary to examine the issue of whether the Commission had to take appropriate measures to obtain a copy of the alleged statement to the United States authorities.

370 In that judgment, the Court did not therefore set out the conditions under which the Commission might be required to obtain certain documents from a third party. The Court was entitled to confine itself to setting out a single condition relating in that instance to the existence of an express request to that effect during the administrative procedure, that condition in any case not having been fulfilled in the case concerned.

2) Determination of the conditions

371 It should be noted that, in certain circumstances, there may be an obligation on the Commission to obtain certain documents at the request of an undertaking which is the subject of an investigation. Such an obligation on the Commission must however be limited to exceptional circumstances since, in principle, it is for the Commission and not for the undertakings concerned to decide how the Commission conducts the investigation of a case.

372 Where an undertaking which is the subject of an investigation has become aware of the existence of an exculpatory document, but is unable to obtain it itself or is prevented from submitting it to the Commission, whereas the Commission is able to obtain that document and use it, the Commission may be obliged in certain circumstances to obtain that document following an express request to that effect by the undertaking concerned. It is for the Commission to conduct an investigation carefully and impartially, and it may not therefore merely gather incriminating documents and turn a blind eye to the existence of exculpatory evidence.

373 Nevertheless, it is necessary to weigh the Commission's obligation to investigate a case carefully and impartially, on the one hand, against the Commission's power to decide how it wishes to conduct its investigations and deploy its resources in order to efficiently ensure compliance with competition law, on the other.

374 An obligation on the Commission to obtain certain documents at the request of an undertaking must therefore be subject, in addition to the condition of a request to that effect during the administrative procedure (see paragraphs 369 and 370 above), at least to the cumulative conditions set out in paragraphs 375 to 382 below.

375 Such an obligation is, first of all, subject to the condition that it in fact be impossible for the undertaking concerned to obtain itself the documents in question or to disclose them to the Commission. Given that the Commission has control over its investigations, such an obligation must be limited to exceptional cases, in which the undertaking which is the subject of the investigation is faced with an obstacle that it cannot overcome alone, since it is aware of the existence of an exculpatory item of evidence but is unable to obtain it or disclose it to the Commission.

376 It is therefore for the undertaking concerned to establish that it took all steps to obtain the documents at issue and/or obtain permission to use them in the Commission's investigation.

377 Moreover, it is for the undertaking concerned to identify the documents that it requests the Commission to obtain as precisely as it can. The establishment on an exceptional basis of an obligation on the Commission to obtain certain documents at the request of an undertaking which is the subject of an investigation presupposes cooperation by that undertaking.

378 Next, an obligation for the Commission to obtain certain documents at the request of an undertaking which is the subject of an investigation is conditional upon the relevant documents' probably being of considerable importance for the defence of the undertaking concerned.

379 In that regard, it should be borne in mind that it is in principle for the Commission to decide when its file is sufficiently complete to adopt its final decision (see, to that effect, *Eisen und Metall v Commission*, paragraph 363 above, paragraph 32, and *Thyssen Stahl v Commission*, paragraph 363 above, paragraph 110). The mere fact that certain documents may contain exculpatory evidence does not suffice to establish an obligation on the Commission to obtain them at the request of a party concerned by the investigation. Where the Commission considers that the investigation of the case has been sufficient, it is not required to continue the investigation in order to obtain an even more complete picture of the case. In investigations into competition law infringements, there is often an extremely high quantity of documents which might potentially contain exculpatory evidence and it is always possible to shed even more light on certain aspects of a case file, but the Commission's resources are limited.

380 The Commission has a margin of discretion in deciding whether the significance of alleged exculpatory evidence justifies its obtaining that evidence and it may, for example, reject a request on the ground that the potentially exculpatory material concerns issues which are not central to the findings necessary to establish an infringement.

381 It is necessary to reject the applicant's argument that, in his Opinion in Case C-36/92 P *SEP v Commission* [1994] ECR I-1911, point 21, Advocate General Jacobs described the correct criterion as whether 'the Commission [may] reasonably suppose, at the time of the request, that the document would help it to determine whether the alleged infringement had taken place'. That passage concerns the conditions under which the Commission is entitled to request a document to be communicated and not the very different question of the conditions under which the Commission is obliged to obtain certain documents.

382 Lastly, it should be noted that the Commission may *inter alia* reject a request if the volume of documents at issue is disproportionate to the importance that the documents may have in the context

of the investigation. In that respect, it is open to the Commission to take into consideration, where relevant, the fact that obtaining and analysing the documents at issue may substantially delay the investigation of the case. The Commission is entitled to weigh the volume of documents requested and the delay that obtaining and studying those documents might cause for the investigation of the case, on the one hand, against the degree of potential relevance for the defence of the undertaking, on the other.

c) Examination of the conditions in this particular case

383 It is necessary to examine whether the cumulative conditions as set out above have been fulfilled in the present case for the documents submitted by AMD in the proceedings in the State of Delaware and identified in the List referred to in paragraph 342 above ('the AMD Delaware documents').

1) Intel's obligation to take all necessary measures to obtain permission to use the AMD Delaware documents in the Commission's investigation

1.1) The contested decision and the arguments of the parties

384 At recital 67 of the contested decision, the Commission observes that the applicant did not establish that it exhausted all steps available to it to provide the Commission with more documents from the proceedings in the State of Delaware, although Intel was able to provide it with documents produced by Dell in that litigation quickly.

385 In the defence, the Commission contends that the applicant was itself in a position to obtain permission to use the AMD Delaware documents in the Commission procedure.

386 The Commission states moreover that the Protective Order is based on a confidentiality agreement concluded between Intel and AMD and accepted by the applicant in its own interest. The Commission observes that, under the Protective Order, all information produced by AMD and the applicant in the proceedings in the State of Delaware was by default initially classified as confidential, but without prejudice to the parties' right to obtain consent that those documents be 'used for any lawful purpose'. It states that, pursuant to paragraph 16 of the Protective Order, Intel could have sought consent from AMD for the disclosure to the Commission of documents that AMD produced in the proceedings in the State of Delaware, with the United States court as final arbiter if AMD had refused. The Commission contends that, as of 26 September 2006, namely the date of the Protective Order, the applicant had at its disposal a mechanism in order to obtain permission to use the AMD Delaware documents in the Commission's administrative procedure, but that the applicant did not even try to make such a request.

387 Moreover, in the Commission's submission, AMD would have welcomed a request from Intel for waivers for the purposes of using the AMD Delaware documents during the Commission's investigation as it would have allowed AMD to seek a reciprocal waiver over Intel documents which could have substantiated AMD's own complaint.

388 In reply to that line of argument, the applicant claims that there was no possibility that AMD, its opponent in the proceedings in the State of Delaware and the complainant before the Commission, would have agreed to assist Intel in the procedure before the Commission while the litigation in the State of Delaware was pending, and that a request to the Delaware court to remove the confidentiality designations applied to such documents would have been fruitless. Moreover, the applicant submits that, in the absence of a legislative provision requiring exhaustion of administrative remedies, the imposition of such a requirement would inappropriately limit the rights of the defence, and it cites in that regard point 38 of the Opinion of Advocate General Mazák in Case C-407/08 P *Knauf Gips v Commission* [2010] ECR I-6375.

389 In the context of the replies to the written questions put by the Court, the applicant moreover claimed that AMD had no interest in reciprocity prior to the adoption of the contested decision, because the Commission's case file contained a vast amount of Intel documents but very few AMD documents. The Commission offers no contemporaneous evidence to support its speculation that AMD would have welcomed a request from Intel during the investigation, subject to reciprocity.

1.2) Findings of the Court

390 In the present case, the applicant has failed to establish that it was unable to obtain from AMD permission to use the AMD Delaware documents.

391 First of all, it should be noted that, in reply to a question put by the Court at the hearing, the applicant admitted that it had not requested AMD to grant such permission.

392 However, it was not impossible that AMD would have granted it such permission if the applicant had put such a request to AMD. AMD was bound just like the applicant by the Protective Order and

was unable to provide the Commission with the documents submitted by Intel in the proceedings in the State of Delaware unless the confidentiality designation of those documents was removed. It is therefore entirely possible that AMD would have permitted the applicant to use the AMD Delaware documents subject to the applicant's granting it reciprocal permission to use the documents of the proceedings in the State of Delaware from Intel in the Commission's administrative procedure.

393 The Court must reject the applicant's argument that AMD had no interest in reciprocity prior to the adoption of the contested decision because the Commission's case file contained a vast amount of Intel documents but very few AMD documents.

394 In that respect, it should be noted that, according to Intel, it had provided the electronic equivalent of over 145 million pages in the proceedings in the State of Delaware. Clearly, the fact that the Commission's administrative file contained 'a vast amount' of Intel documents does not establish that, among the more than 145 million pages provided by Intel in the proceedings in the State of Delaware, there were no documents that AMD might have wished to rely on as incriminating evidence.

395 For the sake of completeness, the Court would point out that the applicant stated, at the hearing, that if it had requested permission from AMD during the Commission's investigation to use a relevant category of documents, AMD would have almost inevitably said that, if Intel wanted some of AMD's documents, AMD then wished to place in the Commission's file a vast raft of additional documents to supplement its complaint. That statement is however inconsistent with the applicant's assertion, in the context of the replies to the written questions, that AMD had no interest in reciprocity prior to the adoption of the contested decision.

396 Nor can the applicant reasonably complain that the Commission offered no contemporaneous evidence to support its speculation that AMD would have welcomed a request from Intel during the investigation, subject to reciprocity. It is not for the Commission to establish that AMD would have given permission to Intel to use the AMD Delaware documents, but it is for the applicant to establish that it was unable to obtain that permission, even though it took all steps to do so.

397 As it cannot be ruled out that AMD would have granted the applicant permission to use the AMD Delaware documents, it was for the applicant to request such permission. Clearly, the mere fact that AMD might have requested reciprocal permission cannot exempt the applicant from that obligation. The applicant complains that the Commission adopted the contested decision on the basis of an incomplete file. In that regard, the Court observes that the Commission's file would have been even more complete if it had contained, in addition to the AMD Delaware documents which the applicant considered to be exculpatory, the documents provided by Intel in the proceedings in the State of Delaware which AMD considered to be incriminating. The applicant may not, on the one hand, benefit from the Protective Order in the sense that AMD cannot provide the Commission with potential incriminating documents from the documents submitted by Intel in the proceedings in the State of Delaware and, on the other, avoid suffering the disadvantages of that order by demanding that the Commission obtain from AMD potential exculpatory evidence from the documents that AMD submitted in the proceedings in the State of Delaware.

398 The applicant further claims that, in the absence of a legislative provision requiring exhaustion of administrative remedies, the imposition of such a requirement would inappropriately limit the rights of the defence, and it cites in that regard point 38 of the Opinion of Advocate General Mazák in *Knauf Gips v Commission*, paragraph 388 above.

399 In that case, the Commission had refused an applicant access to the replies to the statement of objections of other parties to the procedure. That applicant claimed a breach of the right of access to the file. The Commission considered that the applicant could not properly claim a breach of its rights of defence. In that regard, the Commission relied on the fact that the applicant in that case had not exhausted the remedies against the refusal to grant it the access requested, since it had not seized the hearing officer. Advocate General Mazák proposed that that line of argument be rejected and he considered that, in the absence of any legislative provision which specifically requires an interested party to exhaust the remedies available to it during the administrative procedure before the Commission, the imposition of such a requirement by the Court would inappropriately limit the rights of defence of that party and deny it full access to justice (Opinion of Advocate General Mazák in *Knauf Gips v Commission*, paragraph 388 above, point 38).

400 The Commission points out that the position of Advocate General Mazák has been contradicted by other case-law, namely Case T-44/00 *Mannesmannröhren-Werke v Commission* [2004] ECR II-2223, paragraphs 51 to 53).

401 In the present case, it is not necessary to deal with the question whether Advocate General Mazák's line of argument should be followed. The facts giving rise to the present proceedings are different from those underlying the case in *Knauf Gips*. In that case, the question arose as to whether the applicant was obliged to exhaust the remedies at its disposal during the administrative procedure



before the Commission against a refusal by the Commission to grant access to certain documents that were in its possession, namely the replies of other parties to the statement of objections.

402 In the present case, the issue which arises is not the exhaustion of remedies against a Commission decision, but whether a possible obligation on the Commission to obtain the AMD Delaware documents was conditional upon efforts by the applicant to obtain itself permission from AMD to use those documents. That was indeed the case, as the obligation on the Commission to obtain certain documents at the request of an undertaking which is the subject of an investigation must be limited to exceptional cases, and it must be impossible for the undertaking concerned to disclose itself those documents to the Commission (see paragraph 375 above).

403 The Court would point out that it is not a question here of restricting a right that the applicant has, by reason of its rights of defence, by requiring exhaustion of the remedies against a refusal by the Commission to grant that right. On the contrary, it is a matter of defining the scope of a possible right of the applicant to have the Commission undertake specific measures of inquiry by obtaining certain documents.

404 As it cannot be ruled out that AMD would have granted Intel permission to provide the Commission with the AMD Delaware documents, if necessary subject to reciprocity, it was for Intel to attempt to obtain that permission. It is not necessary to examine whether, in addition, a request by Intel to the court of the State of Delaware to lift the confidentiality of those documents would have had a chance of success.

405 It follows from the foregoing that the Commission was not obliged to obtain the AMD Delaware documents, since the applicant has failed to establish that it was unable to obtain permission from AMD to use those documents.

## 2) The importance of the documents for the applicant's defence

406 It is apparent from the List that the documents or categories of documents that the applicant requested the Commission to obtain concern AMD's capacity constraints (points 1 to 9 of the List), its execution failures (points 10 to 33 and 85 of the List), its high-price strategy in Europe (points 34 and 35 of the List), its weak technical and marketing performance and its lack of credibility as a supplier (points 36 to 57, 83 and 84 of the List), industry practice (points 58 to 63 of the List), the fact that Intel and AMD were in competition with one another (points 64 to 82 of the List) and data concerning the AEC test (points 86 and 87 of the List).

407 The Court notes that documents which concern AMD's capacity constraints, its execution failures, its high-price strategy in Europe and its weak technical and marketing performance, as claimed by the applicant, might have been relevant to showing that the applicant's customers had valid business reasons for sourcing from Intel rather than from AMD. However, the existence of such valid business reasons, even if established, is not capable of rebutting the evidence relied upon in the contested decision in order to establish the existence of the exclusivity rebates and the naked restrictions (see paragraphs 540 to 543 and 1096 to 1101 below). Moreover, as regards the categorisation as abusive of the practices found in the contested decision, it must be stated that the Commission is not required to demonstrate either actual effects of those practices or a causal link between those practices and the OEMs' commercial decisions (see paragraphs 104 and 212 above).

408 Furthermore, the Court would point out that the fact that other reasons might have favoured the choice of sourcing exclusively or almost exclusively from the applicant does not preclude the possibility that the applicant's practices which are the subject of the contested decision might also have been taken into account by customers in their decisions.

409 It follows that, in relation to the categories of documents listed in paragraph 407 above, the condition that it must be probable that the documents that the undertaking requests the Commission to obtain be of considerable importance for its defence is not fulfilled.

410 In that context, the applicant's argument that an undertaking which is the subject of an investigation may itself choose how to frame its defence must be rejected. The usefulness for the defence of the undertaking must be assessed objectively and if an undertaking which is the subject of an investigation wrongly takes the view that certain arguments are very relevant to its defence, the Commission cannot be obliged to obtain documents which, according to that undertaking, may support those arguments.

411 As regards the industry practice claimed by Intel, the Court makes the following observations.

412 Points 58 to 60 of the List concern industry practice regarding funding agreements concluded between CPU manufacturers and computer retailers. In that regard, it should be noted that the objection against Intel in the contested decision is not that it concluded funding agreements with MSH, but that the financial incentive was conditional upon exclusivity. Documents demonstrating that funding

agreements are common in the industry would not therefore have been exculpatory for the applicant. The fact that other retailers might have concluded funding agreements at the same time with Intel and AMD could not have called in question the fact that the evidence on which the Commission relies in the contested decision demonstrates the existence of an exclusivity condition in the agreements concluded between Intel and MSH (see paragraph 1487 below).

413 Points 61 to 63 of the List concerned documents which, according to what is stated under the heading 'relevance of omitted documents to [the Statement of Objections of 2007/Supplementary Statement of Objections of 2008]', were relevant in terms of AMD's aggressive tactics which were 'indicative of the fierce competitive atmosphere and help[ed] clarify that Intel's competitive strategies constituted normal competition on the merits in an intensely competitive business'. In that regard, the Court would point out that the fact that aggressive tactics might have been normal in the CPU industry could not call in question either the evidence of the existence of the exclusivity rebates and naked restrictions or their categorisation as abusive. That is also the case in respect of the existence of a 'competitive atmosphere'. The existence of a 'competitive atmosphere' could at most demonstrate that there was no actual foreclosure. However, it would not be capable either of refuting the existence of the practices at issue in the contested decision or of calling in question their capability to restrict competition.

414 As regards Intel's allegedly meeting competition (points 64 to 82 of the List), the Court makes the following observations.

415 Point 64 of the List concerns the situation of an OEM in relation to which no infringement was established in the contested decision. The documents which might demonstrate, in the applicant's submission, that AMD was not prevented from competing with Intel in relation to this OEM could not therefore have been exculpatory for Intel.

416 Points 65 to 71 of the List concern documents which, in the applicant's submission, would have been relevant to demonstrating that 'AMD and Intel were competing for Lenovo's business as best each could, demonstrating normal competition on the merits in a highly competitive market place'. The applicant requested the Commission to obtain from AMD documents concerning AMD's proposals to Lenovo and the negotiations between those undertakings. In that regard, it should be noted that the fact that AMD also submitted proposals to Lenovo and that it negotiated with Lenovo is not capable of calling in question either the evidence of the existence of Intel's practices regarding Lenovo found in the contested decision or the capability of those practices to restrict competition. The mere fact that Lenovo negotiated with AMD does not preclude either Lenovo's having received financial incentives conditional upon postponing the launch of AMD-based products and sourcing exclusively from the applicant or those incentives' having had an influence on Lenovo's commercial decisions (see paragraphs 530 and 1089 below).

417 Points 72 to 82 of the List concern documents which, in the applicant's submission, would have been relevant to demonstrating that 'AMD and Intel were competing for MSH's business and AMD had an equal opportunity to compete for that business if it wished to do so'. The applicant requested the Commission to obtain from AMD documents concerning AMD's 2002 and 2004 proposals to the German company Media Markt, relating to MSH's interest in purchasing AMD-based products and AMD's corresponding proposals, as well as documents relating to AMD's proposals to other retailers. In that regard, the Court finds that the fact that also AMD made proposals to Media Markt and that MSH considered the possibility of purchasing AMD-based products does not call in question either the evidence of the existence of Intel's practices regarding MSH found in the contested decision or their capability to restrict competition. The mere fact that AMD made proposals to Media Markt and that MSH considered the possibility of purchasing AMD-based products does not preclude either MSH's having received financial incentives conditional upon its selling exclusively Intel-based products or those incentives' having had an influence on MSH's commercial decisions (see paragraphs 530 and 1089 below). The proposals made by AMD to other retailers cannot call in question the conclusions of the contested decision for the reasons set out in paragraph 412 above.

418 As regards the data concerning the AEC test (points 86 and 87 of the List), it is sufficient to recall the lack of relevance of the AEC test in the present case (see paragraphs 142 to 166 above).

419 It follows from the foregoing that none of the documents or categories of documents indicated in the List was of such importance for the applicant's defence that the Commission might have been obliged to obtain them.

420 The applicant relies moreover on new documents that it produced, after settlement of the case in the State of Delaware between itself and AMD, in annex to the reply and that it cited in paragraphs 298 to 304 thereof, documents which, according to the applicant, were exculpatory. However, those documents are not capable of calling in question the result at which the Commission arrived, and there is no need to adjudicate on their admissibility, which the Commission disputes.

421 In that regard, the Court observes that the criterion of assessment is not whether some of the AMD Delaware documents were exculpatory, since the question which arises in the present case does not concern a refusal to give access to the file, but the obligation on the Commission to conduct the investigation carefully and impartially. The existence of an obligation on the Commission to obtain certain documents must be examined in the light of the conditions set out in paragraphs 374 to 382 above, in particular in the light of the condition that it must be probable, at the time of the administrative procedure, that the documents at issue were of considerable importance for the defence of the undertaking concerned.

422 For the sake of completeness, the Court makes the following observations regarding the content of those documents.

423 The applicant claims that it is apparent from those documents, inter alia, that AMD was not successful with Dell, since Dell was concerned by the fact that AMD had not kept its promises in terms of performance, that AMD had recognised that Dell had valid business reasons for not sourcing from it and that Dell persisted in pursuing its relationship with AMD. In that regard, it should be noted that the fact that Dell might also have had other reasons for not sourcing from AMD does not call in question either the evidence of the existence of the exclusivity rebates or preclude their capability to restrict competition (see paragraphs 540 to 546 below). Similarly, the fact that Dell continued its relationship with AMD and constantly evaluated the possibility of switching to AMD does not call in question the existence of an exclusivity rebate (see paragraph 530 below).

424 The applicant also states that it is apparent from one of the documents at issue that the [confidential] of HP told AMD that 'the failures [AMD's at HP] had nothing to do with Intel'. In that regard, it must be stated that the Commission proved the existence of the exclusivity rebates and naked restrictions to the requisite legal standard, as is apparent from paragraphs 673 to 873 below. The document cited by Intel can only demonstrate that HP denied, during a meeting with AMD, that AMD's failures with HP were linked to Intel's conduct. That cannot call in question the evidence which clearly demonstrates the existence of the exclusivity rebates and naked restrictions. In that context, it should be noted that HP had an interest in not disclosing to AMD the unwritten conditions of the agreements between HP and Intel.

425 Similarly, the internal views of AMD on the reasons for its failures and AMD's internal emails regarding the quality of its products and its reputation cannot call in question the existence of the exclusivity rebates and naked restrictions. At the very most, they might demonstrate that customers might also have had other reasons for sourcing from Intel.

### 3) The proportionality of the request

426 The Court notes that most of the points in the List do not concern specific documents, but categories of documents.

427 The Commission is right in stating that, if it had granted the applicant's request in its entirety and asked AMD to provide all the categories of documents set out in the List, AMD might have supplied an enormous quantity of documents. The Court observes that, according to the applicant's own statement, AMD produced some 45 million pages of evidence in the context of the proceedings in the State of Delaware. If the Commission had asked AMD, for example, to produce '[a]ll AMD documents relating to AMD's capacity constraints' (points 1 to 3 of the List), AMD might have provided the Commission with a potentially enormous quantity of documents. The same applies as regards, for example, '[a]ll AMD documents relating to AMD's sales projections and actual sales figures' (points 6 to 9 of the List), '[a]ll AMD documents relating to its delivery and design failures' (points 10 to 12, 16 to 24, 33 and 52 to 56 of the List), '[a]ll AMD documents relating to its performance and customer perception in the enterprise segment' (points 13, 37 to 43 and 57 of the List) or 'in the mobile segment' (points 48, 49 and 51 of the List).

428 The Commission's investigation might have been considerably delayed if it had requested the production of all the documents included in those broad categories, studied the documents produced, given the applicant access to those documents and obtained the applicant's observations on those documents.

429 The Commission was therefore entitled to take the view that Intel's request, considered as a whole, was disproportionate in relation to the potential value that those documents might have added to the documents already in its possession.

430 The Commission was also entitled to take account of the fact that the procedure was at an advanced stage when the applicant requested it to obtain the additional documents and that the adoption of the contested decision risked being delayed considerably if it had granted the applicant's request.

431 As the Commission points out, the applicant's line of argument amounts to giving the undertaking under investigation rather than the Commission autonomy over how to deploy resources to ensure efficient competition law enforcement.

432 Lastly, it should be recalled that, by letter of 21 May 2008, following the publication online of the pre-trial briefs written by the applicant and AMD in the context of the proceedings between them in the State of Delaware, the Commission requested both the applicant and AMD to submit to it all the documents written by or received by them and which were cited in their respective pre-trial briefs (see paragraph 340 above).

433 As the Commission notes, an order of the Delaware court of 28 March 2008 stated that those pre-trial briefs should contain each party's 'main, factual contentions in support of each of the elements of its claims or defenses'.

434 The Commission was therefore entitled to take the view that it had obtained the evidence that the parties regarded as most relevant, both of an incriminating and exculpatory nature. The Commission was entitled to take the view that it had taken the necessary steps to have a sufficiently complete view of the case by having requested Intel and AMD to produce the documents which were cited in their respective pre-trial briefs.

435 In that respect, it should be recalled that the question which arises in the present case is whether the Commission complied with its obligation to investigate the case carefully and impartially (see paragraph 358 above). Since the Commission asked for all the documents cited by the applicant and AMD in their respective pre-trial briefs, the Commission cannot be accused of conducting a biased investigation.

#### d) Conclusion on this complaint

436 It follows from all the foregoing that the complaint relating to the Commission's refusal to obtain certain documents from AMD must be rejected. The applicant should have attempted to obtain permission from AMD to disclose the AMD Delaware documents to the Commission. The fact that the applicant did not do so is a sufficient basis for rejecting that complaint, since the conditions laid down in paragraphs 374 to 382 above are cumulative. Moreover, the Commission was not obliged to obtain the AMD Delaware documents, since it was not probable that they would have been of considerable importance for the applicant's defence. In addition, the Commission was entitled to take the view that Intel's request, considered as a whole, was disproportionate in relation to the potential value that those documents might have added to the documents already in its possession. It is not therefore necessary to examine whether the applicant could have identified more precisely the documents that it requested the Commission to obtain.

#### *D – Errors of assessment concerning the practices relating to the various OEMs and MSH*

##### 1. Dell

437 Pursuant to Article 1(a) of the contested decision, Intel granted rebates to Dell between December 2002 and December 2005 at a level that was conditional on Dell purchasing all of its x86 CPU supplies from Intel.

438 In recital 182 of the contested decision, the Commission states that, until 2006, Dell produced exclusively Intel-based computers. It states that, in May 2006, Dell announced that it would produce AMD-based computers for the first time, and that Dell shipped its first AMD-based PCs in September 2006 and its first AMD-based servers in October 2006.

439 The contested decision provides, in essence, that, during the period in question, various types of rebate were granted by Intel through a Meet Competition Program ('MCP'). It states that that program was also referred to as the 'Mother of all programs' ('the MOAP'), and that there is no complete written agreement outlining the terms of the MCP. The precise terms of the rebates relating to the MCP changed over time, as did the way the rebates were calculated. During the period in question, the total amount of rebates granted by Intel to Dell under the MCP ('MCP rebates') was between USD 110 and 479 million per quarter.

440 In the contested decision, the Commission does not conclude that there was a formal exclusive supply obligation. However, in recitals 927 and 950 of the decision, it is stated that the level of MCP rebates granted was de facto conditional on exclusivity.

441 In that regard, in recital 323 of the contested decision, the Commission came to the conclusion, among others, that, during the period in question, Intel made clear to Dell, including at the very highest of levels, that its MCP rebates would significantly diminish if Dell were to discontinue its exclusive relationship with Intel. Dell was convinced that the level of its MCP rebates was based on its status as an exclusive Intel vendor.

442 In recital 221 of the contested decision, the Commission found that Dell was uncertain as to what part — a large part or even all — of the MCP rebates would be lost if it switched part of its supplies to a competitor supplier. It was also concerned as to whether those rebates would be granted instead to a competitor OEM. In any event, Dell invariably concluded that the MCP rebate, or a large part of it, would be lost if this occurred.

443 Moreover, according to recitals 933 and 950 of the contested decision, the MCP rebates influenced Dell's decision to use the applicant as its exclusive supplier during the period in question in the contested decision. They thus had the effect of restricting Dell's freedom to choose its source of x86 CPU supply and preventing other competitors from supplying Dell.

a) Assessment of the evidence provided in the contested decision to establish that Intel communicated to Dell that the level of the MCP rebates was conditional upon exclusivity

444 In the contested decision, the Commission relied inter alia on the evidence listed below to prove that, between December 2002 and December 2005, the applicant communicated to Dell that the level of the MCP rebates was conditional upon exclusivity:

– internal Intel documents;

– Dell's response of 17 April 2007 to a request for information from the Commission under Article 18 of Regulation No 1/2003 ('Dell's Article 18 response');

– internal Dell documents;

– an email of 7 December 2004 from Mr I1, [confidential], to Mr D1, [confidential] of Dell.

445 In essence, the applicant disputes, first, that the level of the MCP rebates was conditional upon exclusivity and, second, that it communicated that fact to Dell. It is thus appropriate to present the content of the evidence referred to above and to examine whether it establishes, to the requisite legal standard, that (i) the level of the MCP rebates was conditional upon exclusivity and (ii) whether the applicant communicated that fact to Dell. Finally, the other arguments raised by the applicant need to be examined.

1) The evidence that the level of the MCP rebates was conditional upon exclusivity

1.1) The internal Intel documents

i) Content

446 The Commission finds, in recital 239 of the contested decision, that, in a presentation of 10 January 2003, Mr I1, [confidential], outlined a list of objectives to be achieved by Intel in a high-level executive meeting between Dell and Intel. The list included the following objective: 'Get [Mr D4], [confidential] clearly [to] understand our meet-comp process and how it applies to DELL — i.e. if they have AMD in their arsenal they'll have less meet-comp exposure-hence less meet-comp dollars avail to them — even the possibility that meet-comp dollars that we're applied [sic] to DELL go somewhere else ...' According to the contested decision, that objective was reiterated in a presentation of 5 February 2003 that served as a briefing for a Dell executive dinner, which was worded as follows:

'Somehow, with finesse, we need [Mr D4] to understand that if Dell adds AMD to their product line they no longer have a meet-comp exposure — We have a meet-comp exposure so we must prioritise opportunities on a case by case [basis].'

447 In recital 240 of the contested decision, the Commission states that, on 17 February 2006, Mr I1 informed Mr I2, [confidential], that Dell had announced that it had no plans to begin using chips from AMD, stating: 'Finally something positive ...' According to the contested decision, in an email sent on the same day, Mr I2 replied:

'[T]he best friend money can buy ...'

448 Finally, in recital 241 of the contested decision, the Commission notes that, in an email of 18 June 2006, Mr I2 wrote to Lenovo's [confidential], Mr L1, about the consequences of Dell's decision to introduce AMD-based computers in its portfolio, saying: '[A]ny meet-comp program that we may have had with Dell will get nullified as they introduce competition.'

ii) Probative value

449 The applicant submits, in essence, that its internal documents do not show that its rebates were conditional upon exclusivity. In recitals 306 and 311 of the contested decision, the Commission stated that the relevant question was whether Dell would have suffered a 'disproportionate' reduction in

rebates if it had switched to AMD. For its theory of conditionality to be sustainable, therefore, the Commission had to prove that if Dell had switched at least part of its purchases to AMD the extent of the loss would have been disproportionate. However, the Commission did not succeed in proving that disproportionality.

450 According to the applicant, the presentation given by Mr I1 on 10 January 2003, referred to in paragraph 446 above, merely shows that Dell would have less meet-comp exposure and therefore would receive less meet-comp dollars if it switched to AMD. This does not suggest, however, that Intel's response would have been 'disproportionate'. The Commission's assumption to the contrary ignores the fact that the MCP rebates were also intended to address competitive threats to Dell from other OEMs. Thus, Intel determined the total amount or percentage to be offered in part on the basis of an assessment of the competitive threats faced by particular Dell products or programs. Since Dell would most likely have switched to AMD the CPUs which faced the greatest competitive exposure downstream, the switch could have had an impact on the appropriate MCP level unrelated to the volumes switched and without being punitive. If Dell had switched to AMD, its need for MCP would simply have been less because the new mix of CPUs purchased by Dell from Intel would have faced (on average) a reduced level of downstream competition. In the applicant's view, neither the presentation of 10 January 2003 nor that of 5 February 2003 thus implies a disproportionate reduction in rebates, but rather a proportionate reduction, given that the rebates were reduced in proportion to the reduced exposure to the AMD-based products of Dell's competitors.

451 When questioned on that point by the General Court at the hearing, the applicant essentially confirmed that the rebates granted to Dell did not increase or decrease exactly in line with the volume purchased. It explained that fact by confirming that the rebates were negotiated more intensely for the parts of the market which were more competitive downstream. It submitted that the concept of disproportionate reduction must not be understood as referring solely to the volume purchased. It is of fundamental importance for the Commission's case that the concept of disproportionate reduction means the same as that of conditionality. According to the applicant, a rebate reduction can be regarded as disproportionate only in so far as an equally-efficient competitor could not provide compensation to the client for the amount of rebate lost.

452 First, it should be noted that it is apparent from the contested decision that the abuse of which the applicant is accused, regarding Dell, is based on the de facto 'conditionality' of the MCP rebates and thus on the fact that Intel gave the impression to Dell that at least part of those rebates would not have been granted if Dell had decided not to enter into an exclusive supply agreement with the applicant (see recitals 927, 940 and 941 of the contested decision). Moreover, it is apparent from that decision that the Commission also described that de facto 'conditionality' by making reference to a 'disproportionate' reduction in MCP rebates if Dell had opted to switch part of its supplies to AMD (see recitals 306, 310 and 311 of the contested decision). In accordance with the terminology used in the decision, the 'disproportionate' loss of rebates refers plainly and simply to the part of the rebates which is granted in consideration for exclusivity.

453 Given that the abuse of which the applicant is accused is thus based on the existence of an exclusivity rebate, it should be noted that it is not the level of the MCP rebates which is at issue in the contested decision, but the exclusivity in consideration for which they were granted (see paragraph 108 above). Consequently, the Commission was not required to provide an exact quantification of the level of the part of those rebates which was provided in consideration for exclusivity. It was able to prove merely that some part of those rebates was conditional upon exclusivity.

454 It is true that the evidence that the MCP rebates did not vary exclusively in accordance with the volume purchased is not sufficient in itself to show that at least part of those rebates was conditional upon exclusivity. However, that circumstance must be considered to be established, if it is shown that Dell's decision not to opt for exclusive supply from the applicant would have led to a reduction in MCP rebates which cannot entirely be explained by either the corresponding reduction in the volume purchased or any condition for granting a rebate other than that of exclusivity.

455 It must be found that the internal Intel documents on which the Commission relied in the contested decision show, to the requisite legal standard, that a partial switch by Dell to a competitor would have led to a reduction in its MCP rebates which cannot entirely be explained by either the corresponding reduction in the volume purchased or any condition for granting a rebate other than that of exclusivity.

456 Indeed, the applicant does not even submit that the reduction in MCP rebates to which reference is made in those documents would have been proportionate solely to the reduction in the volume purchased from it in the event of a partial switch by Dell to AMD. Rather, it accuses the Commission of having overlooked the fact that its MCP rebates also varied in accordance with the 'competitive exposure' of particular Dell products or programs. Consequently, the applicant does not affirm that the MCP rebates must be qualified as mere quantity rebates, which are generally considered not to have the foreclosure effect prohibited by Article 82 EC (see paragraph 75 above).

457 However, the applicant's arguments cannot succeed in so far as it attempts to explain the reduction in MCP rebates foreseen in the event of the partial switch by Dell to AMD — which is stated in the internal Intel documents — also by a change in the 'competitive exposure' of particular Dell products or programs.

458 Insofar as some of Intel's internal documents indicate that the applicant made Dell aware that a breaking of the existing exclusivity agreement would have led to the disappearance of all of that purported 'competitive exposure', and thus a total loss of the part of the MCP rebates which was allegedly granted in consideration for the competitive exposure, the applicant's argument that the MCP rebates also varied in accordance with 'competitive exposure' is a euphemism meaning that at least part of the MCP rebates was conditional upon exclusivity. When an undertaking in a dominant position makes it clear to its customer that the introduction of any product of the dominant undertaking's competitor will always lead to the same reduction, namely, in this instance, the complete loss of the part of a rebate which is allegedly granted in accordance with the 'competitive exposure' of a certain product or program, in reality that part of the rebate does not vary in accordance with 'competitive exposure', but in accordance with whether the customer uses the dominant undertaking as its exclusive supplier or not.

459 In the present case, it is apparent from the presentation of 5 February 2003 that the applicant sought to get Dell to understand that Dell's 'competitive exposure' would disappear entirely if Dell decided to make a partial switch to AMD, as illustrated by the statement: '[I]f Dell adds AMD to their product line they no longer have a meet-comp exposure' (see paragraph 446 above). According to that presentation, even if Dell had switched to AMD only minimally, it would have lost all of the part of the MCP rebates which, according to the applicant's observations, were granted in consideration for 'competitive exposure'.

460 Similarly, the email of 18 June 2006, in which Mr I2 wrote that 'any meet-comp program that we may have had with Dell will get nullified as they introduce competition', also shows unequivocally that the crucial condition for the grant of the MCP rebates was not an alleged variable degree of the 'competitive exposure' of particular Dell products or programs, but simply Dell's abstention from introducing an AMD-based product. The content of that email shows that the mere introduction by Dell of a competitor product would have led to the complete annulment of the meet-comp program.

461 It is true that the presentation of 10 January 2003, pursuant to which Mr I1 sought to get Dell to understand that, 'if they ha[d] AMD in their arsenal they [would have had] less meet-comp exposure — hence less meet-comp dollars avail[ed] to them', does not necessarily imply that all of the MCP rebates would be lost if Dell were to break its exclusivity agreement with Intel. However, the applicant does not provide any explanation as to how exactly an alleged reduction in the 'competitive exposure' of particular Dell products or programs would have led to a reduction in MCP rebates. In the absence of a more concrete explanation in that regard, it may be concluded that the part of the MCP rebates which varied, in the applicant's view, in accordance with the 'competitive exposure' of particular Dell products or programs in fact varied, not on account of 'competitive exposure', but on account of whether Dell used the applicant as its exclusive supplier or not. The fact that, according to the presentation of 5 February 2003, the applicant did not seek to proceed openly, but 'with *finesse*', confirms that conclusion.

462 Second, the applicant's argument that a reduction in rebates can be regarded as disproportionate only in so far as an as-efficient competitor is not in a position to compensate, for its customer, the amount of rebates lost can also not be upheld. The question whether an as-efficient competitor is in a position to compensate its customer's loss in rebates granted in consideration for an exclusivity agreement is distinct from the — logically preliminary — question as to whether a rebate was conditional, at least in part, upon exclusivity. Thus, the fact that an as-efficient competitor is able to compensate a customer for its disproportionate loss in rebates is not such as to call into question the fact that those rebates were conditional upon exclusivity. Moreover, it should be noted that, for the reasons set out in paragraphs 140 to 166 above, the classification of an exclusivity rebate as a constituent element of an abuse of a dominant position does not require that an AEC test be applied.

463 Third, as regards the email of Mr I2, cited in paragraph 448 above, the applicant submits, firstly, that that email dates from after the end of the period in question in the contested decision, namely December 2005. The fact that that email was written after the end of the period in question in the contested decision does not, however, deprive it of its probative value. That email states that 'any meet-comp program that we may have had with Dell will get nullified as they introduce competition'. In using the past tense ('that we may have had'), that email refers to a period preceding its drafting. In the light of other items of evidence in the contested decision, it is clear that that reference includes the period in question in the contested decision.

464 Secondly, the applicant claims that it never cancelled its MCP and that it did not take retaliatory measures following Dell's decision in 2006 to switch part of its supplies to AMD. However, the Court

finds that argument to be irrelevant, as will be explained in greater detail in paragraphs 548 to 552 below.

465 It results from all of the foregoing that the presentations of 10 January and 5 February 2003 and the email of 18 June 2006 constitute precise and consistent evidence of the fact that, from Intel's point of view, the grant of at least part of the MCP rebates was conditional upon Dell using the applicant to supply all of its x86 CPUs. The fact that such a condition existed is confirmed, moreover, by the email of 17 February 2006, in which Mr I2 reacted to Dell's announcement that it would not be using chips from AMD, writing: '[T]he best friend money can buy ...'. That email confirms that the applicant's [confidential] considered that Dell's decision to use the applicant as its exclusive supplier was due to the payments which it had made to it.

#### 1.2) Dell's Article 18 response

##### i) Content

466 Recitals 233 and 234 of the contested decision contain the following extracts from Dell's Article 18 response. Dell stated that '[the] MCP arrangement was not explicitly conditioned on exclusivity or minimum volume commitments' and that, '[a]t the same time, it was negotiated against the historical backdrop of Dell products being based solely on Intel [CPUs]'. Moreover, in relation to its assessment of whether to shift a part of its supplies from Intel to AMD, Dell stated the following: '[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.'

##### ii) Probative value

467 The applicant submits that, in its Article 18 response, Dell never expressly stated that it feared a disproportionate loss in its rebates. In the applicant's view, the shift of part of Dell's purchases to AMD would in the ordinary course of business be expected to result in some reduction in total rebates as the volume of Dell's purchases from Intel would be reduced. This is normal competition and very far from proof that the reduction would be disproportionate. The statement that Dell 'did not rule out the possibility that such reduction might be disproportionate to the reduction in the volume of Dell's purchases from Intel' constitutes, at best, mere speculation which shows that Dell 'did not exclude' that eventuality.

468 However, the Court finds that the applicant completely ignores the context of Dell's Article 18 response in insisting on that point. Dell stated that the agreement on the MCP rebates was not 'explicitly conditioned on exclusivity or minimum volume commitments', but that it had been 'negotiated against the historical backdrop of Dell products being based solely on Intel [CPUs]'. In that regard, the Court draws attention to the way in which Dell stressed that the MCP rebates had been 'negotiated against the historical backdrop of Dell products being based solely on Intel [CPUs]' and that it 'understood that Intel would not welcome [a potential decision on the part of Dell to switch partially to AMD], as it would be viewed as a significant shift in the historical relationship between the companies'. It should be added that, in stating that the agreement on the MCP rebates was not 'explicitly' conditioned on exclusivity, Dell expressly nuanced its statement relating to the existence of a condition of exclusivity. Such a nuance would not have been necessary if Dell had intended to state in a general manner that the MCP rebates were not conditional upon any kind of exclusivity. That nuance is thus in line with the Commission's claim that the MCP rebates were 'de facto' conditional upon exclusivity.

469 Read in that context, Dell's Article 18 response thus gives the impression that Dell considered that it was the breaking of the existing exclusivity arrangement, and not the reduction in the volumes of purchases, which would have a negative impact. Even if the disproportionate nature of the loss of rebates in relation to the reduction in the volume of purchases does not result unequivocally from the wording of Dell's Article 18 response, the overall impression given by that document is that Dell assumed that the rebates granted by Intel were not calculated on the basis of the volume of purchases, but granted as a reward for using Intel as its exclusive supplier. The fact that Dell expressed itself very cautiously in stating that the agreement on the MCP rebates was not 'explicitly conditioned on exclusivity or minimum volume commitments' and that it 'did not rule out the possibility that such reduction might be disproportionate to the reduction in the volume of Dell's purchases from Intel' does not call that conclusion into question.



470 Moreover, it must be found that the applicant acts in a contradictory manner in that it asserts that the statement pursuant to which Dell 'did not rule out the possibility that such reduction might be disproportionate to the reduction in the volume of Dell's purchases from Intel' amounts, at best, to mere speculation. In so far as concerns the internal Intel documents, the applicant expressly admitted that the rebates granted to Dell did not vary exclusively on the basis of the volume of purchases, but also on the basis of the 'competitive exposure' of some particular Dell products or programs (see paragraphs 450 and 451 above). Consequently, if the applicant should attempt to infer from Dell's Article 18 response that the rebates granted to Dell were exclusively linked to the volume of purchases, it must be found that such an argument would be contradicted by the applicant's own observations in relation to the internal Intel documents. Both Dell's Article 18 response and the applicant's own claims regarding the internal Intel documents confirm consistently that the MCP rebates were not mere quantity rebates (see paragraph 456 above).

471 Furthermore, the applicant does not raise any arguments capable of showing how Dell's Article 18 response could support its theory that MCP rebates varied gradually on the basis of the degree of 'competitive exposure' which particular Dell products or programs allegedly faced. Dell's Article 18 response states merely that the premiss underlying the grant of MCP rebates was 'to make Intel products as or more competitive than available alternatives'. That statement applies equally to all Intel products and does not involve a distinction being made between particular Dell products or programs. The fact that Dell refrained from pointing out an alleged relationship between the 'competitive exposure' of some of its products or programs and the level of the MCP rebates shows that Dell did not consider it necessary to inform the Commission specifically of such a relationship. Such conduct thus further confirms that it was not the alleged gradual variation of the 'competitive exposure' of particular Dell products or programs which brought about the variations in the MCP rebates.

472 Finally, at the hearing, the applicant submitted that, in its Article 18 response, Dell also stated that there were two schools of thought within the company. While some of its employees considered that a decision on its part to switch part of its supplies to AMD would lead to a loss in rebates, others believed that such a decision would trigger a global price war and that the applicant would have to give bigger rebates in order to hang on to business. However, Dell's Article 18 response provides only that some Dell employees assumed that such a decision could — in the long term — lead to increased price competition, or even a price war, which could lead to an eventual recovery by Dell of any short-term reduction in MCP rebates. Contrary to what the applicant claims, it does not result from Dell's Article 18 response that some of Dell's employees considered that a decision to switch part of its supplies to AMD would not lead to a reduction in MCP rebates, or lead to their immediate increase. On the contrary, its Article 18 response clearly shows that even the Dell employees with the most optimistic point of view came to the conclusion that, following such a decision, the applicant's conduct would hurt Dell, at least in the short term (see recital 266 of the contested decision).

473 Consequently, it may thus be found that Dell's Article 18 response constitutes evidence which confirms that Dell assumed that the MCP rebates were de facto conditional upon exclusive supply.

### 1.3) The internal Dell documents

#### i) Content

474 In recitals 222 to 227, 229 and 231 of the contested decision, the Commission sets out the content of certain internal Dell documents. The contested decision states, in essence, the following facts.

475 In an internal presentation of 23 December 2002, Dell noted that the 'Intel competitive response' to an AMD engagement would mean the following:

'MOAP [USD] drop to zero, other than limited tactical programs (<[USD] 10M/QTR) — Intel will give MOAP [USD] to others to ensure no TAM [Total Available Market] shift to Dell/AMD.'

476 In an internal Dell presentation of 26 February 2003, Dell noted that, for any scenario of AMD engagement by it, 'retaliatory MOAP reductions could be severe and prolonged with impact to all ... [lines of business]'. In the same presentation, Dell calculated that it would lose USD 103 million in MOAP funds per quarter in its financial year 2004 if it 'moved a portion of [its CPU] spend to AMD'.

477 In an internal Dell presentation of 17 March 2003, Dell stated the following: 'Anticipated Intel response wipes out all potential ... [operating income] upside from going with AMD'. Another slide in the same presentation which contains an 'AMD analysis' is entitled 'Intel funding at risk'. Slide 14 of the same presentation, under the heading 'Key Business Model Assumptions', asks the following question:

'Intel MOAP Funds — How much of the Intel funding would be pulled if we moved a portion of our [CPU] spend to AMD?'

478 In an internal Dell email of 21 July 2003, written by Mr D2, the following is stated:

'[The bottom line is that I don't see how we make AMD a positive for Dell. The end game is inevitable, the cost to support AMD is high, the loss of focus goes against our traditional model and strengths, and the net loss of MCP will far outweigh any gain we get by doing a limited toe-dip with a couple of server platforms.'

479 In an internal Dell presentation of 17 February 2004 entitled 'MAID Status Review', Dell considers two scenarios, one of which is entitled 'AMD Option' and the other 'Enhanced MCP Option'. According to the former scenario, under the heading 'Intel Response', Dell assumed that it would lose USD 293 million of Intel funding per year compared with the actual level of MCP funding at the time. According to the latter scenario, under the heading 'Upside', Dell assumed that it would receive USD 150 million extra funding from Intel compared with the actual level of MCP funding at the time. This is described in greater detail later in the same presentation. In a slide entitled 'Enhanced MCP', Dell states:

'Estimate an additional <[USD] 150 [million] of MCP per year under this approach; Unlikely to reach higher numbers due to Intel legal concerns.'

480 In an internal Dell email of 26 February 2004, written by Mr D2, the following is stated:

'Boss, here's an outline of the framework we discussed with Intel ... Intel is ready to send [Mr I2] [confidential]/[Mr I3] [confidential]/[Mr I4] [confidential] to meet with [Mr D3] [confidential]/[Mr D4] [confidential]/you [Mr D1] ... Background: \*[Mr I2]/[Mr I5] [confidential] are prepared for [all-out war] if Dell joins the AMD exodus. We get ZERO MCP for at least one quarter while Intel "investigates the details" ... We'll also have to bite and scratch to even hold 50%, including a commitment to NOT ship in Corporate. If we go in Opti, they cut it to <20% and use the added MCP to compete against us.'

481 In an internal Dell email of 27 February 2004, written by Mr D2, the following is stated:

'It looks 100% certain that Intel will take MCP to ZERO for at least one quarter while they "review all of the numbers and implications." ... Appears likely that Intel would take MCP to <25% of current levels UNLESS we agree up front not to ship into Corporate. If we do that, we're in "détente" mode and can keep MCP at 50%. However, we don't meet [Mr C1's], [confidential] terms and conditions. So, I would plan on MCP at <20% levels if we execute AMD across server and Opti as AMD wants.'

482 It should be noted that, with the exception of the email of 21 July 2003 and the internal presentation of 17 February 2004, those documents were grouped with other documents in an annex to Dell's Article 18 response.

## ii) Probative value

483 The applicant submits, in essence, that Dell's interpretation of those documents is provided in Dell's Article 18 response. According to the applicant, that response does not substantiate the Commission's claim that Dell knew or believed that disproportionate discount reductions would follow if Dell switched to AMD. In any event, those 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 senior executives. Indeed, most of the internal Dell documents upon which the Commission relies were written by Mr D2, a Dell employee who did not participate in the key meetings regarding pricing between Intel and Dell.

484 The Court notes, at the outset, that, contrary to what the applicant claims, Dell's Article 18 response confirms that Dell considered that the level of the MCP rebates was conditional upon exclusivity (see paragraphs 468 to 473 above).

485 Next, the Court finds that the documents referred to above convincingly corroborate the observations made by Dell in its Article 18 response.

486 First, the Court finds that those documents do not show that Dell considered that the MCP rebates varied exclusively in accordance with the volume of purchases. If the applicant should nevertheless infer from those documents that the rebates granted to Dell were exclusively linked to the volume of purchases, the Court finds that such an argument would, moreover, be contradicted by the applicant's own observations regarding the internal Intel documents, pursuant to which the MCP rebates did not vary exclusively in accordance with the volume of purchases, but also in accordance with the 'competitive exposure' of particular Dell products or programs (see paragraphs 450 and 451 above).

487 Second, the Court finds that the applicant's explanation that the MCP rebates also varied in accordance with the 'competitive exposure' of particular Dell products or programs cannot succeed.

488 It is apparent from the emails of 26 and 27 February 2004, written by Mr D2 (see paragraphs 480 and 481 above), that Dell's estimations went as far as supposing that, in the event of a partial switch to AMD, Dell would lose all of its MCP rebates, at least for a quarter. Such a total loss cannot reflect a gradual variation on the basis of the degree of the 'competitive exposure' which some of Dell's products or programs allegedly faced. In so far as the emails of Mr D2 imply that he forecasted a total loss of MCP rebates, at least for a quarter, the applicant's explanation that the MCP rebates varied in accordance with 'competitive exposure' is thus a euphemism meaning that those MCP rebates were conditional upon exclusivity (see paragraph 458 above).

489 That conclusion is not called into question by the fact that, in his emails of 26 and 27 February 2004, Mr D2 described the period during which he considered that the MCP rebates would be reduced to zero as a period which Intel would need to re-examine the details concerning the consequences of a decision by Dell to switch part of its supplies to AMD. The way in which Mr D2 used quotation marks in the two emails when talking of a period of re-examination of the details concerning the consequences of a decision by Dell to switch part of its supplies to AMD gives the impression that he did not believe that the temporary total loss of MCP rebates would be due to a re-examination of those details. The use of quotation marks suggests, rather, that Mr D2 considered that the alleged need for a re-examination period was nothing more than a pretext to disguise the fact that, in reality, the MCP rebates would be reduced to zero if the exclusivity requirement were broken, and not because of a need to re-examine the details concerning the implications for the purported 'competitive exposure' of a switch by Dell of part of its supplies to AMD.

490 Moreover, in so far as Dell's estimates did not stretch to losing its MCP rebates in full, the applicant has not raised any argument to show how exactly those estimates are supposed to support its theory of a gradual variation of those rebates in accordance with the degree of 'competitive exposure' which particular Dell products or programs allegedly faced. In the absence of a more concrete explanation in that regard, it is possible to conclude that the part of the MCP rebates which varied, in the applicant's view, in accordance with the 'competitive exposure' of particular Dell products or programs did not vary in accordance with such exposure but, in reality, in accordance with whether Dell used the applicant as its exclusive supplier or not. That conclusion is confirmed by the fact that, pursuant to the applicant's own observations, the documents referred to above must be interpreted in the light of Dell's Article 18 response. However, in that response, Dell refrained from submitting that it considered that the MCP rebates varied gradually in accordance with the 'competitive exposure' of some of its products or programs. Rather, in that response, Dell focused on the historical backdrop of its exclusive relationship with the applicant (see paragraphs 468, 469 and 471 above).

491 It follows that the documents referred to above confirm that Dell considered that the level of MCP rebates was conditional upon exclusivity. That is the case, in particular, of the emails of 26 and 27 February 2004 written by Mr D2.

492 The other arguments raised by the applicant in that regard cannot call that conclusion into question.

493 The Court observes that the applicant does not make direct reference to all of the internal Dell documents referred to above. It makes observations only in relation to the content of the presentation of 17 February 2004 (see paragraph 479 above). Moreover, it attempts, above all, to weaken the probative value of the documents drawn up by Mr D2. On a general level, it submits that Dell stated, in another response under Article 18 of Regulation No 1/2003, dated 19 December 2005, that 'knowledge of the details of Dell's negotiations with Intel [was] restricted to senior Dell executives'.

494 As regards, first of all, the presentation of 17 February 2004, the applicant submits that it is not acknowledged in the contested decision that that presentation also forecast that the 'AMD option' was projected to provide a net benefit over four years even with the conjectured 50% reduction in MCP rebates. However, that argument does not make it possible to refute the conclusion that Dell considered that the amount of MCP rebates was conditional upon exclusivity. A customer may reasonably consider that the advantages inherent in the decision to switch part of its supplies to a competitor are greater than the disadvantages inherent in breaking an exclusive arrangement. Although it is true that Dell considered, in the presentation of 17 February 2004, that a decision to switch part of its supplies to AMD would lead to profits in the long term, the fact none the less remains that Dell also anticipated that that change would lead to losses in the short term. That is confirmed by Dell's Article 18 response (see paragraph 472 above). Thus, the presentation of 17 February 2004 rather suggests that Dell considered that, because of the expected loss of the MCP rebates from Intel, it would have taken three years to break even the result of the switch to AMD, and four years to enhance profitability substantially.

495 As regards, second, the probative value of the documents drawn up by Mr D2, the applicant's statement that Mr D2 did not participate in 'key' meetings is factually inaccurate. Mr D2's email of 26 February 2004 shows that he participated very recently in a meeting with Intel, during which relations

between Intel and Dell were discussed, since that message begins as follows: 'Boss, here's an outline of the framework we discussed with Intel.' Moreover, in recitals 251 to 254 of the contested decision, the Commission states that Mr D2 had direct and frequent informal contacts with key executives within Intel, during which the business relationship between Dell and Intel was discussed. The applicant does not dispute those findings. However, the question whether Mr D2 participated in all negotiations between Intel and Dell is not relevant in the present case, since it is likely that the meetings in which he participated were organised with a view to preparing meetings at the highest level. By contrast, it is implausible that such meetings were held between employees who did not know the relevant aspects of the relationship between the two undertakings. It follows that Mr D2 must be regarded as being well informed of the rebate/pricing discussions between Intel and Dell during the period of the infringement.

496 The applicant's argument that Mr D2 left Dell on 8 October 2004 can also not be upheld. The three emails referred in paragraphs 478, 480 and 481 above, which were written by Mr D2, all predate his departure from Dell. Therefore, they constitute reliable evidence in relation to the period of the infringement in question in the contested decision.

497 The Court must also reject the applicant's argument that Mr D2 held an extremely pessimistic point of view at Dell, a point of view which was not however shared by Dell's managing directors. The mere fact that others held a more optimistic vision than Mr D2 of the consequences of a decision to switch part of its supplies to AMD does not alter the fact that, according to Dell's Article 18 response, even the most optimistic forecasts of Dell concluded that the applicant would hurt Dell, at least in the short term (see paragraph 472 above). Moreover, the Commission rightly submits that, in view of the uncertainty maintained by Intel as to the exact consequences of a partial switch to AMD, Dell had to elaborate different scenarios for its business decision. A sound business decision could not be based only on optimistic scenarios. Finally, the Court points out that Dell annexed the documents drawn up by Mr D2, except the email of 21 July 2003 (see paragraph 478 above), due to their relevance to the issue of the consequences of the introduction by Dell of computers equipped with AMD CPUs. Consequently, it is unlikely that Mr D2's scenarios were not taken into account at all by Dell.

498 At the hearing, the applicant relied on two emails of Mr D2, which were also annexed to Dell's Article 18 response and which, according to the applicant, constituted exculpatory evidence of which the Commission should have taken account. In the first of those emails, dated 11 August 2003, Mr D2 wrote: '[W]e could do a pervasive AMD move and still go back to Intel in 2006 with no harm and no foul.' However, as rightly submitted by the Commission, that email does not concern the question whether the MCP rebates would have been reduced or not if Dell were to decide to switch part of its supplies to AMD before going back to Intel. In the second email, dated 7 March 2004, Mr D2 compared the scenario of going 'aggressively' with AMD with that of going 'aggressively' with Intel. In relation to the former scenario, Mr D2 anticipated that 'Dell could trump HP'. However, that email also does not concern the question whether the MCP rebates would have been reduced or not if Dell had decided to switch part of its supplies to AMD and, if so, to what extent. Consequently, the two emails do not call into question the conclusion that Mr D2's forecasts had to be understood as meaning that he considered that at least part of the MCP rebates was conditional upon exclusive supply (see paragraphs 488 and 490 above).

499 Third, the Court points out that only three of the documents referred to above (see paragraphs 475 to 481) were drawn up by Mr D2, namely Dell's internal emails of 21 July 2003 and 26 and 27 February 2004. By contrast, in the internal presentations of 26 February 2003, 17 March 2003 and 17 February 2004, either other people are mentioned as being their authors, or no author at all is indicated. They can thus not be attributed to Mr D2. In so far as concerns the internal presentation of 23 December 2002, the applicant merely submits that it appears that Mr D2 also wrote the relevant part of an earlier draft of that presentation. Given that the applicant limits its argument to the 'draft' presentation, it thus admits implicitly that Mr D2 was not responsible for the final version of that presentation.

500 In addition to its arguments relating to the probative value of the documents drawn up by Mr D2, the applicant submits, in a general manner, that the contested decision omits to mention that it is explained in another of Dell's responses under Article 18 of Regulation No 1/2003, dated 19 December 2005, that 'knowledge of the details of Dell's negotiations with Intel is restricted to senior Dell executives' and that only 'a few Dell employees, all located at Dell's headquarters in Austin, Texas [United States], are involved directly with Intel in these price negotiations'. It further submits that Dell also explained that the documents from employees not directly involved in those negotiations 'inevitably reflect[ed] this partial (and frequently erroneous) understanding of the business realities' between the two companies.

501 However, that argument cannot weaken the probative value of the documents annexed to Dell's Article 18 response either in relation to the documents drawn up by Mr D2 or in relation to the other documents. The Commission states that Dell's response under Article 18 of Regulation No 1/2003,

dated 19 December 2005, was lodged following the Commission's inspection of Dell's United Kingdom premises. The Commission asked Dell to comment on documents found on those premises. Dell explained to the Commission that Dell's employees in the United Kingdom were likely to have little knowledge of the price negotiations between Intel and Dell, which were conducted by employees located at Dell's headquarters in Austin. Dell's statement that its employees 'do not understand the full facts about the negotiations' therefore does not apply to Mr D2, who was based in Austin. The applicant does not dispute those findings. In so far as concerns the documents which were not drawn up by Mr D2, the applicant also does not submit that they were drawn up by Dell employees based in the United Kingdom. Consequently, the applicant has not shown that Dell's statement in its response under Article 18 of Regulation No 1/2003, dated 19 December 2005, on which it relies, applies to the documents referred to above which were not drawn up by Mr D2. Moreover, the Court points out that Dell specifically identified the documents which were annexed to Dell's Article 18 response as being relevant to the issue of the consequences of Dell's introduction of computers equipped with AMD CPUs.

502 The Court thus points out, first, that the documents of 23 December 2002, 26 February 2003, 17 March 2003 and 17 February 2004 (see paragraphs 475, 476, 477 and 479 above) confirm the probative value of Mr D2's emails in so far as all of those documents show that Dell forecast a loss in rebates if it decided to switch part of its supplies to AMD, for which there is no plausible explanation other than that the amount of the rebates was conditional upon exclusivity. Second, even supposing the probative value of Mr D2's emails to be weak, or inexistent, the fact none the less remains that the other documents prove to the requisite legal standard that Dell considered that the amount of the MCP rebates was conditional upon exclusivity.

503 Consequently, in the contested decision, the Commission was right to infer from the internal Dell documents that Dell was convinced that the level of its MCP rebates was based on its status as an exclusive Intel vendor.

2) The evidence that Intel communicated to Dell that the level of the MCP rebates was conditional upon exclusivity

504 The applicant submits that the Commission has not proved that Intel communicated to Dell that the rebates were conditional upon exclusivity. It claims that the contested decision refers to only four Intel documents, namely the documents referred to in paragraphs 446 to 448 above, in support of its finding that Intel 'made clear to Dell' that its discounts would be disproportionately reduced if Dell sourced from AMD. However, none of these documents involves a communication from Intel to Dell. The applicant points out, in particular, that Mr I2's email of 18 June 2006 was sent to Lenovo, not Dell.

505 In that regard, the Court draws attention to the fact that the content of the internal Intel documents and those of Dell is the same. This is a result of the fact that, if the exclusive relationship between the applicant and Dell were broken, the internal Intel and Dell documents indicate consistently either that the purported 'competitive exposure' would cease to exist or that all of the MCP rebates would be lost, or that there would at least be a reduction in the purported 'competitive exposure' or the MCP rebates for which there is no plausible explanation other than that the amount of the MCP rebates was conditional upon exclusivity.

506 Insofar as some of the internal Intel documents and some of those of Dell imply that the purported 'competitive exposure' would cease to exist or that all the MCP rebates would be lost if the exclusive relationship between the applicant and Dell were broken, those documents contain consistent evidence that the applicant informed Dell that the level of the MCP rebates was conditional upon exclusivity (see paragraphs 458 and 488 above).

507 It is true that one of those two internal Intel documents which suggest that the purported 'competitive exposure' would cease to exist or that all the MCP rebates would be lost if the exclusive relationship were to end, namely Mr I2's email of 18 June 2006 (see paragraph 448 above), was not sent to Dell, but to Lenovo. Therefore, that email does not constitute direct evidence that the applicant communicated to Dell the fact that the purported 'competitive exposure' would cease to exist or that the MCP rebates would be reduced to zero if the exclusive relationship were to end.

508 However, in the internal Intel presentation of 5 February 2003, Mr I1 sought to 'make [Dell] understand with *finesse*' that 'if Dell adds AMD to their product line they no longer have a meet-comp exposure'. That must be understood as implying that the applicant intended to make it clear to Dell that the purported 'competitive exposure' would cease to exist if Dell 'add[ed] AMD to its product line' (see paragraphs 446 and 459 above).

509 As regards the internal Dell documents, Mr D2's emails of 26 and 27 February 2004 suggest that Dell would lose all of its MCP rebates for at least a quarter if it were to switch part of its supplies to AMD (see paragraphs 480, 481 and 488 above). The fact that Mr D2 began his email of 26 February

with the words, 'Boss, here's an outline of the framework we discussed with Intel', confirms that he was referring to the facts which the applicant had communicated to him.

510 In the light of those items of evidence, Mr I2's email indirectly confirms that the communication which took place between the applicant and Dell included scenarios in which the mere introduction by Dell of a competitor product would have led to the total annulment of the MCP. Although it is true that that email does not constitute direct evidence of the existence of communication between the applicant and Dell, it does however constitute evidence of the way in which the applicant's [*confidential*] presented the modus operandi of the MCP.

511 Moreover, in so far as the internal Intel and Dell documents do not suggest that the purported 'competitive exposure' would completely disappear or that the MCP rebates would be lost in full if the exclusive relationship between the applicant and Dell were to end, it must be found that the applicant does not even submit that the MCP rebate varied exclusively in accordance with the volume of purchases. In so far as the applicant attempts to justify the reduction in MCP rebates — if Dell were to decide to switch part of its supplies to AMD — by a gradual variation of competitive exposure, it must be found that neither the internal Intel documents nor those of Dell contain evidence that the applicant communicated to Dell how exactly a reduction in competitive exposure would have been translated into a reduction in MCP rebates. In the absence of a more concrete explanation in that regard, it is permissible to conclude that the applicant informed Dell that at least part of the MCP rebates was conditional upon exclusivity (see paragraphs 461 and 490 above).

512 It follows that the evidence found in the internal Intel and Dell documents is consistent and shows that the applicant communicated to Dell that the level of the MCP rebates was conditional upon exclusivity.

513 In addition to that consistency, the existence of such communication is confirmed by an email of 7 December 2004, set out in recital 313 of the contested decision, in which Mr I1 of Intel explicitly conveys the following message to Mr D1 of Dell:

'[I] have to spend incremental cycles evaluating how our meet-comp program would evolve if this [Dell using AMD's Opteron] is inevitable ... i.e. changes in competitive exposure = changes in competitive support.'

514 It is apparent from the content of that email that the MCP rebates would have been reduced if Dell had decided to switch part of its supplies to AMD. In so far as concerns the exact amount of the reduction, the email shows that the level of the MCP rebates did not vary exclusively in accordance with the volume of purchases but, above all, in accordance with the purported 'competitive exposure'. It is true that the email does not state that all of that purported 'competitive exposure', and thus all of the part of the MCP rebates which was allegedly granted in consideration for the competitive exposure, would disappear if Dell decided to switch part of its supplies to AMD. However, in the absence of a more concrete explanation as to how exactly a reduction in competitive exposure would be translated into a reduction in MCP rebates, it is permissible to conclude that the applicant informed Dell that at least part of the MCP rebates was conditional upon exclusivity (see paragraphs 461 and 490 above).

515 Consequently, it is permissible to conclude that the Commission proved to the requisite legal standard that the applicant communicated to Dell that the level of the MCP rebates was de facto conditional upon exclusivity.

### 3) The applicant's other arguments

3.1) The argument alleging that the documents on which the Commission relies cover only the first 15 months of the period of the infringement

516 The applicant submits that the documents relied on by the Commission cover only the first 15 months of the period of the infringement, namely from December 2002 to March 2004. Attaching decisive weight to evidence relating to the first 15 months of a 3-year period is both arbitrary and unlawful.

517 In that regard, the Court notes, first of all, that, in its Article 18 response, Dell furnished internal documents dating from the first 15 months to illustrate the evaluation of the consequences of a decision to switch part of its supplies to AMD which it made 'during the 2003-2005 time-frame'. Second, the email of 7 December 2004, referred to in recital 313 of the contested decision (see paragraph 513 above), constitutes further evidence that, in December 2004, the applicant was still informing Dell that the level of the MCP rebates was conditional upon exclusivity. Third, Mr I2's email to the [*confidential*] of Lenovo (see paragraph 448 above), indicating that 'any meet-comp program that we may have had with Dell will get nullified as they introduce competition', is dated 18 June 2006.

The use of the future tense ('will get nullified') appears to suggest that, at that point in time, the MCP had not yet been terminated or was in the process of being terminated.

518 In the light of the convincing evidence that anti-competitive practices continued throughout the entire period, the applicant should have furnished its own evidence to call that evidence into question, which it did not do. It follows that the Commission proved to the requisite legal standard that, between December 2002 and December 2005, the applicant informed Dell that the level of the MCP rebates was conditional upon exclusivity.

3.2) The argument alleging that the Commission cannot rely on a customer's internal estimates to establish an infringement under Article 82 EC

519 The applicant, supported by ACT, submits that, in the contested decision, the Commission was wrong to rely on Dell's internal estimates. According to the applicant, the statement that Dell was convinced that the level of its MCP payments was based on its status as an exclusive Intel vendor is, in accordance with the principle of legal certainty, legally irrelevant. The liability of the undertaking in a dominant position cannot be based on what its customers believed. At the hearing, the applicant essentially stated in that regard that it is not possible to rely on the internal estimates of a customer to infer the existence of actual conduct on the part of the applicant, since those estimates may be unreasonable.

520 ACT submitted, at the hearing, that the fact that the Commission based its theory that there was an abuse on Dell's internal estimates is confirmed by the fact that the applicant's conduct neither changed at the start of the period of the infringement in question in the contested decision nor at the end of that period. According to ACT, the Commission relied solely on the beginning and end of Dell's internal speculations regarding the consequences of a decision to switch part of its supplies to AMD to determine when the period of the infringement started and ended. When questioned on its argument by the Court, ACT explained that it was not claiming that the duration of the infringement found in the contested decision should be reduced, but merely that the Commission's theory that there was an abuse was based on Dell's internal speculations.

521 It should be noted that, in the present case, in the absence of a formal exclusivity requirement, the Commission relied on Dell's internal estimates to establish that the applicant de facto informed Dell, during the period in question, that the level of the MCP rebates was subject to such a requirement. That approach, by which the Commission took account of the expectations of one of the applicant's customers solely to establish evidence of the applicant's own conduct, cannot be criticised.

522 It is true that, in the Court's judgment in *Deutsche Telekom*, see paragraph 98 above (paragraphs 198 and 202), and in *TeliaSonera*, see paragraph 88 above (paragraphs 41 and 44), the Court confirmed that, in order to assess the lawfulness of the pricing policy applied by a dominant undertaking, reference should be made, as a general rule, to pricing criteria based on the costs incurred by the dominant undertaking itself, and that the validity of such an approach is reinforced by the fact that it conforms to the general principle of legal certainty, since taking into account the costs and prices of the dominant undertaking enables that undertaking to assess the lawfulness of its own conduct.

523 However, that case-law, which limits the legal criteria which may be taken into account when assessing the lawfulness of a pricing policy, does not prevent the Commission from relying, as regards the facts, on the internal expectations of a customer in order to establish evidence of the dominant undertaking's own conduct. In the present case, the allegation of an abuse of a dominant position is based on the fact that the applicant applied a rebate system, the level of which was de facto conditional upon exclusivity. That allegation is thus based exclusively on the applicant's own conduct, of which it must have been aware. By contrast, it is not based on Dell's internal estimates, on which the Commission relied solely to establish the factual evidence of the practice at issue.

524 For the same reasons, the Court must dismiss ACT's argument that the Commission relied solely on the beginning and end of Dell's internal speculations regarding the consequences of a decision to switch part of its supplies to AMD to determine when the period of the infringement started and ended. Given that, in the contested decision, the Commission called into question own conduct of the applicant, there was nothing preventing it from relying on Dell's internal estimates in order to determine when the period of infringement started and ended.

525 Finally, the Court must reject the applicant's argument that it is not possible to rely on the internal estimates of a customer to infer the existence of actual conduct on the part of the applicant since those estimates may be unreasonable. It is true that the applicant is free, in principle, to refute the evidence furnished by the Commission in the contested decision by showing that Dell's internal estimates, on the basis of which the Commission inferred that the applicant had implemented an exclusivity rebate, were unreasonable and that they were not brought about by the applicant's conduct. However, in the present case, the applicant has not shown that this was the case. On the

contrary, the fact that the content of Dell's internal estimates is the same as that of the internal Intel documents and that of the email of 7 December 2004 (see paragraphs 505 to 515 above) confirms that those estimates were not unreasonable, but were based precisely on what the applicant had communicated to Dell.

3.3) The argument alleging that the Commission was required to establish that the MCP rebates would actually have been reduced disproportionately had Dell decided to switch part of its supplies to AMD

526 The applicant submits, in essence, that the Commission was wrong not to establish that the MCP rebates would actually have been reduced disproportionately had Dell decided to switch part of its supplies to AMD. In particular, the internal Dell documents do not take account of actual changes made to Dell's rebates. Rather, they speculate on what might have happened had Dell switched to AMD.

527 The Court finds that the capability of an exclusivity rebate to be anti-competitive is based on the fact that it may give customers an incentive to opt for exclusive supply (see, to that effect, *Hoffmann-La Roche*, paragraph 71 above, paragraph 90, and *British Airways*, paragraph 74 above, paragraph 62). However, the existence of such an incentive does not depend on whether the rebate is actually reduced or annulled if the requirement of exclusivity on which it is conditional is not satisfied (see, to that effect, *Tomra*, paragraph 72 above, paragraph 300). It is sufficient, in that regard, that the dominant undertaking gives the impression to the customer that that would be the case. What counts are the circumstances which the customer could expect when making its orders — on the basis of what it was told by the dominant undertaking — and not the actual reaction of that undertaking to the customer's decision to change supplier.

528 In the present case, the Commission has shown to the requisite legal standard that the applicant communicated to Dell that the level of the MCP rebates was de facto conditional upon an exclusive supply agreement with it (see paragraphs 446 to 515 above). The question whether the applicant actually reduced the MCP rebates is thus irrelevant. Although it is true that, in recitals 306 and 311 of the contested decision, it is stated that a switch to AMD 'would have' led to a disproportionate reduction in rebates, it is none the less clear from the context of the contested decision that the Commission did not take issue with the fact that the applicant would actually have reduced the rebates if the exclusive relationship between itself and Dell were broken, but with the fact that it made such a communication to Dell. The applicant's argument that the defence seeks to change the theory of abuse adopted in the contested decision cannot, therefore, succeed.

3.4) The argument alleging that Dell's constant evaluation of the possibility of switching to AMD is inconsistent with the theory developed in the contested decision

529 The applicant submits that Dell's strategy of constantly evaluating the possibility of switching to AMD is inconsistent with the theory developed in the contested decision that Dell feared having a disproportionate punishment imposed on it 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 a switch to AMD would have been unprofitable because it would trigger disproportionate reductions in Intel rebates. According to the applicant, Dell's constant evaluation of a partial switch to AMD directly refutes both the fact that Dell believed that it would experience disproportionate rebate reductions if it switched to AMD, and the fact that Intel gave the 'impression' that Dell would experience such reductions.

530 The Court points out that it may be profitable for a customer to break an exclusive relationship in spite of the loss of an exclusivity rebate. From the point of view of the customer, there is nothing preventing the advantages related to a decision to switch partially to a competitor from outweighing the disadvantages incurred in removing the financial incentive which is granted in consideration for exclusive supply. The fact that Dell constantly evaluated the possibility of switching to AMD thus does not call into question the fact that the applicant informed Dell that the level of the MCP rebates was conditional upon it using the applicant as its exclusive supplier. Consequently, the applicant's argument must be dismissed.

3.5) The argument alleging that the lack of transparency of the MCP rebate system cannot provide a basis for the applicant's liability

531 The Court notes that, in recitals 942 to 949 of the contested decision, the Commission took account of the lack of transparent and objective criteria for the grant of MCP rebates as a factor which reinforces the effect of the exclusivity requirement.

532 According to the applicant, there is no legal basis for holding it liable on the basis of that uncertainty, and such liability is not supported by the evidence furnished by the Commission.

533 In the present case, it is not necessary to rule on the question whether that uncertainty constitutes a factor which increased the incentive to opt for exclusive supply. In any event, the applicant's



arguments cannot call into question the evidence that the applicant communicated to Dell that the level of the MCP rebates was conditional upon exclusivity.

534 First, the applicant submits that, in the contested decision, the Commission does not claim that, in any given quarter, Dell was not aware what discounts it would receive from Intel if it were to source from AMD. According to the applicant, the Commission claims 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 still unknown, is itself evidence of conditionality.

535 That argument is unconvincing. According to Article 1(a) of the operative part of the contested decision, the finding that the applicant's conduct vis-à-vis Dell constituted an abuse is not based on the lack of transparency of the MCP rebate system, but on the fact that the level of those rebates was conditional upon exclusivity. In order to prove that conditionality, the Commission did not rely on the lack of transparency of the MCP rebate system. Rather, it proved the conditionality of those rebates by means of the evidence examined in paragraphs 444 to 515 above, which shows to the requisite legal standard that the applicant communicated to Dell that the level of the MCP rebates was de facto conditional upon exclusivity. On the contrary, the Commission took account of the lack of transparency of the MCP rebate system only as a factor reinforcing the loyalty-inducing effect of those rebates (see recital 945 of the contested decision). The applicant's assertion that the Commission submits that the lack of transparency of the MCP rebate system constitutes in itself evidence of the conditionality is thus erroneous.

536 In any event, in so far as concerns the alleged lack of transparency of the MCP rebate system, the relevant question is precisely that as to whether Dell could, at any given moment, predict for future periods the extent to which the MCP rebates would change if it were to switch to AMD for a given volume of purchases or particular products or programs. That was not the case in this instance, however. In that regard, the Court points out that, in its Article 18 response, Dell expressly mentioned that it 'did not know precisely how much MCP would decline, in what manner and over what time period'. Moreover, Dell explained that it sought to forecast this negative impact across a range of potential scenarios (see paragraph 466 above). Those circumstances are confirmed by the internal Dell documents (see paragraphs 474 to 481 above). Consequently, the Commission has shown to the requisite legal standard that Dell was not aware of the exact proportion of the MCP rebates which would have been annulled if it were to break its exclusive relationship with the applicant.

537 Second, the applicant submits that there is no basis in law for the Commission's attempt to impose liability on Intel for the alleged internal expectations or uncertainties of its powerful customers. In that regard, it should be noted that the finding of a lack of transparency of the MCP rebate system is not indispensable to justify the operative part of the contested decision. Contrary to what the applicant claims, Intel's liability at issue in the contested decision does not depend on proof that Dell was uncertain as to the exact proportion of the MCP rebates which would have been cancelled if it broke its exclusive relationship with Intel. In any event, it must be found that, in that decision, the Commission relied on that uncertainty only to show that the MCP rebate system lacked transparency. That lack of transparency constitutes an objective quality of the MCP rebate system, of which the applicant must have been aware. Given that the Commission thus relied on that uncertainty only to prove an objective circumstance of which the applicant must have been aware, the Commission's approach cannot be criticised (see paragraphs 521 to 525 above).

538 For the sake of completeness, the Court points out that the fact that Dell was not aware of the exact portion of the MCP rebates which would have been cancelled if it were to break its exclusive relationship with the applicant cannot deprive those rebates of their capacity to encourage Dell to use the applicant as its exclusive supplier. It should be noted, in that regard, that the anti-competitive nature of the practices at issue in the contested decision do not depend on the precise amount of the portion of the MCP rebates which was conditional upon exclusivity. Rather it depends on the exclusivity which was granted in consideration for those rebates (see paragraph 108 above). In the present case, the Commission stated, in recital 216 of the contested decision, that, during the period in question in the contested decision, the total amount of MCP rebates granted by Intel to Dell was between USD 110 and 479 million per quarter. The applicant does not dispute those figures. Moreover, the Commission proved to the requisite legal standard that the applicant communicated to Dell that at least part of those rebates was de facto conditional upon exclusivity. Even if Dell was not aware of the exact portion of the MCP rebates which would have been cancelled if it had broken its exclusive relationship, those findings are sufficient for the conclusion to be reached that the applicant's practices vis-à-vis Dell were capable of encouraging Dell to use the applicant as its exclusive supplier (see paragraph 109 above).

3.6) The argument alleging that Dell used the applicant as its exclusive supplier for reasons entirely independent of any fear of a disproportionate reduction in rebates if it were to switch to AMD

539 The applicant submits that Dell used it as its exclusive supplier for reasons entirely independent of any fear of a disproportionate reduction in rebates if it were to switch to AMD. First, the applicant claims that Dell chose to buy CPUs exclusively from Intel as part of its low-cost business model because of the lower cost of supplying only the Intel platform. Second, it claims that Dell believed that Intel's CPUs were generally superior to those of AMD and that Intel possessed superior capabilities as a supplier. Third, Dell was concerned about the 'sustainability of [AMD's] roadmap and the health of [AMD's] chipset ecosystem'. Fourth, Dell was concerned about AMD's reliability as a supplier. Fifth, Dell concluded that to purchase from AMD would create significant logistical problems for it. Sixth, Dell was concerned about AMD's lack of capacity to meet Dell's high volume requirements.

540 In that regard, it must be found, first, that the applicant's arguments are ineffective in so far as they seek to refute the evidence that the applicant informed Dell that the level of the MCP rebates was conditional upon exclusivity.

541 By its arguments, the applicant attempts to explain the existence of an exclusive relationship between itself and Dell during the period in question with reasons other than the grant of exclusivity rebates. However, in the contested decision, the Commission did not infer the existence of exclusivity rebates from the mere fact that there was an exclusive relationship between the applicant and Dell, so that, in order to rebut that evidence, the applicant could merely have provided an alternative explanation. On the contrary, by relying, in particular, on the internal Intel and Dell documents, Dell's Article 18 response and the email of 7 December 2004, the Commission established by means of precise and consistent evidence that the applicant informed Dell that the level of the MCP rebates was conditional upon Intel being its exclusive supplier (see paragraphs 446 to 515 above). The applicant's arguments relating to Dell's alleged independent reasons for using Intel as its exclusive supplier do not however concern directly the evidence relied on in the contested decision. Instead, those arguments merely call in question that evidence indirectly by offering an alternative explanation for the existence of an exclusive relationship between the applicant and Dell during the period in question. Such an indirect challenge is in no way sufficient to rebut the probative value of the evidence relied on in the contested decision.

542 Moreover, it is apparent from the case-law that, when the Commission relies on evidence which is in principle sufficient to demonstrate the existence of the infringement, it is not sufficient for the undertaking concerned to raise the possibility that a circumstance arose which might affect the probative value of that evidence in order for the Commission to bear the burden of proving that that circumstance was not capable of affecting the probative value of that evidence. On the contrary, except in cases where such proof could not be provided by the undertaking concerned on account of the conduct of the Commission itself, it is for the undertaking concerned to prove to the requisite legal standard, on the one hand, the existence of the circumstance relied on by it and, on the other, that that circumstance calls in question the probative value of the evidence relied on by the Commission (*E.ON Energie v Commission*, paragraph 67 above, paragraph 56).

543 The Court finds that, by providing an alternative explanation for the existence of an exclusive relationship between the applicant and Dell, the applicant does not call in question the fact that the level of the MCP rebates was conditional upon exclusivity. Even supposing that the applicant succeeded in proving that Dell used the applicant as its exclusive supplier solely for the reasons put forward by the applicant, that would not call into question the probative value of the evidence on which the Commission relied in order to establish the existence of an exclusivity rebate. The evidence put forward by the applicant would be capable only of disproving the causal link between the exclusivity rebate, the existence of which was proved to the requisite legal standard in the contested decision, and Dell's decision to use the applicant as its exclusive supplier. However, that evidence would not be capable of disproving the existence of an exclusivity rebate as such.

544 It follows that the applicant's arguments are ineffective in so far as they seek to refute the evidence that the applicant informed Dell that the level of the MCP rebates was conditional upon exclusivity.

545 Second, the Court finds that the applicant's arguments are also ineffective in so far as they seek to call in question the legal characterisation of the exclusivity rebates as abusive. In that regard, it should be noted that the characterisation of an exclusivity rebate as abusive does not require proof either of an actual effect on the market or of a causal link (see paragraphs 103 and 104 above). Such rebates are unlawful on account of their capability to restrict competition. Even if the applicant succeeded in refuting the existence of a causal link between the grant of exclusivity rebates and Dell's decision to use the applicant as its exclusive supplier, that would not call in question the inherent capability of the MCP rebates to restrict competition. Any financial advantage granted on condition of exclusivity is necessarily capable of inducing the customer to opt for an exclusive supplier, and it is irrelevant that the customer might also have opted to use the dominant undertaking as its sole supplier in the absence of an exclusivity rebate.

546 Accordingly, it must be concluded that the applicant's arguments that there were other reasons why Dell used the applicant as its exclusive supplier during the period in question in the contested decision are ineffective. They are in no way capable of rebutting the evidence of the existence of an exclusivity rebate, or of its legal characterisation as abusive. Consequently, those arguments must be dismissed, without it being necessary to examine their substance and to adjudicate on whether the applicant established to the requisite legal standard that Dell used the applicant as its exclusive supplier solely for reasons other than the existence of an exclusivity rebate.

3.7) The argument alleging that Intel's reaction to Dell's decision to switch part of its supplies to AMD in 2006 refutes the conclusions reached in the contested decision

547 The applicant submits that its reaction to Dell's decision in 2006 to switch part of its supplies to AMD ('Dell's 2006 decision') refutes the Commission's conclusions. In the applicant's view, Dell would not have taken that decision in 2006 if it had feared that that would have led to a disproportionate reaction. Moreover, no disproportionate loss of rebates ensued from that decision. The applicant asserts that, although it is true that Dell did experience a reduction in its rebates in 2006, that reduction was in no way caused by Dell's switch to AMD, but essentially by a dramatic reduction in Intel's list prices to align them more closely with transactional prices and by a substantial reduction in the volume of CPUs purchased by Dell from Intel.

548 First of all, the applicant's argument that Dell would not have taken its 2006 decision if it had feared that it would have led to a disproportionate reaction must be rejected. There is nothing precluding, from the customer's point of view, the advantages related to the decision to switch part of its supplies to a competitor from outweighing the disadvantage inherent in the cancellation of the financial incentive which is granted in consideration for exclusive supply (see paragraph 530 above). Thus, the mere fact that Dell finally decided, in 2006, not to continue to use the applicant as its exclusive supplier is not such as to refute the fact that the applicant informed Dell, prior to that decision, that the level of the MCP rebates was conditional upon exclusivity.

549 Next, as regards the argument that there was no disproportionate loss of rebates following Dell's 2006 decision, the following should be noted.

550 First, it must be found that that argument on the part of the applicant lacks legal relevance in so far as the legal classification of an exclusivity rebate does not depend on the question whether that rebate was actually reduced or cancelled following a customer's decision to switch part of its supplies to a competitor (see paragraph 527 above).

551 Second, the applicant's argument must also be rejected in so far as it seeks to refute the evidence that the level of the MCP rebates was subject to an exclusivity requirement during the period of infringement in question in the contested decision. It should be noted that that period extends from December 2002 to December 2005 in so far as concerns Dell. Even if the applicant were able to prove that the reduction in MCP rebates in 2006 was fully explainable by its reduction in its catalogue prices and by the reduction in the volume of CPUs which Dell purchased from Intel, the fact none the less remains that the evidence in question related solely to the applicant's actual reaction to Dell's 2006 decision. The Court finds that that reaction has weak probative value, at best, in relation to the question concerning the content which the applicant communicated to Dell during the period in question in the contested decision. Given that the CPU x86 market is highly dynamic, it cannot be ruled out that the market circumstances changed significantly between the end of the period of infringement in question in the contested decision and Dell's 2006 decision. Consequently, several reasonable commercial reasons may explain why, following Dell's 2006 decision, the applicant no longer considered it opportune to implement its earlier announcement that it would reduce the MCP rebates for the sole reason that Dell had introduced a competitor product. As a result of that weak probative value (even if it were established), the evidence envisaged by the applicant is not such as to refute the precise and consistent evidence which shows that, during the period in question in the contested decision, the applicant informed Dell that the level of the MCP rebates was conditional upon exclusivity.

552 For the sake of completeness, the Court observes that the applicant's argument by which it attempts to use the drop in its list price to explain the proportion of the 2006 MCP rebate reduction which is not justified by the reduction in the volume of purchases is ineffective. The Commission rightly states, in recital 288 of the contested decision, that a general drop in prices cannot compensate a reduction in rebates, since such a drop in prices is not equivalent to a rebate. The transformation of a rebate granted only to Dell into a drop in prices for all of Intel's customers constituted a net loss of competitive advantage for Dell as compared with its situation when it was honouring the exclusivity requirement. It is pointed out in the contested decision, in that regard, that OEMs operate in a highly competitive environment, which the applicant does not dispute. The relative price of their inputs is thus as important as their absolute price, in particular in so far as concerns components, such as x86 CPUs, which represent the most significant proportion of the cost of a computer.

3.8) The argument alleging that the depositions made during the procedure before the Delaware court and during the procedure before the US FTC refute the conclusions reached in the contested decision

553 The applicant submits that the probative value of the evidence relied on in the contested decision is called into question by the depositions which were made by three of Dell's executives, namely Mr D3, [confidential], Mr D1, [confidential], and Mr D2, [confidential], during the procedure before the Delaware court in 2009. Moreover, the applicant relies on Mr D1's deposition before the Federal Trade Commission ('US FTC') in 2003 which took place in the context of an investigation initiated by the latter in relation to Intel's commercial practices.

i) The probative value of the depositions relied on by the applicant vis-à-vis Dell's Article 18 response

554 The applicant submits that, under American law, depositions under oath of senior corporate officials are deemed to be of greater probative force than mere unsworn corporate submissions.

555 In that regard, it should be noted, first of all, that, under Article 23(1)(a) of Regulation No 1/2003, supplying incorrect or misleading information in response to a simple request for information is punishable by a fine. In providing inaccurate information to the Commission in its Article 18 response, Dell would thus have risked being fined by the latter.

556 Moreover, the accuracy of Dell's Article 18 response is confirmed by the documents annexed to it and which Dell identified as being relevant to the question raised by the Commission (see paragraph 501 above).

557 Finally, it is apparent from the case-law that responses given on behalf of an undertaking as such carry more weight than that of an employee of the undertaking (see *JFE*, paragraph 62 above, paragraph 205 and the case-law cited).

558 Consequently, the depositions relied on by the applicant do not, as such, carry more weight than Dell's Article 18 response.

ii) The statements contained in the depositions made before the Delaware court, by which the applicant seeks to weaken the probative value of the documents drawn up by Mr D2

559 The applicant submits that Mr D2 stated that he was 'not privy to what negotiating tactics' the key decision-makers within Dell used in their dealings with Intel, that 'the details and mechanics of ... a deal would have been negotiated directly with procurement' and he '[would not] have been involved'. The applicant claims that Mr D2 testified that he 'never met directly with [Mr D3]'. Moreover, Mr D2 stated, under oath, that he continued to be 'the voice of doom on the worst-case scenarios that could conceivably happen', that his 'personal intent [was] to help balance the ... variety of opinions across Dell', and that '[since] some people had the rosy view, [he] intentionally always laid out the ... worst case'. Furthermore, it claims that Mr D2 stated that his estimates as to Intel's reaction if Dell were to decide to switch to AMD were 'highly speculative'. Mr D1 testified that he considered Mr D2 to be 'an advocate of continuing to be sole sourced with Intel', and that, 'as a result, ... he may have positioned things a little more dire than they really were'. Mr D3, for his part, testified that he could not 'remember a specific meeting that [he] was in and [Mr D2] was there'.

560 In so far as concerns the use of the term [all-out war] in the email of 26 February 2004, the applicant submits that Mr D2 himself tried to put the use of that term into perspective. Before the Delaware court, he stated that that metaphor was aimed at illustrating the following situation: 'I was acting as kind of a loose cannon where I was taking a very worst-case scenario and presenting it as a statement of fact.' He also stated that he '[was] quite certain they didn't say Intel will declare [all-out war]'. As regards that email, Mr D3 stated the following: '[A]ll of this strikes me as kind of, you know, opinions of ... this guy, [Mr D2]. I don't know if they're ... well informed or, you know, I've only read some of this, but I could certainly disagree with ... a lot of what I've read.' Similarly, when asked whether he disagreed with Mr D2's 'whole analysis' in his email, Mr D1 responded, 'I would say that I disagree'.

561 The Court finds that those extracts from the depositions made before the Delaware court are not even sufficient to cast doubt on the probative value of the three documents referred to in paragraphs 478, 480 and 481 above, which were drawn up by Mr D2. A fortiori, they cannot refute all of the precise and consistent evidence on which the Commission relied to show that the level of the MCP rebates was conditional upon exclusivity.

562 First of all, in so far as the applicant asserts that Mr D2 was not aware of the negotiations between it and Dell on the MCP rebates, the Court points out that Mr D2's email of 26 February 2004 shows that he participated very recently at a meeting with Intel, during which the relationship between Intel and Dell was addressed (see paragraphs 480 and 495 above). As regards that email, Mr D2 was asked the following question during his deposition before the Delaware court: '[H]ow did you know that [Mr I2] and [Mr I5] were prepared for [all-out war]? Did you get that information from [Mr I1] and/or [Mr

14]?’ Mr D2 responded as follows: ‘I would imagine there would have been discussions with [Mr I1 and Mr I4] on how would [Mr I2 and Mr I5] — how would Intel executives react to AMD.’ Later, in response to the question whether he had consulted Mr I1 and Mr I4 in relation to the scenarios referred to in the email, Mr D2 responded that, ‘[t]here would have been ... informal discussions around a ... dinner table ... on what’s the worst thing that could happen and mutual discussion on different scenarios.’ When asked whether his bosses within Dell were aware that he had lines of communication with Mr I1 and Mr I4, Mr D2 responded, ‘[i]f I communicated information to them that I got from [those individuals], they would clearly know where it came from’. Moreover, during his deposition before the Delaware court, Mr D1 confirmed that he was aware that Mr D2 had been in direct contact with Mr I1 and that he was using Mr D2 to exchange information with Intel.

563 In that regard, the Court points out that Mr I1 and Mr I4 were Intel executives who were involved in negotiations at the highest level. Mr I1 was [*confidential*] at Intel. Mr I4 was initially [*confidential*] and then, from 2005, Intel’s [*confidential*]. The depositions of Mr D2 and Mr D1 thus confirm that Mr D2 had contact with Intel executives who themselves were involved in negotiations at the highest level. Mr D1’s deposition implies that Dell used Mr D2 to exchange information with Intel.

564 Moreover, in his deposition before the Delaware court, Mr D1 confirmed the relevance of the pessimistic scenarios for Dell’s decision-making, while stressing that he did not share those views, stating that, ‘[w]hen we’re negotiating, we’re going to make sure that if the worst-case scenario did happen, we would be in a position to be advantaged once we concluded whatever direction we took. Did I believe that? No.’ In so far as concerns, in that regard, the use of the term [all-out war], the Commission rightly submits that, although the term [all-out war] might have been used to add some colour to the discussion, it nevertheless indicates Mr D2’s understanding of a marked adverse reaction on the part of Intel in the event of such a switch to a competitor.

565 The depositions before the Delaware court are thus not such as to show unequivocally either the fact that Mr D2 was not aware of the negotiations between Intel and Dell on the MCP rebates or the fact that his projections were not taken seriously within Dell. Taken in isolation, the depositions before the Delaware court must, at best, be considered to be ambiguous in that regard. They cannot, therefore, deprive the documents drawn up by Mr D2 of their probative value.

566 In that regard, the Court points out that answers given on behalf of an undertaking as such carry more weight than those of an employee of the undertaking (see paragraph 557 above). It also recalls that two documents drawn up by Mr D2 formed part of the annex to Dell’s Article 18 response containing the documents which Dell identified as relevant to the issue of the consequences of its introduction of computers equipped with AMD CPUs (see paragraph 501 above). In the light of those considerations, the Court must reject the applicant’s argument that the documents written by Mr D2 are devoid of any probative value in relation to Dell’s corporate vision because they are not consistent with the sworn statements of Dell’s executives.

567 Second, the Court notes that, even if the probative value of the emails written by Mr D2 were weak, or even non-existent, the fact none the less remains that the internal Intel documents, Dell’s Article 18 response and the other internal Dell documents referred to above prove, to the requisite legal standard, that Intel communicated to Dell that the amount of the MCP rebates was conditional on Intel being its exclusive supplier (see paragraph 502 above).

iii) The statements contained in the depositions made before the Delaware court, by which the applicant seeks to establish that Dell did not consider that the level of the rebates was conditional on Intel being its exclusive supplier

568 According to the applicant, Dell’s key decision-makers testified under oath that Dell’s rebates during 2002-2005 were not conditional upon exclusivity, that Intel never threatened Dell with disproportionate reductions in its rebates if it decided to switch to AMD, and that Dell never rejected AMD out of fear of Intel ‘punishment’.

The statements pursuant to which the rebates granted to Dell during 2002-2005 were not conditional on Intel being its exclusive supplier

569 It is true that, in his deposition before the Delaware court, Mr D3 stated: ‘I don’t think we ever had an agreement with Intel that was exclusive or monogamous.’ In his deposition before the Delaware court, Mr D1 stated the following:

‘There has never been an arrangement between Intel and Dell that we had an exclusive arrangement. We always retained, throughout the negotiations and throughout any additional consideration given to the company, the right to decide.’

570 However, the Court points out that the claim made against the applicant in the contested decision is not based on a formal exclusivity requirement or an agreement concluded between Intel and Dell. Rather, it is based on evidence that the applicant informed Dell that the level of the MCP rebates was

de facto conditional upon exclusivity. In that regard, the statements made by Mr D1 in his depositions before the US FTC and before the Delaware court and by Mr D3 before the Delaware court do not make it possible to refute the conclusions drawn in paragraphs 446 to 515 above concerning the evidence relied on in the contested decision.

The statements pursuant to which Intel never threatened Dell that it would reduce the rebates disproportionately if Dell decided to switch to AMD

571 The applicant attempts to show that Mr D3 and Mr D1 did not believe that there would be a disproportionate loss of rebates if Dell were to decide to switch part of its supplies to AMD and relies, in particular, on the following extracts from the witness statements of those two men.

572 The applicant submits that Mr D1 stated, in his deposition before the US FTC in 2003, that, '[t]here are no dollars that come from Intel that incent us not to use any of their competitors' products.'

573 However, it should be pointed out that, in recital 263 of the contested decision, the Commission sets out the context of that statement. Immediately after his statement, Mr D1 was asked the following: 'So the funding that you receive from Intel would not change if you were to start selling a product that included an AMD microprocessor?' Mr D1 responded: 'If the competitive threat changes, then the competitive response may indeed change.' When asked to explain what he meant by his response, he stated: 'Some of the programs that we have established are a competitive response to an alternate chipset or [a CPU]. If we were to use that [CPU] or chipset, there would be no competitive response from Intel.' In recital 265 of the contested decision, the Commission therefore rightly concluded that Mr D1 thus reduced the significance of his statement that there are 'no dollars that come from Intel that incent us [Dell] not to use any of their competitors' products' by saying that those dollars would disappear if Dell were to source from a competitor.

574 Moreover, the Commission states, in recital 312 of the contested decision, that, in his deposition before the Delaware court, Mr D1 stated the following: 'Well, we certainly understood that if you had a meet-comp program and you introduced the competition, there was really no need to have a meet-comp program ... I was not concerned at any time of retaliation or an absoluteness of it all goes away, but certainly there was some at risk.' In the same recital of the contested decision, the Commission states that Mr D1 also said that: '[A]ny consideration that we got on a technology of product or anything that we believed as a competitive alternative existed, if you introduced the competitive alternative, we would have believed and modelled that you wouldn't have got the consideration on that series of products. Not that it was an all or nothing.' Moreover, in recital 313 of the contested decision, the Commission states that Mr D1 confirmed that the email of 7 December 2004 (see paragraph 513 above) meant that, if Dell decided to switch to AMD, Intel would change its competitive support, which means give less money to Dell.

575 Mr D1's depositions thus clearly show that he had understood that the level of the rebates was not exclusively linked to the volume of purchases. The depositions indicate, rather, that at least part of the MCP rebates was linked to the 'competitive exposure' of the products to be moved by Dell over to AMD. It is true that Mr D1's depositions do not imply that he himself considered that all of that 'competitive exposure' would have disappeared if Dell had broken its long-established exclusive supply agreement with the applicant. However, the applicant does not show how exactly, in accordance with Mr D1's own estimations, the alleged changes in 'competitive exposure' should have been translated into changes in the MCP rebates. In the absence of a more concrete explanation in that regard, it is permissible to conclude that the part of the MCP rebates which varied, according to Mr D1's statement, in accordance with the 'competitive exposure' of particular Dell products or programs, did not vary, in reality, on the basis of 'competitive exposure', but on the basis of whether Dell used the applicant as its exclusive supplier or not (see paragraphs 461, 490 and 511 above).

576 Moreover, the Court points out that Mr D1 confirmed the relevance of the pessimistic scenarios for Dell's decision making, while stressing that he did not share those views himself (see paragraph 564 above). The pessimistic scenarios included Mr D2's projections that all of the MCP rebates would have been lost for at least a quarter if Dell switched part of its supplies to AMD. In those scenarios, the expression 'competitive exposure' which is used must therefore be regarded as a euphemism meaning that the level of the MCP rebates was conditional on Intel being Dell's exclusive supplier (see paragraph 488 above). Consequently, Mr D1's statements are not incompatible with the finding in the contested decision that Dell, as an undertaking, considered that the level of the MCP rebates was conditional on Intel being its exclusive supplier.

577 Furthermore, the applicant relies, in particular, on the passages set out below of Mr D3's deposition before the Delaware court to show that he did not believe that there would be a disproportionate loss of rebates if Dell switched part of its supplies to AMD.

578 Mr D3 stated the following: 'No ... I don't believe that they paid us a premium to stay 100 percent Intel.'

579 However, that statement is compatible with the contention that the MCP rebates did not constitute a 'premium' for exclusivity, but rather a 'response' to the 'competitive exposure' of particular Dell products or programs. In the light of all of the evidence relied on in the contested decision concerning the relationship between Dell and the applicant during the period in question, it is likely that Mr D3 denied the existence of a 'premium' for exclusivity because he assumed implicitly that the rebates did not constitute a 'premium' for exclusivity, but a 'response' to the 'competitive exposure'. However, the applicant does not put forward any argument capable of showing that, in his depositions, Mr D3 gave a more precise explanation of exactly how the alleged changes in terms of competitive exposure should have been translated into changes in the grant of MCP rebates. Consequently, Mr D3's statement is not incompatible with the finding in the contested decision that Dell, as an undertaking, considered that the level of the MCP rebates was conditional on Intel being its exclusive supplier.

580 Moreover, the applicant relies on the fact that Mr D3 stated that he 'didn't know whether' sourcing from AMD 'would be positive or negative' with respect to the level of Intel rebates, and he 'thought there was a legitimate chance that Intel would fight even harder to retain more of our business and therefore give us even larger discounts' if Dell were to switch to AMD.

581 However, when asked whether there were some people within Dell who believed that Dell's discounts from Intel might increase if Dell were to purchase AMD [CPUs], Mr D1 responded as follows: 'I don't think so. There may have been some who thought over a long time frame that may be the case, but not initially.' When asked whether he recalls conversations with Mr D3 in which the latter expressed an opinion that the rebates might increase, Mr D1 answered that he did not have such a recollection. In addition, it should be noted that Mr D3 abstained from saying whether he considered that the applicant would offer larger rebates in the short or long term. Consequently, his response must be considered in the light of Dell's Article 18 response, pursuant to which some of Dell's employees assumed that a decision to switch part of its supplies to AMD could — in the long term — lead to increased price competition, or even a price war, which could lead to an eventual recovery by Dell of any short term reduction in MCP rebates (see paragraph 472 above).

582 The applicant points out that Mr D3 also answered 'yes' to the question whether he could have announced in October 2003 that 'Dell would be going with using an AMD processor for a product or two and face no repercussions from Intel.' However, that statement is not compatible with the applicant's theory that the level of the MCP rebates varied in accordance with 'competitive exposure'. According to that theory, even the use of AMD CPUs for 'a product or two' would have led to a change in 'competitive exposure' and thus triggered a reaction from Intel. That theory is also contradicted by Dell's Article 18 response, in which Dell, as an undertaking, stated that even the Dell employees with the most optimistic point of view came to the conclusion that, if it were to switch part of its supplies to AMD, the applicant would hurt Dell, at least in the short term (see paragraph 472 above). Consequently, that statement of Mr D3 is not credible.

The statements pursuant to which Dell did not decline AMD's offers for fear of being subjected to Intel 'sanctions'

583 In support of its argument that Dell did not perceive the changes made to its rebates as a 'sanction', the applicant relies on the statements of Mr D1 and Mr D3 before the Delaware court, pursuant to which Mr D1 and Mr D3 did not believe that Intel took retaliatory measures against Dell following Dell's 2006 decision. For the grounds set out in paragraphs 547 to 552 above, those statements do not make it possible to refute the findings made in the contested decision that Dell considered, during the period in question in the contested decision, that the level of the MCP rebates was conditional on Intel being its exclusive supplier.

4) Conclusion in relation to the evidence that the applicant informed Dell that the level of the MCP rebates was conditional on Intel being its exclusive supplier

584 In the light of all of the foregoing considerations, it must be concluded that it was established in the contested decision, in accordance with precise and consistent evidence, that the applicant informed Dell, during the period in question in that decision, that the level of the MCP rebates was conditional on Intel being its exclusive supplier. In view of the considerations set out in paragraphs 69 to 166 above, that evidence is sufficient for those rebates to be qualified as abusive for the purposes of Article 82 EC.

b) Analysis of the capability of the rebates to restrict competition according to the circumstances of the case

585 It should be noted that, in order to find that the exclusivity rebates were unlawful, the Commission is not required to analyse the capability of those practices to restrict competition according to the circumstances of the case at hand (see paragraphs 80 to 94 above)..

586 For the sake of completeness, the Court also points out that, in the contested decision, the Commission established that the MCP rebates were capable of restricting competition also on the basis of an analysis of the circumstances of the case at hand.

587 In that regard, it should be noted generally that the fact that the conditional rebates granted by the applicant to Dell were part of an overall strategy aimed at foreclosing AMD's access to the most important sales channels and the fact that that strategy included two types of infringement which complemented and strengthened one another render the applicant's conduct capable of restricting competition (see paragraphs 181, 184 and 213 above).

588 Moreover, the fact that the applicant's conditional rebates and payments were granted to certain particularly important beneficiaries also constitutes a factor which suggests that those payments are capable of restricting competition (see paragraph 182 above).

589 The Court also notes that the Commission stated, in that regard, in recital 182 of the contested decision, that Dell, although recently overtaken by HP, has in recent years been the most important PC and server vendor in terms of overall computer sales. The applicant does not dispute those facts. Accordingly, the applicant's conduct vis-à-vis Dell was capable of making it more difficult for AMD to gain access to a particularly important customer. It was thus capable of producing a particularly harmful effect on the structure of the competition.

590 Moreover, the conditional rebates and payments were an important element for OEMs to consider on account of the strong competition on the OEM market and their low operating margins (see paragraph 179 above). Furthermore, the fact that those rebates and payments were actually taken into account in the commercial decisions of those benefiting from them also constitutes a factor which suggests that those payments are capable of restricting competition (see paragraphs 180 and 212 above).

591 The Court finds that the rebates granted to Dell under the MCP agreements were of great importance for Dell. The total amount of MCP rebates granted by Intel to Dell was between USD 110 and 479 million per quarter. The Court observes that the level of those rebates, at least part of which was conditional on Intel being Dell's exclusive supplier, had a significant impact on Dell's choice of supplier during the period in question in the contested decision.

592 In that regard, the Court points out that, in recitals 234 and 933 of the contested decision, the Commission relied on the passages set out below from Dell's Article 18 response in concluding that the MCP rebates had a non-negligible impact on Dell's decision to use the applicant as its exclusive supplier:

'An important part of this assessment [pros and cons of adopting a dual source strategy] was a consideration of the financial impact on Dell ... of the potential change in [CPU] strategy ... There was a general consensus [within Dell] that such a change [switching to a dual-source strategy] would result in a reduction in MCP, which would have a negative financial impact on Dell, and that this would need to be taken into account in evaluating the benefits of such a fundamental change in strategy.'

593 Moreover, in recitals 183 to 186 of the contested decision, the Commission stated that, during the entire period of infringement in question in that decision, Dell constantly envisaged the possibility of switching part of its supplies to AMD. In recitals 931 and 932 of the contested decision, the Commission stated that, while it constantly envisaged the possibility of switching part of its supplies to AMD, Dell decided to stay with Intel because of the rebates granted by the latter. This is clear from Dell's analysis, as well as from internal Intel documents, pursuant to which any advantage in going with AMD would be more than offset by the associated loss of, or reduction in, the Intel rebate.

594 In so far as concerns Dell's documents, it is sufficient to refer, in that regard, to Dell's internal presentation of 17 March 2003, in which Dell found that '[the] anticipated Intel response wipes out all potential ... [operating income] upside from going with AMD', and to Mr D2's email of 21 July 2003, in which he stated the following: 'Bottom line is that I don't see how we make AMD a positive for Dell. The end game is inevitable, the cost to support AMD is high, the loss of focus goes against our traditional model and strengths, and the net loss of MCP will far outweigh any gain we get by doing a limited toe-dip with a couple of server platforms.' Those documents show that Dell envisaged scenarios in which any advantage related to using AMD as a supplier would be offset by the loss of, or reduction in, the applicant's MCP rebates.

595 As regards the internal Intel documents, the Court draws attention to the exchange of emails of 17 February 2006. The fact that Mr I2 claimed to have 'bought' Dell shows that the applicant considered that its MCP rebates had had an impact on Dell's decision to use it as its exclusive supplier.

596 It is true that the applicant endeavours to refute the existence of a causal link between the fact that the level of the MCP rebates was conditional upon exclusivity and Dell's use of Intel as its exclusive supplier, by submitting that Dell used it as its exclusive supplier for reasons entirely



independent of any fear of a disproportionate reduction in rebates if it were to switch to AMD (see paragraphs 539 and 541 above).

597 However, the Court finds that the applicant's arguments are not such as to rule out any influence upon Dell's decision to use the applicant as its exclusive supplier of the fact that the amount of the MCP rebates was conditional on exclusive supply. A customer's decision to use one supplier instead of another is necessarily a multi-causal decision. As long as there is evidence, in the present case, showing that the exclusivity rebates had an impact on Dell's choice of supplier (see paragraphs 592 to 595 above), that evidence cannot be refuted by the mere fact that other reasons also influenced that choice. The fact that an exclusivity rebate has an influence on a customer's choice of supplier does not preclude other factors from having an influence.

598 It follows that the Commission inferred from precise and consistent evidence that the MCP rebates had an impact on Dell's choice of supplier. It is apparent from Dell's Article 18 response that that impact was even 'important'.

599 Moreover, that importance is confirmed by the fact that the internal Intel and Dell documents indicate that the applicant informed Dell that the rebates which Dell would lose if it were to switch part of its supplies to AMD would be allocated to a competitor OEM. According to Dell's internal presentation of 10 January 2003, Mr I1 aimed to '[g]et [Mr D4] [*confidential*] clearly [to] understand our meet-comp process and how it applies to DELL — i.e. if they have AMD in their arsenal they'll have less meet-comp exposure — hence less meet-comp dollars avail to them — even the possibility that meet-comp dollars that we're applied [sic] to DELL go somewhere else ...' (see paragraph 446 above). According to Dell's internal presentation of 23 December 2002, an agreement with AMD would mean the following: '... Intel will give MOAP [USD] to others to ensure no TAM shift to Dell/AMD' (see paragraph 475 above). According to the internal Dell email of 26 February 2004, Intel '[will] use the added MCP to compete against us' (see paragraph 480 above). In the light of the highly competitive environment in which OEMs operate and their low operating margins (see paragraph 552 above), from Dell's point of view, the transfer of rebates to one of its competitors would have been even worse than losing just those rebates.

600 Accordingly, the Court finds that, the facts of the present case having been analysed, the MCP rebates were capable of restricting competition. They were thus capable of restricting Dell's freedom of choice of supplier and foreclosing AMD from the market.

#### c) Meeting with Mr D1 of Dell

##### 1) Arguments of the parties and procedure

601 The applicant accuses the Commission of having infringed its rights of defence in failing adequately to record the meeting held on 23 August 2006 between Commission staff and the [*confidential*], Mr D1. The Commission admitted that that meeting was organised only after the applicant had shown it that an indicative list of topics existed, while denying that a record had been made thereof. Some months later, the Hearing Officer acknowledged that the note to the file existed, while stating that it was a note to the file to which the applicant did not have a right of access. On 19 December 2009, the Commission finally sent a copy of the note to the file to Intel 'as a matter of courtesy'. That copy was heavily redacted.

602 According to the applicant, it is apparent from both the indicative list of topics and the note to the file that the meeting between the Commission and Mr D1 related to key issues concerning Dell. It is likely that Mr D1 gave evidence exculpatory of Intel.

603 The applicant relies, in particular, on a decision of the European Ombudsman of 14 July 2009. In that decision, the Ombudsman concluded that the meeting of 23 August 2006 should have been classed as a meeting for the purposes of Article 19 of Regulation No 1/2003, that it could not be excluded that it concerned potentially exculpatory evidence and that the failure adequately to record it constituted maladministration on the part of the Commission.

604 By order of 16 April 2012, in accordance with Article 65(b), Article 66(1) and the second subparagraph of Article 67(3) of the Rules of Procedure, the Court requested the Commission to produce the confidential version of the note to the file, it being stated that that version would not be communicated to the applicant or the interveners at this stage. The Commission complied with that request within the period prescribed.

605 At the hearing, the applicant submitted that the Commission failed adequately to record not only the meeting between the Commission and Mr D1, but also the meetings between the Commission and other witnesses and of hundreds of telephone conversations. That amounts to a systematic error on the part of the Commission.

606 By order of the Court of 29 January 2013, the oral procedure was re-opened. By way of measures of organisation of procedure, and the Commission — which consulted Dell — having been heard and having raised no objections, the General Court sent the applicant and the interveners the full version of the note to the file and invited them to submit their observations on the passages which had not been sent to them earlier. The applicant and ACT complied with that request on 6 and 14 March 2013. UFC did not submit any observations within the period prescribed. The Court thus invited the Commission to submit its observations on those of the applicant. The Commission complied with that request on 25 March 2013. The Court also invited the applicant and the Commission to submit their observations on ACT's observations. Both parties complied with that request on 12 April 2013. The oral procedure was then closed on 6 May 2013.

607 In its observations of 6 March 2013, the applicant essentially maintained its earlier argument that the Commission infringed its rights of defence in failing adequately to record the meeting between the Commission and Mr D1. Moreover, it submitted that the omission on the part of the Commission to disclose to Intel during the administrative procedure the exculpatory evidence which was removed in the redacted parts of the note to the file also constituted an infringement of its rights of defence.

608 The Commission disputes the applicant's arguments. Moreover, it takes the view that the argument concerning the existence of an alleged systematic error constitutes a new complaint, which was submitted out of time.

## 2) Findings of the Court

609 First of all, the Court finds that the applicant's claims that the Commission committed a systematic error in failing adequately to record a number of meetings and telephone conversations with other witnesses constitute a new complaint which must be declared out of time and which is thus inadmissible in accordance with Article 48(2) of the Rules of Procedure. As the Commission rightly stated at the hearing, in its application the applicant merely denounced the Commission's failure adequately to record the meeting of 23 August 2006 between the Commission and Mr D1. The applicant's claim that the Commission failed adequately to record a number of meetings and telephone conversations with other witnesses cannot be considered to be an amplification of that complaint, given that those other meetings and telephone conversations lack a sufficiently close link to the meeting which took place between the Commission and Mr D1.

610 Next, the Court finds that it is common ground between the parties that the meeting did not give rise to the establishment of a document intended to be included among the documents to which the applicant could have requested access in accordance with the rules governing access to the file. Although it is true that the Commission contends that it adequately recorded the content of the meeting by drawing up the note to the file, the fact none the less remains that it also emphasises that the note to the file was intended only for internal purposes and that it was not intended to form part of the evidence resulting from the Commission's investigation. Similarly, the applicant points out that the note to the file cannot be considered to be an adequate record, since it was intended to serve as an *aide memoire* for one of the Commission's case handlers.

611 Moreover, it is also common ground between the parties that, in the contested decision, the Commission did not make use of the information obtained at the meeting with Mr D1 to inculcate the applicant. The latter merely submits that Mr D1 provided the Commission with exculpatory evidence of which the Commission should have made an adequate record accessible to the applicant.

### 2.1) The existence of a procedural irregularity

612 As regards the question whether the Commission vitiated the administrative procedure with an irregularity, the Court points out, first of all, that the Commission did not infringe Article 19(1) of Regulation No 1/2003, read in conjunction with Article 3 of Regulation No 773/2004. The Commission was not in fact required to organise the meeting with Mr D1 as a formal interview for the purposes of those provisions.

613 Article 19(1) of Regulation No 1/2003 provides that the Commission may interview any natural or legal person who consents to be interviewed for the purpose of collecting information relating to the subject-matter of an investigation. Article 3 of Regulation No 773/2004 makes questioning on the basis of that provision subject to certain formalities. In accordance with Article 3(1) of Regulation No 773/2004, the Commission shall, at the beginning of the interview, state the legal basis and the purpose of the interview, and recall its voluntary nature. It shall also inform the person interviewed of its intention to make a record of the interview. Under Article 3(3) of the same regulation, the Commission may record the statements made by the persons interviewed in any form. A copy of any recording shall be made available to the person interviewed for approval. Where necessary, the Commission shall set a time-limit within which the person interviewed may communicate to it any correction to be made to the statement.

614 However, the Court notes that the scope of Article 19(1) of Regulation No 1/2003, read in conjunction with Article 3 of Regulation No 773/2004, does not extend to all interviews relating to the subject-matter of the Commission's investigation. A distinction must be made between formal questioning made by the Commission in accordance with those provisions and informal interviews. The practical needs of the sound functioning of administration and the interest in providing effective protection of the competition rules justify the possibility for the Commission to carry out interviews which are not subject to the formal requirements laid down in Article 3 of Regulation No 773/2004. Both reasons relating to procedural economy and the potential deterrent effects which formal questioning might have on the likelihood of a witness to provide information preclude a general obligation on the Commission to make all interviews subject to the formal requirements provided for in Article 3 of Regulation No 773/2004. If the Commission intends to use in its decision inculpatory evidence provided to it during an informal interview, it must make it available to the undertakings to which the statement of objections was addressed, and where necessary, it must create a written document to be placed in the file (see, to that effect, *Atlantic Container Line and Others v Commission*, paragraph 359 above, paragraph 352, and Case T-38/02 *Groupe Danone v Commission* [2005] ECR II-4407, paragraph 67). However, the Commission may rely on information obtained during an informal interview, in particular to obtain more solid evidence, while not making the information obtained during an informal interview accessible to the undertaking in question.

615 It is apparent from the wording of Article 19(1) of Regulation No 1/2003, pursuant to which the Commission 'may interview' a person 'for the purpose of collecting information relating to the subject-matter of an investigation', that the Commission enjoys discretionary power in deciding whether to make an interview subject to the formal requirements of Article 3 of Regulation No 773/2004. That interpretation of the wording is confirmed by the aim of Article 19 of Regulation No 1/2003, read in conjunction with Article 3 of Regulation No 773/2004. It results from the Commission's obligation to make all recordings available to the person interviewed for approval that the formal requirements provided for in Article 3 of Regulation No 773/2004 seek, in addition to protecting the person interviewed, particularly to increase the reliability of the statements obtained. Thus, those provisions do not apply to any interview relating to the subject-matter of an investigation, but only to the cases for which the Commission pursues the objective of collecting both incriminating and exculpatory information, on which it will be able to rely as evidence in its decision bringing a given investigation to an end. By contrast, those provisions do not seek to restrict the possibility for the Commission to carry out informal interviews.

616 That interpretation of Article 19 of Regulation No 1/2003, read in conjunction with Article 3 of Regulation No 773/2004, also results from recital 25 in the preamble to Regulation No 1/2003. Pursuant to that recital, the detection of infringements of the competition rules is growing ever more difficult, and, in order to protect competition effectively, the Commission's powers of investigation need to be supplemented. That recital also states that the Commission should in particular be empowered to interview any persons who may be in possession of useful information and to record the statements made. The aim of Article 19 of Regulation No 1/2003 is thus to 'supplement' the Commission's other powers of investigation and to grant it the 'power' to interview and record. However, that provision does not seek to restrict the Commission's use of informal practices by imposing on it a general obligation to make all interviews relating to the subject-matter of an investigation subject to the formal requirements in Article 3 of Regulation No 773/2004 and to make a record available to the incriminated undertaking.

617 That interpretation of Article 19 of Regulation No 1/2003, read in conjunction with Article 3 of Regulation No 773/2004, does not mean that the Commission may decide arbitrarily, during an interview, which information it is to record. It is apparent from Article 3(1) of Regulation No 773/2004 that, where the Commission carries out an interview in accordance with Article 19 of Regulation No 1/2003, it must inform the person interviewed, at the beginning of the interview, of the legal basis and the purpose of the interview, and of its intention to make a record of it. It follows that the Commission must decide, at the beginning of each interview, whether it wishes to carry out a formal interview. If the Commission decides, with the consent of the person interviewed, to carry out such an interview, it cannot opt to omit certain aspects from the record. In that case, it is required, rather, to record the interview in full, without prejudice to the fact that the first sentence of Article 3(3) of Regulation No 773/2004 leaves the Commission free to decide on the type of record. However, in the present case, the Commission stated, without being contradicted on that point by the applicant, that the purpose of the meeting was not aimed at collecting evidence in the form of countersigned minutes or statements under Article 19 of Regulation No 1/2003, but simply to examine whether there were sufficient indications for antitrust concerns with regard to Intel's business practices vis-à-vis Dell and to explore appropriate further investigative measures related to Dell. The meeting between the Commission's services and Mr D1 thus did not constitute formal questioning for the purposes of Article 19 of Regulation No 1/2003.

618 Given that the meeting between the Commission's services and Mr D1 did not constitute formal questioning for the purposes of Article 19 of Regulation No 1/2003 and that the Commission was also not required to carry out such questioning, Article 3 of Regulation No 773/2004 is not applicable in the present case, with the result that the argument alleging an infringement of the formal requirements laid down in that provision is ineffective.

619 Second, as regards the principle of good administration laid down in Article 41 of the Charter of Fundamental Rights, it is apparent from settled case-law that that principle imposes a duty on the competent institution to examine carefully and impartially all the relevant aspects of the individual case (*Atlantic Container Line and Others v Commission*, paragraph 359 above, paragraph 404, and Joined Cases T-458/09 and T-171/10 *Slovak Telekom v Commission* [2012] ECR, paragraph 68). Although there is no general duty on the part of the Commission to establish records of the discussion which it has had with the complainants or other parties during the meetings or telephone conversations held with them (see, to that effect, *Atlantic Container Line and Others v Commission*, paragraph 359 above, paragraphs 351 and 385, and *Groupe Danone v Commission*, paragraph 614 above, paragraph 66), the fact none the less remains that the principle of good administration may, depending on the circumstances of the particular case, be under a duty to make such a record of the statements it receives (see, to that effect, Case T-15/02 *BASF v Commission* [2006] ECR II-497, paragraph 501).

620 In that regard, it should be pointed out that the existence of a duty on the Commission to record the information which it receives during meetings or telephone conversations and the nature and extent of such an obligation depend on the content of that information. The Commission is required to establish adequate documentation, in the file to which the undertakings concerned have access, on the essential aspects relating to the subject-matter of an investigation. That conclusion is valid for all information of a certain importance and which bears an objective link with the subject-matter of an investigation, irrespective of whether it is incriminating or exculpatory.

621 In the present case, it is apparent *inter alia* from the note to the file that the subjects addressed at the meeting did not concern purely formal questions, such as, for example, the confidentiality of certain items of information, but questions bearing an objective link with the substance of the investigation. Moreover, Mr D1 was one of the most senior executives of Intel's largest customer. Finally, as stated by Intel at the hearing and in its observations of 6 March 2013, the meeting lasted five hours. Those circumstances bestowed an importance on the meeting which required the Commission to place in the file at least a succinct note containing, subject to any requests for confidentiality, the name of the participants and a brief summary of the subjects addressed. Given that the Commission failed to draw up such a document for the file, to which the applicant could have requested access, the Court finds that it infringed the principle of good administration.

622 However, by making available to the applicant, during the administrative procedure, the non-confidential version of the note to the file and by offering it the possibility to submit its observations on that document, the Commission remedied the initial omission in the administrative procedure, with the result that that procedure was not vitiated by an irregularity. The fact that the note to the file was drawn up to serve as an *aide-mémoire* for the members of the Commission's services and that only a version in which certain passages were concealed was sent to the applicant does not call that conclusion into question. The version of the internal note which was sent to the applicant during the administrative procedure contained information which the Commission was required to record in a document to be placed in the file to which the applicant could have requested access. It contains the names of the participants and a brief summary of the subjects addressed.

623 Third, the applicant's argument, raised in its observations of 6 March 2013, pursuant to which the Commission committed a procedural irregularity by also failing to disclose to it, during the administrative procedure, the parts of the note to the file treated as confidential, must be rejected. In accordance with Article 27(2) of Regulation No 1/2003 and Article 15(2) of Regulation No 773/2004, the right of access to the file does not extend to internal documents of the Commission. That restriction is justified by the need to ensure the proper functioning of the institution concerned when dealing with infringements of the Treaty competition rules (see, to that effect, *Atlantic Container Line and Others v Commission*, paragraph 359 above, paragraph 394). The note concerning the meeting between the Commission and Mr D1 constitutes a document of an internal nature which is exempt from the right of access to the file. It contains information from sources other than Mr D1 and assessments and personal conclusions of its author (see also recitals 108 and 109 of the decision of the Ombudsman). Consequently, the Commission was not required to disclose to the applicant the concealed parts of the note to the file.

624 It is true that, in the present case, the communication of the non-confidential version of the note to the file to the applicant enabled the Commission to remedy the initial omission in the procedure resulting from the fact that the Commission failed to establish a note relating to its meeting with Mr D1 to be placed in the file to which the applicant could have requested access. However, it was not

necessary to communicate the entire note to the file to the applicant in order to regularise the administrative procedure. Given that the version of the internal note which was communicated to the applicant constituted only a substitute for the note which should have been placed in the file and that it contained the information which the Commission should have recorded in that note, the Commission was not required to grant the applicant more extensive access to the note to the file.

625 It results from all of the foregoing that the administrative procedure was not vitiated by an irregularity.

2.2) The possible consequences of a procedural irregularity on the legality of the contested decision

i) Preliminary observations

626 For the sake of completeness, it is necessary to examine whether a hypothetical irregularity in the administrative procedure, which would result from an infringement of Article 19 of Regulation No 1/2003, read in conjunction with Article 3 of Regulation No 773/2004, from a failure to remedy an infringement of the principle of good administration or from an infringement of the right of access to the file, would be likely to have repercussions on the legality of the contested decision. In that regard, the Court finds that a procedural irregularity can bring about the annulment of the contested decision only to the extent that it is such as to actually affect the applicant's rights of defence and therefore the content of that decision (see, to that effect, Case T-75/06 *Bayer CropScience and Others v Commission* [2008] ECR II-2081, paragraph 131). That is also the case where the irregularity constitutes an infringement of the principle of good administration (see, to that effect, the judgment of 3 December 2009 in Case C-476/08 P *Evropaïki Dynamiki v Commission*, not published in the ECR, paragraph 35).

627 In so far as concerns an infringement of the right of access to the file, it is apparent from the case-law that, where access to the file, and particularly to exculpatory documents, is granted at the stage of the judicial proceedings, the undertaking concerned has to show not that if it had had access to the non-disclosed documents the Commission decision would have been different in content, but only that those documents could have been useful for its defence (see Case C-110/10 P *Solvay v Commission* [2011] ECR I-10439, paragraph 52 and the case-law cited). In such a case, it is for the undertaking concerned to adduce prima facie evidence that the undisclosed documents would be useful to its defence (see, to that effect, *Heineken Nederland and Heineken v Commission*, paragraph 352 above, paragraph 256). In that regard, when the Commission relies on direct documentary evidence to establish an infringement, the undertaking must prove that the evidence that was inaccessible to it during the administrative procedure was at variance with the thrust of that evidence or, at the very least, shed a different light on it (see, to that effect, *Aalborg Portland and Others v Commission*, paragraph 353 above, paragraph 133).

628 In so far as the applicant submits that the Commission infringed its rights of defence in failing to communicate to it the passages of the note to the file deemed to be confidential during the administrative stage, that case-law is directly applicable to the present case. Given that the full version of the note to the file was communicated to the applicant during the proceedings before the Court, the applicant was able to adduce prima facie evidence of the usefulness, for its defence, of the evidence contained in the passages which were previously treated as confidential.

629 For the rest, in so far as the applicant accuses the Commission of not having adequately recorded the meeting, the Court finds that, at least in the circumstances of the case at hand, the relevant criteria for examining whether a possible procedural irregularity concerning that subject would be such as to have a concrete impact on the applicant's rights of defence are the same as those required by the case-law on access to the file. The applicant must thus adduce prima facie evidence of the fact that the Commission failed to record exculpatory evidence which was at variance with the thrust of the direct documentary evidence on which the Commission relied in the contested decision or, at the very least, sheds different light on it. However, it is not sufficient that such a hypothesis cannot be excluded.

630 In the present case, even in the absence of the record sought by the applicant, the content of the interview between the Commission and Mr D1 can be reconstituted to the requisite legal standard from other sources, namely the note to the file and a document containing Dell's written responses to oral questions put to Mr D1 at the meeting ('the follow-up document'). That circumstance distinguishes the present case from that in *Solvay v Commission*, paragraph 627 above (paragraphs 61 to 63), invoked by the applicant at the hearing and in its subsequent observations. In that case the Court concluded that there had been an infringement of the rights of the defence resulting from the fact that, after refusing the applicant access to the file during the administrative procedure, the Commission had lost a number of entire sub-files the content of which could not be reconstituted, with the result that it could

not be ruled out that those sub-files could have contained exculpatory evidence which could have been relevant for the applicant's defence.

631 The conclusion that the note to the file constitutes one of the items of evidence from which the content of the interview between the Commission and Mr D1 may be reconstituted is not called into question by the fact that the note to the file was intended to serve as an *aide-memoire* for the Commission. As such, the internal note served a double purpose. On the one hand, it aimed to determine in an objective manner the circumstances which the Commission, as the authority responsible for the investigation, deemed to be important. Thus, it pursued objectives inherent in documentation of an objective nature. On the other hand, the note to the file enabled the members of the Commission's services who participated in the meeting to maintain their subjective evaluations. However, those subjective evaluations supplement the objective documentation contained in the note to the file and do not call it into question. Moreover, since the note to the file was drawn up as an *aide-memoire* to be used solely by the Commission for internal purposes, there is no reason to believe that it omits a discussion which actually took place.

ii) Assessment of the documents on which the applicant relied as evidence that Mr D1 provided the Commission with exculpatory evidence which the applicant could have used for its defence

632 In the application and reply, the applicant relied on an indicative list of topics and on the disclosed parts of the note to the file as evidence of the fact that Mr D1 provided the Commission with exculpatory evidence which it could have used for its defence. At the hearing, in response to a question put by the Court, the applicant submitted, moreover, that the follow-up document also showed that Mr D1 furnished exculpatory evidence to the Commission at the meeting. According to the applicant, it is apparent from those three documents that the interview covered key questions concerning Dell, in particular the Commission's claims concerning the existence of de facto exclusivity, Dell's one-supplier business model, the performance differences between Intel and AMD, Intel's ability to 'retaliate' in the event that Dell switched to AMD, Dell's actual shift to AMD around the time of the interview, and Mr D1's 2003 testimony to the US FTC concerning some of those issues.

633 In so far as concerns the precise content on the documents on which the applicant relies in order to show that the Commission failed to record exculpatory evidence which the applicant could have used in its defence, the following should be pointed out.

The indicative list of topics

634 As regards the indicative list of topics, it is true that that list mentions, inter alia, subjects concerning complaints on which the Commission based the contested decision. However, it is apparent from both its title and its content that the list constituted only an 'indicative' list of the subjects to be discussed at the meeting. Given that the note to the file and the follow-up document contain more concrete and more up-to-date information regarding the content of the interview between the Commission and Mr D1, the indicative list of topics does not have any autonomous probative value in relation to those latter documents.

The note to the file

635 The note to the file contains concrete information regarding the content of the interview between the Commission and Mr D1. In that regard, it must therefore be regarded as decisive evidence. It is divided into three main parts, entitled respectively 'Discussions around [Mr D1's] testimony before the US FTC', 'Information concerning Dell's new strategy' and 'Intel/AMD price performance competition'. Those main parts are preceded by an executive summary and followed by a conclusion.

636 First, the Court points out that the first part of the note to the file, entitled 'Discussions around [Mr D1's] testimony before the US FTC', states the following:

'The Q&A focused on [Mr D1's] deposition to the [US] FTC and in particular on

- Dell's product strategy: the one supplier business model;
- Dell's de facto exclusivity with Intel — how it is rewarded through the Mother of All Programs (MOAP) rebate system;
- Intel's ability to retaliate;
- explanations on how AMD became a significant player in the server market with AMD 64 (thanks to the adoption by Linux OS of 64 bit extension, AMD performance advantage, thermal advantage, and by mid 2005 the launch of Dual core) and
- why it presented a less attractive offer in PC (MS only adopted an OS with 64 bit extension in August 2005 and [independent software vendor's] did not writ[e] apps running on 64 bit extensions).'

637 The Court points out that the applicant had full access to that part during the administrative procedure. In the application and the reply the applicant merely stated, in that regard, that, before the US FTC, Mr D1 had provided highly relevant exculpatory evidence. He confirmed that Intel's rebates to Dell were not conditional on Intel being its exclusive supplier, that Dell did not fear retaliation from Intel for using AMD products, since it used the threat of switching to AMD to extract greater rebates from Intel, that Dell did not consider AMD to be a reliable supplier, and that the structure and basis of Intel's discounts were fully transparent to Dell.

638 However, the Court finds that those claims do not constitute prima facie evidence that, during the meeting, Mr D1 provided the Commission with new exculpatory evidence which the applicant could have used for its defence. During the administrative procedure, the applicant was in possession of Mr D1's witness statement before the US FTC and there was nothing preventing it from using it for its defence. The applicant already relied on Mr D1's witness statement before the US FTC in its response of 7 January 2008 to the 2007 statement of objections. Moreover, it has already been shown above that Mr D1's witness statement before the US FTC cannot be regarded as exculpatory evidence and that, in any event, that witness statement is not such as to call into the question the direct documentary evidence relied on in the contested decision (see paragraphs 572 to 576 above).

639 In its observations of 6 March 2013, the applicant submits, in essence, that the first part of the interview between the Commission and Mr D1 was not limited to the period preceding Mr D1's deposition before the US FTC in 2003. In that regard, the applicant submits, first, that the last two items in the first part of the note to the file concern, in particular, the developments which took place in 2005. Second, it refers to a passage from the executive summary of the note to the file. That passage, which was not disclosed to the applicant during the administrative procedure, states the following: '[Mr D1] provided very detailed explanations on Dell's strategy vis-à-vis Intel and its decision to stick to a one supplier strategy until very recently.' The applicant submits that the first part of the note to the file records the subjects discussed, but not what Mr D1 said in relation to the way in which Dell was allegedly 'rewarded' for its 'de facto exclusivity' and about 'Intel's ability to retaliate'. While the Commission would certainly have made a note of it if Mr D1 had provided it with incriminating evidence, the note to the file bears no indication in that regard. Consequently, the 'very detailed' explanations which the Commission chose not to record must necessarily have been exculpatory.

640 That argument cannot be accepted.

641 It is true that the observation of the author of the note to the file, referred to in the executive summary, pursuant to which Mr D1 provided very detailed explanations in relation to Dell's decision to use Intel as its exclusive supplier 'until recently' and the last two items of the first part of the note to the file indicate that the first part of the interview between the Commission and Mr D1 did not concern only the period which preceded its deposition before the US FTC in 2003, but a period stretching until Dell's change to its supply strategy in mid-2006. However, there is nothing to indicate that, during the part of the interview which is referred to in the first part of the note to the file, Mr D1 furnished new exculpatory evidence to the Commission which could have enabled the applicant better to support its arguments based on the evidence in its possession, or to raise new arguments.

642 In that regard, the Court points out at the outset that, contrary to what the applicant and ACT submit in their observations of 12 April and 14 March 2013, the last two items of the first part of the note to the file do not state that Mr D1 furnished new exculpatory evidence to the Commission. Those items of information show that the part of the interview in question concerned AMD's performance. The information provided by Mr D1 thus concerns the applicant's arguments that Dell used it as its supplier for commercial reasons other than the existence of an exclusivity rebate. However, it should be recalled that those arguments have no bearing on the legality of the contested decision (see paragraphs 540 to 546 and 597 above). Moreover, in its application, the applicant cites a number of items of evidence in its possession which support its argument that Dell considered that Intel's CPUs were generally superior to those of AMD. That evidence includes, inter alia, Mr D3's deposition before the Delaware court in 2009 and a Dell presentation entitled 'AMD — Why and Why Not?' Those two examples show that the applicant was in possession of evidence to support its argument that its CPUs were generally superior to those of AMD. There is nothing to suggest that Mr D1 provided the Commission with information concerning AMD's performance which could have enabled the applicant better to support that argument, or to raise new arguments.

643 Next, as regards the first three items of the first part of the note to the file, namely Dell's product strategy, how Dell's de facto exclusivity with Intel was rewarded through the MOAP rebate system, and Intel's ability to retaliate, the following should be pointed out.

644 First of all, the Court finds that the applicant's argument that the Commission failed to record exculpatory evidence in relation to those subjects is based on the erroneous premiss that the note to the file does not contain any indications that Mr D1 provided any incriminating evidence to the Commission. First, the neutral wording used in the first part of the note to the file, pursuant to which

the interview concerned 'Dell's product strategy: the one supplier business model' and 'Intel's ability to retaliate', must be examined in their context together with the following passage of the second part of the note to the file, concerning Dell's new supply strategy from mid-2006: '[Mr D1] explained that Dell has now decided to abandon the one supplier business model ... Today Dell is less worried about Intel's retaliatory power than in the past and does not expect lower rebates from Intel (in value) after its decision to offer AMD based products ... [Mr D1] explained that the situation is currently more favourable to PC vendors [than] in the past because significant overcapacity on the CPU market (especially on the Intel side).' Second, the Court points out that the second item of the first part of the note to the file shows that the interview concerned 'Dell's de facto exclusivity with Intel — how it is rewarded through the MOAP rebate system'.

645 Taken together, those passages of the note to the file constitute more incriminating than exculpatory evidence. They give the impression that Mr D1 explained to the Commission that, until Dell's decision to change its supply strategy as of mid-2006, Dell's product strategy, which comprised a one supplier business model or, in other words, 'de facto exclusivity' with Intel, was 'rewarded' by the MOAP rebate system, and that one of the reasons why Dell decided to abandon its one supplier strategy was that, due to overcapacity on the CPU market in particular on the Intel side, it no longer needed to expect a disproportionate reduction in its MOAP rebates following its decision to introduce AMD-based products.

646 It is true that the passages of the note to the file which give that impression are brief and do not enable a detailed assessment of what Mr D1 actually said. In the light of their weak probative value, the Commission was thus right to choose not to use them as incriminating evidence in the contested decision. However, those passages are sufficient to refute the applicant's argument that there is nothing in the note to the file to suggest that Mr D1 furnished incriminating evidence to the Commission.

647 Secondly, it should be noted that, even supposing that there is nothing in the note to the file to suggest that Mr D1 provided the Commission with incriminating evidence, the applicant's conclusion that that necessarily means that Mr D1 provided the Commission with exculpatory evidence is erroneous. First, it cannot be ruled out that Mr D1 provided the Commission with incriminating evidence that the latter chose not to record in a more detailed manner because there was nothing new to add to the evidence which it already had in its possession. In that regard, the Commission rightly submits that, at the time of the meeting, it was in possession of a large part of the evidence on which it relied in the contested decision to establish the conditional nature of the rebates. Second, it cannot be ruled out that Mr D1 provided the Commission with neutral evidence which cannot be regarded as being either incriminating or exculpatory.

648 Thirdly, the Court finds that, in any event, there is nothing to suggest that Mr D1 provided the Commission with information relating to the first three items of the first part of the note to the file which was new as compared with the evidence on which the applicant was able to rely and, in particular, as compared with Mr D1's depositions before the US FTC and his deposition before the Delaware court. Given that the probative value of the direct documentary evidence on which the Commission relied in the contested decision in order to establish the conditionality of the MCP rebates is not called into question by those depositions, it is not plausible that, during his interview with the Commission, Mr D1 made statements which could have enabled the applicant to shed different light on the evidence on which the Commission relied.

649 Fourthly, the observation of the author of the note to the file, reproduced in the executive summary, pursuant to which '[Mr D1] provided very detailed explanations on Dell's strategy vis-à-vis Intel and its decision to stick to a one supplier strategy until very recently' does not mean either that Mr D1 provided the Commission with new exculpatory evidence which could have shed different light on the applicant's arguments which it developed on the basis of the evidence at its disposal. As such, that observation does not make it clear whether the 'very detailed explanations' provided by Mr D1 constituted incriminating evidence, exculpatory evidence or neutral information, and whether those explanations differed from the evidence to which the applicant had access. However, it has been found in the preceding paragraphs that, read in their context, the first three items of the first part of the note to the file constitute incriminating evidence rather than exculpatory evidence and that they do not suggest, in any event, that Mr D1 provided the Commission with new exculpatory evidence. Consequently, in so far as the observation in the executive summary concerning the 'very detailed explanations' constitutes a summary of that evidence, it can also not be regarded as evidence of the fact that Mr D1 provided the Commission with new items of exculpatory evidence on which the applicant could have relied for its defence.

650 Second, the Court notes that the second part of the note to the file, entitled 'Information concerning Dell's new strategy', indicates that the part of the interview in question concerned Dell's decision to switch part of its supplies to AMD from mid-2006. In its observations of 6 March 2013, the



applicant, supported by ACT, relied on passages from the second part of the note to the file and of the executive summary which show that Dell decided 'widely [to] adopt AMD's products in the three segments' of the market and to 'walk away from Intel and to have AMD [as] a sole supplier' in certain market segments. The applicant also relies on the following passage: 'According to [Mr D1,] Intel is unlikely to reduce the current level of rebates since it suffers from significant overcapacity and has an interest in reducing its production surplus.' According to the applicant, those passages indicate that Dell did not fear retaliation from Intel, even in response to a decision to sole source from AMD in certain segments.

651 However, it must be recalled that, according to the contested decision, the period of infringement, in so far as concerns Dell, dates from December 2002 to December 2005. The circumstances surrounding Dell's 2006 decision are, at best, of very weak probative value in relation to the applicant's practices during the period in question in the contested decision. It has already been shown in paragraphs 547 to 552 above that the applicant's arguments concerning Dell's 2006 decision are not capable of calling into question the direct documentary evidence on which the Commission relied in the contested decision. Moreover, Mr D1's statement that Dell did not fear retaliation at the time of the meeting between the Commission and Mr D1 as a result of Intel's significant overcapacity must be read in conjunction with the passage which states that '... Dell is less worried [today] about Intel's retaliatory power than in the past and does not expect lower rebates from Intel (in value) after its decision to offer AMD based products' (see paragraph 644 above). In that context, the passage relied on by the applicant constitutes incriminating evidence rather than exculpatory evidence. Finally, the Court points out that, in its application, the applicant relied on Mr D1's and Mr D3's statements before the Delaware court pursuant to which they did not believe that Intel had taken retaliatory measures vis-à-vis Dell following Dell's 2006 decision (see paragraph 583 above). Consequently, the passages of the second part of the note to the file on which the applicant relies do not suggest that Mr D1 provided the Commission with new exculpatory evidence which could have enabled the applicant better to support its arguments based on the evidence in its possession, or to raise new arguments.

652 Moreover, the applicant submits that two passages from the second part of the note to the file which were treated as confidential during the administrative procedure are highly relevant for the AEC test carried out in the contested decision. However, the Court notes that, in the contested decision, the Commission relied, primarily, on the criteria stemming from the Court's case-law in *Hoffmann-La Roche*, paragraph 71 above, in finding the exclusivity rebates granted to Dell to be unlawful (see paragraphs 69, 72 and 73 above). By contrast, it based that decision on the AEC test only for the sake of completeness (see paragraphs 173 and 175 above). The Court recalls that the application of an AEC test is not necessary to establish the illegality of the applicant's practice vis-à-vis Dell and that such a test can also not provide a reliable means by which the applicant may rule out any infringement (see paragraphs 140 to 166 above). Even supposing that the passages relied on by the applicant could have enabled it to amend its argument relating to the AEC test, which was raised on the basis of the evidence already in its possession, the Court finds that that new argument would not have been such as to shed different light on the direct documentary evidence on which the Commission relied to establish the conditionality of the MCP rebates. Accordingly, the passages relied on by the applicant could not have been used for its defence.

653 Third, the Court notes that the third part of the note to the file, entitled 'Intel/AMD price performance competition', indicates that the part in question of the interview concerned competition between Intel and AMD in relation to prices and performance. That part of the interview thus refers to the applicant's arguments pursuant to which Dell used it as a supplier for commercial reasons other than the existence of an exclusivity rebate. However, it should be noted, first, that those arguments have no bearing on the legality of the contested decision and that, second, the applicant was in possession of evidence on which it could have based its argument that its CPUs were generally superior to those of AMD (see paragraph 642 above). The applicant's and ACT's argument that Mr D1 provided the Commission with information concerning the deficiencies in AMD's performance which the Commission chose not to record thus cannot succeed.

654 Consequently, the Court concludes, first, that the Commission did not infringe the applicant's rights of defence in opting not to disclose the parts of the note to the file which were concealed during the administrative procedure. Second, it must be found that, in so far as concerns the note to the file, the applicant has not furnished any prima facie evidence capable of showing that the Commission failed to record new exculpatory evidence which the applicant could have used for its defence.

The follow-up document

655 It is apparent from the follow-up document that the questions set out therein had already been addressed by the Commission and Mr D1 at the meeting of 23 August 2006. The follow-up document must therefore be regarded as additional evidence of the content of the interview which took place between the Commission and Mr D1.

656 The Court points out that, of the eight sections of that document, the first four and the sixth constitute responses to questions relating to Mr D1's witness statement before the US FTC concerning technical details relating to Intel's and AMD's performance. Those questions and responses thus overlap with the subjects of the first part of the note to the file and therefore provide additional evidence of the content of that part of the interview. The seventh section concerns the orders which Dell intended to place with AMD from September 2006. Thus, it addresses the same subject as the second part of the note to the file, namely the part concerning Dell's new strategy. The fifth and eighth sections are not relevant to the findings in the contested decision. It must be found that the applicant had access to that document in its entirety during the administrative procedure.

657 However, in its written pleadings, the applicant did not rely on the follow-up document in order to show that Mr D1 provided the Commission with new items of exculpatory evidence which it could have used for its defence. At the hearing, in response to a question put to it by the Court, the applicant merely stated, in essence, that it was apparent from the questions relating to Mr D1's deposition before the US FTC that the Commission had questioned Mr D1 on Intel's purported better performance. None the less, the applicant has not shown any prima facie evidence resulting from the follow-up document which shows that, during the meeting, Mr D1 provided new information to the Commission on AMD's performance which could have enabled the applicant better to support its argument concerning AMD's performance, or to raise new arguments in that regard. The Court points out that, in any event, the applicant's purported better performance bears no impact on the legality of the contested decision (see paragraph 642 above).

658 In addition, it must be found that the detailed technical information relating to the performance of Intel and AMD contained in the follow-up document makes it possible to understand why the author of the note to the file stated in the executive summary that '[Mr D1] provided very detailed explanations on Dell's strategy vis-à-vis Intel and its decision to stick to one supplier strategy until very recently'. In the light of the technical details contained in the follow-up document, it is plausible that, when referring to 'very detailed explanations', the author of the note was actually referring to Mr D1's explanations relating to AMD's performance, and thus the last two items of the first part of the note to the file. However, the fact that AMD's performance constituted the key issue of the first part of the interview does not mean that Mr D1 abstained from providing the Commission with incriminating evidence relating to the conditionality of the MCP rebates or that it provided new items of exculpatory evidence in that regard.

659 In so far as concerns the rest of the follow-up document, it must be found that the applicant has also not made any submissions capable of showing that, during the meeting, Mr D1 provided the Commission with new items of exculpatory evidence which it could have used for its defence. In that regard, it stated merely, at the hearing, that the response to the seventh question of the follow-up document concerned Dell's decision to switch part of its supplies to AMD in 2006. However, it has not furnished any prima facie evidence of the fact that Mr D1 provided the Commission with new information on that decision which could have shed different light on the applicant's argument based on the evidence in its possession. In any event, the Court points out that, contrary to what the applicant claims, Dell's 2006 decision does not constitute exculpatory evidence which the applicant could have used for its defence (see paragraphs 547 to 552 above).

Conclusion in relation to the documents relied on by the applicant

660 Consequently, the Court finds that none of the documents relied on by the applicant has enabled it to provide prima facie evidence that the Commission failed to record new items of exculpatory evidence which would have been capable of shedding different light on the direct documentary evidence relied on in the contested decision to establish the conditionality of the MCP rebates.

iii) The other circumstances relating to the question whether the Commission failed to record new items of exculpatory evidence which the applicant could have used for its defence

661 In order to dispute the incriminating evidence relied on in the contested decision, the applicant relies to a large extent on the deposition made in in 2009 by Mr D1 before the Delaware court. However, it does not submit that that deposition shows that, during the meeting of 23 August 2006, Mr D1 provided the Commission with exculpatory evidence of which it was not aware and which it could have used for its defence. As rightly stated by the Commission at the hearing, in his 2009 deposition, Mr D1 had the opportunity to raise the issue of the exculpatory evidence purportedly provided to the Commission at the 2006 meeting. During that deposition, Mr D1 was questioned on a response which Dell gave to a request for information from the Commission under Article 18 of Regulation No 1/2003. On the third day of the deposition, namely on 20 February 2009, Mr D1 was questioned by one of the applicant's advisers. Given that the non-confidential version of the note to the file had already been communicated to the applicant on 19 December 2008, the applicant's adviser could have questioned Mr D1 on that note and the exculpatory evidence allegedly provided to the Commission at the 2006 meeting. The fact that he did not do so constitutes evidence of the fact that the applicant did not grant

any particular importance to the 2006 meeting at the time of Mr D1's deposition before the Delaware court. Contrary to what the applicant submitted at the hearing and in its observations of 6 March 2013, the fact that the meeting between the Commission and Mr D1 was not addressed during Mr D1's deposition before the Delaware court cannot simply be explained by the fact that the meeting between the Commission and Mr D1 was not relevant to the proceedings before that court. In footnote 59 of its observations of 6 March 2013, the applicant acknowledges that the subjects which were addressed at the meeting between the Commission and Mr D1 were important for the subjects in question in the proceedings before the Delaware court and that those subjects were addressed in detail during the deposition before that court. Given that the probative value of the direct documentary evidence on which the Commission relied in the contested decision in order to establish the conditionality of the MCP rebates is not called into question by Mr D1's deposition before the Delaware court, that observation confirms that it is not plausible that, during his interview with the Commission, Mr D1 made statements which could have been useful to the applicant.

662 Moreover, the Commission stated, at the hearing, without being challenged on that point by the applicant, that between the date of the meeting of 23 August 2006 and the date of the statement of objections of 2007 Dell still provided the Commission with responses to several other measures of inquiry to which the applicant had access. However, in so far as concerns both those responses and the rest of the file to which the applicant had access, the latter did not furnish any evidence capable of showing that, at the meeting, Mr D1 provided the Commission with new items of exculpatory evidence which it could have used for its defence.

663 Finally, in so far as the applicant relies on the decision of the Ombudsman, the Court finds that the latter's conclusion, pursuant to which it could not be excluded that, at least in part, the meeting of 23 August 2006 concerned evidence which could be exculpatory for the applicant, is based on an erroneous classification of the applicant's alleged better performance as potentially exculpatory evidence. In recital 127 of his decision, the Ombudsman found that the note to the file suggests that Mr D1 considered that AMD's performance in the corporate sector was 'very poor'. According to the Ombudsman, that statement could potentially support the applicant's assertion that Dell decided not to purchase AMD products because of performance concerns in relation to AMD, with the result that Mr D1's statement is potentially exculpatory of Intel. However, it has already been found in paragraph 642 above that, in the present case, Intel's alleged better performance does not constitute exculpatory evidence which could have been used by the applicant for its defence.

### 2.3) Conclusion in relation to the meeting with Mr D1

664 Consequently, the Court concludes that the Commission did not infringe the applicant's rights of defence.

### d) Conclusion

665 It results from all of the foregoing that all of the complaints raised by the applicant in relation to Dell's exclusivity rebates must be rejected.

## 2. HP

666 According to Article 1(b) of the contested decision, Intel granted 'rebates to HP between November 2002 and May 2005 at a level that was conditional on HP obtaining at least 95% of its corporate desktop x86 CPU supplies from Intel'.

667 Moreover, according to Article 1(f) of the contested decision, Intel granted 'payments to HP between November 2002 and May 2005 conditional on: (i) HP directing HP's AMD-based x86 CPU business desktops to [SMB] and [GEM] customers rather than to enterprise business customers; (ii) precluding HP's channel partners from stocking HP's AMD-based x86 CPU business desktops such that such desktops would only be available to customers by ordering them from HP (either directly or via HP channel partners acting as sales agents); and (iii) HP delaying the launch of its AMD-based x86 CPU business desktop in the EMEA region by six months'.

668 The contested decision states that between November 2002 and May 2005 HP and Intel entered into two agreements known respectively as HP Alliance Agreement 1 and HP Alliance Agreement 2 (referred to individually as 'HPA1' and 'HPA2', or jointly as 'HPA').

669 Under the HPA1 agreement, Intel paid HP a USD 32.5 million rebate at the close of each quarter. The HPA1 agreement was concluded at the end of 2002, for a one-year term, starting on 1 November 2002. Each party was free to withdraw from the agreement at 30 days' notice. Upon the expiry of the HPA1 agreement on 31 October 2003, the parties continued to implement that agreement on a monthly basis until May 2004.

670 Next, Intel and HP entered into the HPA2 agreement, also for a one-year term. According to the HPA2 agreement, Intel granted HP rebates of USD 43 million per quarter.

671 According to the contested decision, the rebates granted under the HPA agreements were subject to several unwritten conditions. First, there was an unwritten condition that HP was required to obtain at least 95% of its corporate desktop x86 CPU supplies from Intel ('the 95% condition'). Second, there were the three conditions listed in Article 1(f) of the contested decision (see paragraph 667 above).

672 It is necessary to examine, in the first place, the legality of the contested decision as regards the findings relating to the 95% condition (exclusivity rebates) and, in the second place, as regards the three other conditions (naked restrictions).

a) The exclusivity rebates

1) Assessment of the evidence presented in the contested decision of the conditionality of the rebates

673 As regards the 95% condition, the contested decision is based inter alia on the following items of evidence:

- HP's response of 23 December 2005 to a request for information from the Commission under Article 18 of Regulation No 1/2003 ('HP's Article 18 response');
- several emails from July 2002;
- a document containing an HP internal presentation dated 17 October 2002;
- internal HP emails from September 2004;
- the fact that AMD offered HP one million CPUs for free but that in the end HP accepted only 160 000.

674 It is appropriate to present the content and examine the probative value of each of those items of evidence.

1.1) HP's Article 18 response

i) Content

675 As the Commission observed at recital 348 of the contested decision, HP stated in its Article 18 response that 'HPA1 was subject to a number of conditions, only some of which appear in the HPA1 agreement'.

676 HP specified that:

'Intel granted the [HPA1 rebates] subject to the following unwritten requirements:

(a) that HP should purchase at least 95% of its CPUs for business desktop systems from Intel;

(b) that HP's distribution ... model for AMD-based business desktops should:

(i) direct HP's AMD-based business desktops to SMB and [GEM] customers rather than to mainstream (or "enterprise") business customers; and

(ii) preclude HP's channel partners from stocking the AMD-based business desktops, so that these desktops would only be available to customers by ordering them from HP (either directly or via HP channel partners acting as sales agent). This is known within HP as a direct/"top config" go-to-market model;

(c) that HP would defer the launch of its AMD-based business desktop in the EMEA region by six months.'

677 The unwritten conditions of the HPA agreements that the Commission found in the contested decision correspond to those to which HP's Article 18 response refers. Condition (a) mentioned in the previous paragraph concerns the exclusivity rebates and will be examined subsequently. Conditions (b) and (c), which are also mentioned in the previous paragraph, correspond to the 'naked restrictions' that the Commission found in the contested decision and which will be examined in paragraphs 799 to 873 below.

678 The Commission stated, at recital 349 of the contested decision, that HP had indicated that Messrs I6, I7 and I2 of Intel had made it clear, in meetings with HP during the negotiations, that the unwritten conditions mentioned in paragraph 676 above were part of the HPA1 agreement.

679 Next, the Commission observed, at recital 350 of the contested decision, that HP had also stated that the HPA2 agreement 'was subject to the same unwritten conditions' and that 'it was stated by Intel to HP during the negotiations that the HPA2 rebates were conditional on HP complying with these unwritten conditions'. Moreover, HP specified that '[a]s under the HPA1 agreement, [Ms H1]

[*confidential*] recalls that during [the monthly senior management meetings] she and [Mr I7] [of Intel] discussed HP's compliance with the 95% Intel-alignment requirement'.

ii) Probative value

The inherent reliability of HP's Article 18 response

680 The Court would point out that HP's Article 18 response states expressly and unequivocally that the HPA agreements were subject to certain unwritten conditions, inter alia the 95% condition.

681 It should be noted that HP was a third-party undertaking, namely neither the complainant nor an undertaking which was the subject of the Commission's investigation.

682 The Court observes moreover that, in the present case, it does not appear that HP had any interest in providing incorrect information in this respect to the Commission and in wrongly accusing Intel.

683 In that context, it should be pointed out that it is possible that a customer of an undertaking in a dominant position which is the subject of an investigation has an interest in not revealing unlawful conduct by that undertaking for fear of possible reprisals. Thus, in Case C-310/93 P *BPB Industries and British Gypsum*, paragraph 89 above (paragraph 26), the Court of Justice raised the possibility that an undertaking in a dominant position on the market might adopt retaliatory measures against customers who have collaborated in the investigation carried out by the Commission and concluded that the Commission was entitled to treat replies to requests for information as confidential.

684 However, a customer of an undertaking in a dominant position does not normally have an interest in accusing such an undertaking wrongly of anti-competitive conduct. On the contrary, the customer of an undertaking in a dominant position which wrongly accuses that undertaking of anti-competitive conduct in a Commission investigation risks exposing itself to retaliatory measures by that undertaking.

685 In the present case, it is very unlikely that HP, for which Intel was an unavoidable trading partner, gave incorrect information to the Commission which might have been relied on by the latter in order to establish an infringement of Article 82 EC by Intel.

686 When questioned on that point at the hearing, Intel stated that it was not claiming that HP had an interest in providing incorrect information or that HP had acted in bad faith in providing its Article 18 response. Intel moreover claimed, at the hearing, that HP's Article 18 response should not be read as meaning that HP was accusing it of anti-competitive conduct. Intel added that there was no 95% condition, but only an expectation that HP would reach a rate of 95% and that, even though the term 'conditions' had been used in HP's Article 18 response, it would be perfectly possible for two parties to a contract to understand the same thing and use different terminology.

687 However, it follows unequivocally from HP's Article 18 response that the 95% condition was a real condition and not merely an expectation. HP not only used the term 'condition' on a number of occasions, in its Article 18 response, but also used, in particular in the responses to questions Nos 2.5, 2.8 and 2.13, the expressions 'unwritten requirements' and 'unwritten obligations'. The use of those terms demonstrates unambiguously that HP did not consider that the 95% condition corresponded in fact to a mere non-binding expectation. It can therefore be ruled out that HP merely expressed itself badly in using the term 'condition'.

688 Moreover, several statements in HP's Article 18 response are clearly inconsistent with there having been a mere expectation which does not amount to a condition. It should be noted that HP had indicated that Intel executives had made it clear, in meetings with HP during the negotiations, that the unwritten conditions were part of the HPA1 agreement (see paragraph 678 above). According to HP, it was stated by Intel to HP during the negotiations that the HPA2 rebates were conditional on HP's complying with the unwritten conditions (see paragraph 679 above). Moreover, according to HP, HP's compliance with the 95% condition was discussed during the monthly senior management meetings (see paragraph 679 above). Those statements are inconsistent with there having been a mere expectation and cannot be explained merely by HP's using incorrect terminology.

689 It follows that, in its Article 18 response, HP referred unambiguously to the existence of several unwritten conditions of the HPA agreements, including the 95% condition. It was clear to HP that that information might be used by the Commission against Intel in the investigation which was ongoing.

690 The Court observes moreover that, according to Article 23(1)(a) of Regulation No 1/2003, the supply of incorrect information by an undertaking is punishable by fines. In providing incorrect information to the Commission in its Article 18 response, HP would thus have also risked being fined by the latter.

691 Lastly, as was pointed out in paragraph 557 above, it is apparent from the case-law that responses given on behalf of an undertaking as such carry more weight than that of an employee of the undertaking (*JFE*, paragraph 62 above, paragraph 205).

692 The Court therefore finds that the very clear and precise information given by HP must be regarded as particularly reliable, because HP had no interest in providing incorrect information that could be used by the Commission in order to establish an infringement of Article 82 EC by Intel and because HP would have faced significant risks in providing incorrect information to the Commission.

The applicant's arguments seeking to call in question the reliability of HP's Article 18 response

693 In the reply, the applicant claims that HP's Article 18 response is highly suspect and untrustworthy. In the applicant's submission, that response was almost certainly prepared without obtaining the information from the executive decision-makers at HP, who had left the undertaking prior to the date of HP's Article 18 response. This is particularly significant in light of the fact that HP provided the Commission with a number of submissions, which were prepared while those persons were still working at that company, and that none of those submissions claimed any restriction. HP's Article 18 response contains numerous other assertions that are demonstrably inaccurate.

694 The Commission observes that the applicant responded to HP's Article 18 response and called in question its reliability belatedly for the first time in the reply.

– Preliminary observations on admissibility

695 First of all, as regards the applicant's alleged failure to raise certain arguments in reply to the statement of objections, it should be observed that this is not capable of limiting the possibility for the applicant to raise those arguments during the judicial proceedings. In Case C-407/08 P *Knauf Gips v Commission*, paragraph 388 above, the Court of Justice held that, as regards the application of Articles 81 EC and 82 EC, no provision of EU law requires that during the administrative procedure the addressee of a statement of objections must contest the individual matters of fact or of law in it, failing which it will no longer be able to do so subsequently during the judicial proceedings. The Court moreover held that an undertaking's express or implicit acknowledgement of matters of fact or of law during the administrative procedure before the Commission cannot restrict the actual exercise of a natural or legal person's right to bring proceedings before the General Court under the fourth paragraph of Article 263 TFEU, and that such a restriction would be contrary to the fundamental principles of the rule of law and of respect for the rights of the defence (*Knauf Gips v Commission*, paragraph 388 above, paragraphs 90 and 91; see also Case T-234/07 *Koninklijke Grolsch v Commission* [2011] ECR II-6169, paragraphs 37 and 38).

696 Nor is the submission of those arguments at the stage of the reply contrary to Article 48(2) of the Rules of Procedure. The applicant already claimed in the application that the Commission had failed to prove the 95% condition. Moreover, in the application, the applicant claimed that the Commission 'prefers HP's Article 18 response to contemporaneous evidence'. The submission of new arguments intended to cast doubt on the credibility of HP's Article 18 response cannot be regarded as a new plea in law within the meaning of Article 48(2) of the Rules of Procedure. They are arguments that can be linked to the plea alleging errors in the assessment of the conditionality of the rebates which was presented at the stage of the application.

697 Lastly, the Court must reject the Commission's argument that the evidence submitted as an annex to the reply under the references C.30 and C.31 is inadmissible under Article 48(1) of the Rules of Procedure. If a new argument presented at the stage of the reply is admissible, the party which raises that argument cannot be prevented from producing evidence in support of that argument (see, to that effect, Case T-60/05 *Ufex and Others v Commission* [2007] ECR II-3397, paragraph 123).

698 As regards the merits of those arguments of the applicant, the Court makes the following observations.

– The argument that HP's Article 18 response was prepared without obtaining the information from the executive decision-makers at HP

699 As regards the applicant's argument alleging that the executives concerned, namely Messrs H2, H3 and H4, had left HP by the time that HP sent its Article 18 response, the Commission submitted, in Annex D.18 to the rejoinder, an additional page from HP's Article 18 response from which it is apparent that HP had interviewed, inter alia, Mr H5, Ms H1 and Mr H2.

700 The submission of that item of evidence at the stage of the rejoinder must be considered admissible according to Article 48(1) of the Rules of Procedure, as the delay in submitting that item of evidence is sufficiently reasoned by the fact, first, that it is a response to an argument that was submitted for the first time at the stage of the reply and, second, by the fact that in the version submitted as an annex to the defence, the names of the persons interviewed were removed for

confidentiality reasons and that HP meanwhile agreed to disclosure of the names, as the Commission noted in footnote 244 of the rejoinder.

701 It follows that the applicant's assumption that HP did not interview Mr H2 before preparing its Article 18 response has no factual basis. According to the applicant, Mr H2 was 'the [confidential] in charge of HP's [confidential], who was the ultimate decision-maker who signed HPA1 and approved the signing of HPA2'. It follows from the foregoing that Mr H2 was perfectly able to inform HP about the existence of unwritten conditions in those agreements.

702 Moreover, according to paragraph 2.1 of HP's Article 18 response, the HPA1 agreement was primarily negotiated for HP by Ms H1, Mr H5 and Mr H6. Ms H1 and Mr H5, who were interviewed by HP (see paragraph 699 above), were therefore also able to inform HP in this connection.

703 The applicant's assumption that HP's Article 18 response was almost certainly prepared without obtaining the information from the executive decision-makers at HP therefore has no factual basis. The mere fact that HP did not interview all the persons who were in charge at the material time, some of whom had left the company at the time of HP's Article 18 response, is not capable of calling in question the reliability of that response.

– HP's earlier submissions do not refer to any restriction

704 Second, as regards the applicant's argument that HP's submissions prior to HP's Article 18 response do not refer to any restriction, it should be observed, first of all, that the applicant states that the only earlier HP submission that addressed the HPA agreements was HP's reply of 6 August 2004 to a Commission request for information. It follows that the fact that HP did not mention any restrictions connected with the HPA agreements in the other submissions that it sent to the Commission is not relevant to the credibility of HP's Article 18 response in which it for the first time mentioned unwritten conditions.

705 In the response of 6 August 2004 to a Commission request for information, HP provided as an annex the written HPA1 and HPA2 agreements, stating that they were '[c]opies of the terms of these rebates, which Intel agreed to in order to meet an actual/expected competitive offer from AMD'.

706 The Commission responds that there is no inconsistency between the submission of 6 August 2004 and HP's Article 18 response, as, in the submission of 6 August 2004, HP did not purport to 'list the written *and* unwritten conditions of the HPA agreements'. The Commission followed up by sending another request for information asking HP if the rebates were conditional on HP's complying with any supplementary conditions (written or unwritten, formal or informal) not recorded in the agreement. This direct question elicited an equally direct answer from HP.

707 The Court shares the Commission's view that there are no contradictions between the various HP responses to the requests for information sent to it by the Commission. It is true that, in principle, HP could have indicated the existence of unwritten conditions from the stage of its response of 6 August 2004. The Commission had asked HP to describe all the conditions attached to the rebates, as is apparent from question 11(b) of the request for information, which is worded: 'Please include a specific detailed description of any conditions attached to the grant of such rebates and/or discounts.' However, the fact that HP initially provided an incomplete response which did not cover the unwritten conditions is not capable of calling in question the reliability of the explicit response which was given subsequently following an express question from the Commission referring to possible unwritten conditions.

708 On the contrary, the fact that HP submitted that inculpatory evidence only after an express request from the Commission regarding the unwritten conditions demonstrates that HP had no desire to incriminate Intel. It is therefore rather a factor which strengthens the credibility of HP's Article 18 response which indicates the existence of the unwritten conditions of the HPA agreements than a factor which might cast doubt on that credibility.

– HP's Article 18 response contains assertions that are demonstrably inaccurate

709 Third, as regards its argument that HP's Article 18 response contains numerous other assertions that are demonstrably inaccurate, the applicant states that HP is wrong, in its Article 18 response, in asserting that Mr I6 and Mr I7 of Intel were primarily responsible for negotiating the HPA2 agreement.

710 In the applicant's submission, neither of those persons had any role in the negotiations of the HPA2 agreement, which took place in the spring of 2004. Mr I6 left Intel in April 2003 to become [confidential] of [confidential]. Mr I7 also had no responsibility for CPU sales or marketing in 2004, as he left the CPU business in November 2003, two months before the expiration of the HPA1 agreement.

711 Similarly, according to the applicant, HP's Article 18 response is wrong in stating that Ms H1 of HP attended management meetings with Mr I7 whilst the HPA2 agreement was in force (June 2004 to

May 2005), during which Mr I7 supposedly discussed compliance with the 95% condition. Mr I7 left Intel's CPU business in 2003, six months before the HPA2 agreement was concluded, and left Intel entirely in the summer of 2004, shortly after the HPA2 agreement began.

712 It must be stated that, even if it were established that HP's Article 18 response contains an inaccuracy regarding the identity of the persons who negotiated the HPA2 agreement for Intel, such an error would not be capable of calling in question the probative value of HP's Article 18 response as a whole. In that regard, it should be noted that the issue of the identity of those persons was not a central point either in HP's Article 18 response or for the finding of an infringement. An error concerning a detail cannot call in question the reliability of a 19-page response to a Commission request for information as a whole.

713 As regards the assertion relating to the discussion of compliance with the 95% condition during the monthly senior management meetings, HP expressly indicated that it was relying on the recollection of Ms H1, as is apparent from paragraphs 2.8 and 3.3 of HP's Article 18 response. Even if Ms H1 was mistaken in that respect, that would not mean that her recollection is not reliable generally. In that context, it should be noted that the applicant does not dispute that Mr I7 participated in the monthly senior management meetings concerning the HPA1 agreement. A possible error by Ms H1 regarding the person who represented Intel in the monthly senior management meetings for the HPA2 agreement could be explained by the fact that, in the context of the HPA1 agreement, it was Mr I7 who was present. A possible inaccuracy in HP's Article 18 response in that regard cannot therefore call in question the reliability of that response in a general manner either.

– HP's Article 18 response is contradicted by sworn testimony

714 Fourth, as regards the applicant's claim that, in relation to the alleged restriction concerning distribution channels for certain computers, HP's Article 18 response is contradicted by the sworn testimony of Mr H3, [*confidential*] of HP, before the US FTC, the Court finds that, in fact, there is no such contradiction, as is apparent from paragraphs 859 to 864 below.

715 The applicant may not therefore usefully rely on Mr H3's sworn testimony in order to call in question the reliability of HP's Article 18 response.

716 It follows from all the foregoing that HP's Article 18 response must be considered a particularly reliable item of evidence.

The importance of HP's Article 18 response in order to demonstrate the existence of the unwritten conditions

717 As to whether HP's Article 18 response might potentially be sufficient on its own to demonstrate the accuracy of the facts relied on in the contested decision regarding the existence of the unwritten conditions of the HPA agreements, the Court makes the following observations.

718 The principle which prevails in EU law is that of the unfettered evaluation of evidence. The only relevant criterion for the purpose of assessing the evidence adduced is its reliability (Case C-407/04 P *Dalmine v Commission* [2007] ECR I-829, paragraph 63).

719 The case-law has also made clear, in relation to a document used as evidence of an infringement of Article 81 EC, that there is no principle of EU law which precludes the Commission from relying on a single piece of evidence, provided that its probative value is undoubted and that the evidence itself definitely attests to the existence of the infringement in question (*Cimenteries CBR and Others v Commission*, paragraph 354 above, paragraph 1838).

720 With respect to infringements of Article 81 EC, the case-law has established the rule that an admission by one undertaking accused of having participated in a cartel, the accuracy of which is contested by several other undertakings similarly accused, cannot be regarded as constituting adequate proof of an infringement committed by the latter undertakings unless it is supported by other evidence (see *JFE*, paragraph 62 above, paragraph 219 and the case-law cited). The case-law has also made clear that, in the case of a cartel comprising only two parties, it is sufficient for one of the undertakings to challenge the material contained in the statement of the other undertaking for other evidence to be required in support of it (*Groupe Danone v Commission*, paragraph 614 above, paragraph 285).

721 It is not however appropriate to apply such a rule also to the statement of a third-party undertaking — which is neither the complainant nor the undertaking which is the subject of the investigation — indicating conduct that constitutes an infringement of Article 82 EC by another undertaking, where the undertaking in a dominant position which is the subject of the investigation contradicts the content of that statement.

722 In that regard, it should be noted that establishing a general rule constitutes an exception to the principle of the unfettered evaluation of evidence. In the case of an undertaking which admits to



having participated in a cartel contrary to Article 81 EC, such a rule is justified, since an undertaking which is the subject of an investigation, or which applies to the Commission in order to benefit from immunity from fines or a fine reduction, may have a tendency to play down its own responsibility in an infringement and highlight the responsibility of other undertakings.

723 The situation is different with respect to the statements of a third-party undertaking such as HP which is, in essence, a witness. Admittedly, such an undertaking may, in certain cases, have an interest in not revealing the infringement, for fear of retaliatory measures that the undertaking in a dominant position might adopt against it (see paragraph 683 above). However, it is very unlikely that an undertaking such as HP, for which the undertaking in a dominant position is an unavoidable trading partner, will accuse that undertaking wrongly of conduct constituting an infringement of Article 82 EC, where there are no exceptional circumstances because of which that third-party undertaking might have an interest in doing so.

724 It is not therefore appropriate to establish a general rule according to which the statement of a third-party undertaking indicating that an undertaking in a dominant position has adopted a certain type of conduct can never suffice on its own to prove the facts constituting an infringement of Article 82 EC.

725 In cases such as the present one, in which it is not apparent that the third-party undertaking has any interest in incriminating wrongly the undertaking in a dominant position, the statement of the third-party undertaking may, in principle, be sufficient on its own to demonstrate the existence of an infringement.

726 In any event, HP's Article 18 response is supported by several other items of evidence, as will be explained below.

727 In that context, the Court would point out that, even on the assumption that corroboration of HP's Article 18 response were necessary, the degree of corroboration required would not be high, in terms both of precision and of depth, on account of the intrinsic reliability of that response (see, to that effect, *JFE*, paragraph 62 above, paragraph 220).

1.2) The evidence corroborating HP's Article 18 response

i) The emails from July 2002

Content

728 The contested decision relies on several emails from July 2002 as evidence of the infringement.

729 First, there is an email by Mr H5, [*confidential*] of HP, dated 14 July 2002, cited at recital 352 of the contested decision and entitled 'Intel Deal Summary', in which Mr H5 summarised the conditions attached to the contract that was being negotiated. He wrote:

'HP commitments to Intel

1. For the duration of the contract, HP will purchase at least 95% (based upon an annual average) of its IA-32 compatible processors for commercial desktop PC products from Intel.

2. If HP sells commercial desktop PC products using a non-Intel IA-32 compatible processor then:

- these products will not be sold using the EVO brand;
- these products will be sold only direct or in response to a specific RFP [Request for Proposal];
- these products will be positioned for the SMB market.

...

3. If Intel can reasonably demonstrate that HP is not fulfilling the above commitments then a joint HP-Intel executive escalation session will be held to review and discuss this disagreement. If the HP and Intel executives agree that HP has not met its requirements, HP will be given a reasonable time period to cure the problem. If HP fails to remedy the problem then Intel has the option to terminate the agreement. If this termination occurs, no further payment will be due to HP beyond the quarter prior to which the unremedied problem occurred. Payments made to HP for quarters after this point will be refunded to Intel.'

730 At recital 353 of the contested decision, the Commission also relied on the fact that, in paragraph 2.7(a) of HP's Article 18 response, HP stated that, although the agreement that was being negotiated at the beginning of the summer of 2002 was not actually signed, those conditions were carried over into the HPA1 agreement.

731 Second, at recital 354 of the contested decision, the Commission relied on an email of 15 July 2002 from Ms H1 to several HP executives, in which she wrote:

'PLEASE DO NOT... communicate to the regions, your team members or AMD that we are constrained to 5% AMD by pursuing the Intel agreement.'

732 Third, the Commission relied, at recitals 385 to 389 of the contested decision, on an internal Intel email, dated 9 July 2002, concerning the evolution of the HPA1 agreement negotiations, in which it was stated, inter alia:

'Latest hp proposal giving Intel the opportunity to compete for 95% of hp's total corporate desktop business (including smb + large [business]).'

733 Next, in that email, the three options that Intel was considering for the purposes of the negotiations were presented. The first option was to provide the 'best offer' if HP agreed to a 100% exclusivity condition in respect of corporate desktop computers. The second option was to provide 'some assistance' if HP agreed only to 95% exclusivity. The third option was to not pursue the agreement.

Probative value

734 Intel claims that those emails, which predate the conclusion of the HPA1 agreement, have no probative value, as the initial negotiations ended in failure.

735 In that regard, it should be observed that, admittedly, the mere fact that the parties to an agreement discussed certain conditions during the negotiations does not mean that those conditions are part of the final agreement. It follows that the emails from July 2002 cannot suffice on their own to demonstrate the existence of unwritten conditions in the HPA1 agreement.

736 However, contrary to the applicant's submission, those emails cannot be regarded as having no probative value. In the context of the body of evidence that the Commission may present in order to demonstrate an infringement of the competition rules, it is not necessary that each item of evidence be sufficient on its own to prove the infringement (see paragraph 64 above).

737 The emails of July 2002 demonstrate that certain conditions, inter alia the 95% condition, were discussed during the negotiations which took place in the summer of 2002.

738 The emails of July 2002 must be considered in conjunction with HP's statement, as set out in paragraph 2.7(a) of its Article 18 response, that the HPA1 agreement was the substitute for the deal negotiated in the summer of 2002 which was never signed and that the unwritten 95% condition and those concerning the distribution model for AMD-based computers were carried over into the HPA1 agreement.

739 Although the emails of July 2002 concerned the deal negotiated in the summer of 2002, they constitute evidence of such a kind as to support HP's Article 18 response, since they confirm at the very least that HP and Intel discussed certain unwritten conditions, inter alia the 95% condition, in the negotiations on a deal, during the summer preceding the signing of the HPA1 agreement.

740 It would be possible to deny any probative force to those emails only if the applicant had been able to demonstrate that the deal negotiated in the summer of 2002 had not been signed precisely because of doubts about the compatibility of the unwritten conditions with competition law.

741 The applicant claims, in that regard, that, in August 2002, Intel's [confidential] informed HP's [confidential] that Intel had 'antitrust concerns and business concerns' and could not accept the proposed agreement. HP's [confidential] stated that he would 'engage his lawyers to make sure there were no antitrust issues'. In that regard, the applicant relies on an internal Intel email of 23 August 2002. The applicant also submitted, in Annexes A.165 and A.166 to the application, the exchange of emails between HP's and Intel's lawyers that followed.

742 It is apparent from those emails that the discussion between the lawyers did not relate to the possible illegality of the unwritten conditions envisaged, but to whether Intel's bid meant that Intel was offering a lower price for its CPUs than AMD. In that regard, the Commission explained, in footnote 464 of the contested decision (footnote 457 of the public version thereof), that, '[i]n certain instances in the law of the United States of America, pricing below costs is possible for a company with market power, to the extent that the company's offer only matches the offer of a competitor, but does not beat it'. The Commission correctly observed, at recital 381 of the contested decision, that the 'antitrust concerns' did not relate to the conditionality of the rebates.

743 The applicant has therefore failed to prove that it rejected the agreement being negotiated in the summer of 2002 on account of concerns about the legality of the unwritten conditions.

744 Moreover, the existence of a link between the negotiations that took place in July 2002 and those that resumed after the interruption is confirmed by an HP internal presentation of 17 October 2002 which will be examined in paragraphs 746 to 752 below.

745 It follows from the foregoing that the Commission was entitled to rely on the emails of July 2002 as evidence corroborating HP's Article 18 response.

ii) HP's internal presentation of 17 October 2002

#### Content

746 At recital 371 of the contested decision, the Commission cites an HP internal presentation of 17 October 2002 entitled 'Intel update'.

747 As the Commission observed in the contested decision, slide 10 of that presentation describes, under the heading 'History', as follows:

- '1. HP reached agreement at the term-sheet level in mid-July with Intel and AMD ...
2. Intel stalled contract negotiations until HP-AMD launch
3. Intel reacted very negatively to HP-AMD launch and terminated negotiations.'

748 Next, on the following slide of the presentation, the status of the negotiations in progress at the time of the presentation, namely mid-October 2002, was described under the heading 'Status'. It is stated on that slide that 'Intel negotiations have resumed'.

#### Probative value

749 At recital 371 of the contested decision, the Commission cites that HP internal presentation in support of its claim that HP and Intel, a few months after the initial negotiations were stalled, resumed the same negotiations from the point they were interrupted.

750 In that regard, the Court observes that that presentation does in fact demonstrate the existence of a certain connection between the negotiations of the summer of 2002 and those preceding immediately the conclusion of the HPA1 agreement. Thus, that presentation is an element corroborating HP's Article 18 response.

751 The Court moreover observes that, in its replies to the written questions put by the Court, the applicant explained that the phrase contained in slide 11 of that presentation according to which '[a]s a sign of good faith, HP has been operating under most of the expected conditions of a potential agreement' was referring to the fact that, before reaching an agreement with Intel, HP unilaterally implemented its plan to focus its new AMD-based commercial desktop offering on SMBs and the direct distribution channel.

752 In that regard, it should be noted that they are two conditions which were mentioned in the email of 14 July 2002 cited in paragraph 729 above. In the presentation of 17 October 2002, HP referred to 'expected conditions of a potential agreement'. According to the explanation given by the applicant itself, HP therefore referred to two of the conditions mentioned in the email of 14 July 2002 as 'expected conditions of a potential agreement' in a presentation of 17 October 2002. This demonstrates the existence of a link between the negotiations that took place in July 2002 and those that resumed after the negotiations were interrupted, which confirms the probative value of the emails of July 2002 as elements corroborating HP's Article 18 response.

iii) The HP internal emails of September 2004

#### Content

753 The Commission observes, at recital 359 of the contested decision, that, on 3 September 2004, Mr H7 [*confidential*] asked Mr H2 about the manner in which AMD-based commercial desktops could be marketed in the EMEA Region. Mr H7 wrote the following email:

'[Mr H2], Quick question. Instead of asking [*confidential*] to add localized pavilion for some of the ISE countries (Poland, Turkey...), can we consider using the commercial AMD line up inside the [distribution] channel in those countries or do you believe we at least need to change the Bezel and call it Presario (Which will mean additional complexity and therefore resources?) Alternatively I could let 2/3 countries to try (To see if it works at least), and let Intel react if they discover it?'

754 On the same day, Mr H2 replied, as is mentioned at recital 360 of the contested decision, as follows:

'You can NOT use the commercial AMD line in the [distribution] channel in any country, it must be done direct. If you do and we get caught (and we will) the Intel moneys (each month) is gone (they would terminate the deal). The risk is too high. Without the money we do not make it financially.'

755 As the Commission observes, at recital 360 of the contested decision, Mr H7 then informed Mr H8, a member of his sales team, that HP EMEA could not make available its AMD-based 'Presario' computer through its channel partner. In an email of 6 September 2004, he wrote: 'Cannot do what we talked about.'

#### Probative value

756 The Court observes that the HP internal emails of September 2004 are very strong evidence of the existence of a restriction concerning the distribution channels for AMD-based HP business desktops (see, in that regard, paragraphs 822 to 824 below).

757 It should be recalled that, in the contested decision, the Commission found the existence of four unwritten conditions in the HPA agreement: (i) the 95% condition and (ii) three conditions that the Commission considered to be 'naked restrictions'.

758 In that context, the Court would point out that it is apparent from the case-law that, if the body of consistent evidence relied on by the Commission makes it possible to establish the existence of, and certain specific aspects of, an agreement mentioned in a statement made on behalf of an undertaking, that statement could in itself be sufficient to constitute evidence of other aspects of the contested decision (see, to that effect, *JFE*, paragraph 62 above, paragraph 334). In the present case, there is no reason to suppose that HP made incorrect statements regarding the 95% condition, when other evidence corroborates its statements concerning the existence of the unwritten condition regarding the distribution channels (see, to that effect, *JFE*, paragraph 62 above, paragraph 335). In that context, it should be observed that unwritten conditions of the same agreements are at issue.

759 Even on the assumption that HP's Article 18 response must, in principle, be corroborated by other evidence, an element corroborating very clearly the existence of one of the four unwritten conditions referred to in HP's Article 18 response must also be considered an element corroborating that response in relation to the existence of the other conditions.

760 The HP internal emails of September 2004 are therefore elements corroborating HP's Article 18 response, even in relation to the 95% condition.

iv) The fact that HP did not take advantage of the offer of one million free CPUs

#### Findings made in the contested decision

761 The Commission observed, at recital 956 of the contested decision, that, by email of 11 July 2002, AMD offered HP one million x86 CPUs for free. HP ended up taking only 160 000.

762 The Commission observed, at recital 957 and in footnote 1292 of the contested decision (footnote 1283 of the public version thereof), that the fact that HP did not take advantage of the offer was a consequence of the unwritten conditions of the HPA1 agreement. In that regard, the contested decision quotes HP's Article 18 response, in which HP stated as follows:

'HP can confirm that Intel's inducements (in particular the block rebates) were a material factor in determining HP's agreement to the unwritten conditions. As a result:

...

(c) HP ... did not take advantage of AMD's one million free CPUs: HP only took a small number of these because the restricted distribution model adopted for the D315 and the other HPA1 requirements meant that HP was not producing the D315 in any significant volumes.'

763 The 'D315' or 'Compaq D315' computer ('the D315') is an AMD-based business desktop that HP launched on the United States market on 19 August 2002. The D315 was ultimately not launched in the EMEA region (see paragraph 846 below).

#### Probative value

764 In its Article 18 response, HP clearly stated that the fact that the D315 had not been produced in significant quantities was connected with the unwritten conditions in the HPA1 agreement. The fact that HP only accepted a small quantity of the CPUs offered for free, considered in conjunction with the explanation given by HP in its Article 18 response, constitutes an additional indication of the existence of unwritten conditions in the HPA1 agreement.

765 The applicant claims that HP must have rejected AMD's offer simply because there was insufficient demand for AMD-based systems.

766 In that regard, the Court notes that, in theory, it is true that it cannot be ruled out that an undertaking might accept only a small quantity of products offered for free on account of weak demand. In the present case, it is however explicit from HP's Article 18 response that the reason for the conduct of HP in question lay in the unwritten conditions of the HPA1 agreement.

767 It should be observed that, since the circumstance that HP did not accept all the CPUs offered by AMD for free must be considered in conjunction with the explanation given by HP in order to rule out the possibility that it can be explained by weak demand, the value of that circumstance as evidence corroborating HP's Article 18 response is rather limited.

768 None the less, it is not possible to deny any probative force to that circumstance, as it seems unusual to say the least that AMD offered such a number of CPUs for free and that HP only accepted a small quantity of them, and because the explanation given by HP in its Article 18 response is credible.

769 It follows from all the foregoing that the Commission presented, in the contested decision, a body of sufficient evidence of such a kind as to demonstrate that the HPA agreements contained the unwritten 95% condition.

## 2) The applicant's arguments

### 2.1) Absence of a binding obligation

770 The applicant claims that HP was not subject to an enforceable 95% condition. It states that, under United States law, which governed the HPA agreements, terms that are discussed but which do not appear in the signed agreement are not part of the contract and are unenforceable. It follows that HP was not subject to any legally binding 95% share requirement.

771 In that regard, the Court would point out that the illegality of exclusivity rebates does not presuppose that customers of the undertaking in a dominant position be bound by formal obligations (see paragraph 106 above). In the light of the existing case-law on exclusivity rebates, a situation in which a dominant undertaking initiates proceedings against a customer in order to ensure that it comply with an exclusivity condition seems moreover rather theoretical.

### 2.2) Absence of de facto conditionality

772 The applicant claims that the Commission failed to provide evidentiary support for its claim of de facto conditionality, which is based upon the premiss that HP feared that it would experience, and in fact would have experienced, 'disproportionate' rebate reductions if it sourced more from AMD. The Commission also fails to identify any communication from Intel threatening disproportionate rebate reductions.

773 In that regard, the Court would point out, first of all, that the Commission is in no way required to demonstrate that HP in fact would have experienced disproportionate rebate reductions if had not complied with the 95% condition (see paragraph 527 above).

774 As regards the applicant's argument that the Commission failed to prove that HP feared a total loss or a disproportionate reduction of the rebates, the Court observes, first of all, that the relevant question is whether HP should have expected, at the time, that the rebates would be cancelled or reduced disproportionately if it failed to comply with the 95% condition, and not whether HP in fact believed that they would be (see paragraph 527 above).

775 In that regard, as has already been observed, the Commission demonstrated to the requisite legal standard that the HPA agreements were subject to the unwritten 95% condition. Where an undertaking in a dominant position grants rebates to a customer on condition that that customer obtain 95% of its requirements in a certain segment from that undertaking, this falls within the definition of an abusive loyalty rebate as set out by the Court of Justice in paragraph 89 of *Hoffmann-La Roche*, paragraph 71 above.

776 Accordingly, there was no obligation on the Commission to demonstrate, in addition to the existence of the unwritten exclusivity condition, that the parties had expressly agreed, or that Intel had expressly communicated to HP, that the rebates would, at least in part, be withdrawn if HP failed to comply with the 95% condition. The mere fact of agreeing to the grant of a rebate subject to compliance with an exclusivity condition implies that that rebate may be withdrawn or reduced disproportionately if the purchaser fails to comply with that condition. The mere fact that an undertaking in a dominant position reaches agreement with its purchaser on the grant of a rebate subject to an exclusivity condition is therefore sufficient to give an incentive to the purchaser to comply with that condition and to limit its freedom to choose at any time its supplier solely on the basis of competition on the merits.

777 Moreover, it should be noted that the HPA agreements provided for a clause according to which each party was able to withdraw from the agreement at 30 days' notice, without being required to provide any justification.

778 For a contract which involves unwritten conditions and provides for a possibility of termination at short notice without justification, it is clear that there is a possibility that, in the event of non-compliance with the unwritten conditions by one party, the other party will serve on it notice of termination. That threat is inherent in the existence of unwritten conditions, regardless of whether it is communicated expressly or not.

779 Moreover, as the Commission observed at recital 963 of the contested decision, HP expressly confirmed, in its Article 18 response, that it regarded the possibility of termination of the agreements at 30 days' notice as having given it an incentive to comply with the unwritten conditions of the HPA agreements.

780 For the sake of completeness, the Court notes that it is clearly apparent from the email of 3 September 2004 (see paragraph 754 above) that Mr H2, [*confidential*], feared that Intel would terminate the agreement and that the payments would be lost if HP failed to comply with the unwritten condition concerning the restriction of the distribution channels. It is not plausible that HP feared the loss of the rebates only in the event of non-compliance with the unwritten condition concerning the restriction of the distribution channels and not in the event of non-compliance with the 95% condition.

781 The applicant further claims that the evidence in the case file contradicts the Commission's claim that HP feared that it would experience disproportionate rebate reductions if it sourced more from AMD. In the applicant's submission, HP's unilateral decision to switch at least 5% of its corporate desktop computer business to AMD and its demand for a large rebate for the remaining Intel business shows that it did not fear retaliatory measures. The applicant relies on slide 13 of an HP internal presentation of 13 June 2002, set out in Annex A.25 to the application, according to which 'a shipping AMD line pressures Intel into more competitive [CPU] pricing'. The applicant relies also on slide 19 of that internal presentation, which allegedly shows that HP considered that there was little precedent for retaliatory action once AMD had been introduced in the portfolio, and that introducing AMD led to better price offers from Intel.

782 In that regard, the Court notes that HP's decision to introduce AMD in its corporate desktop computer business had been made before the conclusion of the HPA1 agreement. That decision could not therefore have constituted a breach of the unwritten conditions of that agreement, which did not yet exist. Moreover, the decision to award a 5% share to AMD did not constitute a breach of the 95% condition which was the subject of negotiations. As regards the HP internal presentation of 13 June 2002, it should be noted that that presentation also predates the conclusion of the HPA1 agreement.

783 The fact that HP might have taken the view, before the HPA agreements were concluded, that sourcing from AMD in respect of a part of its corporate desktop computer business would improve its position in the negotiations with Intel does not mean in any way that HP considered that breaching the unwritten 95% condition that was in force for the duration of the HPA agreements would not have led to a loss or disproportionate reduction of the rebates. Furthermore, the Court observes that slide 19 of the presentation of 13 June 2002 is entitled 'Intel "punitive" reaction expected but limited by several factors'. Contrary to the applicant's submission, that slide cannot therefore demonstrate that HP did not fear retaliatory measures.

784 At the hearing, the applicant also relied on an HP internal presentation of 2004, which is set out in Annex A.26 to the application, and pointed out that slides 8 to 10 of that presentation were entitled 'Precedent — better Intel cost from more AMD competition'.

785 In that regard, it should be noted that that presentation considers whether HP should pursue 'long-term agreements' such as the HPA agreements with Intel or whether it should change the situation, as is apparent from slides 3 and 7 of that presentation. Consideration of whether it might be more beneficial for HP to no longer conclude agreements such as the HPA agreements in no way means that HP did not fear losing the rebates provided for in those agreements in the event that it failed to comply with the unwritten conditions of those contracts while they were in force. Moreover, it should be pointed out that, despite the thoughts set out in the presentation in question, HP decided to conclude the HPA2 agreement, which also included the 95% condition.

### 2.3) The fact that the rebates reflect normal competition

786 The applicant claims that the Court of Justice held, in paragraph 91 of *Hoffmann-La Roche*, paragraph 71 above, that Article 82 EC is not infringed by rebates which constitute 'normal competition' in the particular market setting at issue. 'Normal competition' among CPU suppliers is characterised by the type of conduct exhibited by HP, namely that powerful OEMs create bidding contests to extract lower prices from the two major suppliers, in which they offer some portion of their

business for a short duration in exchange for lower prices. This OEM strategy of playing the suppliers off against each other constitutes 'normal competition' that is the antithesis of abuse under Article 82 EC. In the applicant's submission, HP controlled the negotiations and set up a bidding war to get the best possible price. HP unilaterally chose to give 5% of its commercial desktop business to AMD and considered the possibility of shifting an additional 30% to AMD. It then gave AMD and Intel the opportunity to submit offers as part of an open bid.

787 That line of argument is not convincing. It follows clearly from *Hoffmann-La Roche*, paragraph 71 above, that it is of no consequence whether the undertaking which took the initiative regarding the exclusivity condition is the dominant undertaking or the purchaser. Thus, in paragraph 89 of that judgment, it was held that it is an abuse of a dominant position for an undertaking in such a position to tie 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 that undertaking.

788 Moreover, it should be recalled that, according to the *Hoffmann-La Roche* line of case-law, an undertaking in a dominant position abuses that position by the grant of a rebate 'conditional on the customer's obtaining all or most of its requirements — whether the quantity of its purchases be large or small — from the undertaking in a dominant position' (*Hoffmann-La Roche*, paragraph 71 above, paragraph 89). As the Commission notes, the fact that rebates granted by an undertaking in a dominant position are subject to an exclusivity or quasi-exclusivity condition excludes the finding that a rebate system constitutes normal competition. This is reasonable, as exclusivity rebates granted by an undertaking in a dominant position are generally capable of restricting competition (see, in that regard, paragraphs 72 to 94 above). As the Commission observes, restricting customers' freedom to source from the dominant undertaking's competitors falls outside the scope of competition on the merits.

789 As regards the applicant's argument that HP is a larger undertaking than Intel and that there was no inequality of bargaining power, the Court would point out that the fact that a customer of the undertaking in a dominant position is itself a powerful undertaking and that there is no inequality of bargaining power does not justify the grant of an exclusivity rebate (see paragraph 139 above). Moreover, HP's buying power does not alter the fact that it depended on the applicant as an unavoidable trading partner in the x86 CPU market (see paragraph 139 above).

790 The applicant further claims that a customer would lose a powerful tool for eliciting lower prices if it could not request a bid based on purchasing a specific volume or share of its requirements. In that regard, the Commission correctly observes that a customer remains entitled to request rebates by reference to its volume of purchases. The OEMs can therefore play the suppliers off against each other. As the Commission states, in order to determine the amount of the rebates it can grant to its customer, it is sufficient for the dominant undertaking to know the number of units the customer will purchase from it. However, there is no legitimate commercial interest for the dominant undertaking in obtaining an assurance that the customer will purchase all or almost all of its requirements from that undertaking, and, consequently, that it will not purchase, or will purchase less, from the dominant undertaking's competitors.

791 It follows from the foregoing that the fact that HP might have taken the initiative to introduce the 95% condition and the fact that Intel merely acceded to its customer's request — supposing those factors to be established — are not capable of calling in question the illegality of the conditional rebates granted to HP.

792 Moreover, it is apparent from the Intel internal email of 9 July 2002, cited in paragraphs 732 and 733 above, that Intel intended to provide the 'best offer' if HP agreed to a 100% exclusivity condition, to provide 'some assistance' on the basis of HP's 95% exclusivity proposal and not to pursue the agreement in all other cases. That email contradicts the applicant's assertion that, in essence, it merely made a bid, at the express request of HP, covering 95% of HP's CPU corporate desktop requirements. It is true that that email, and in particular the phrase quoted in paragraph 732 above, indicates that HP proposed that Intel make it an offer for 95% of its CPU requirements in the corporate desktop sector. However, it is also apparent from that email that Intel did not merely submit a bid in response to that request, but that it was prepared to grant larger rebates in the event of 100% exclusivity, and that it was not prepared to pursue the agreement without exclusivity in respect of at least 95% of HP's requirements.

793 As regards the applicant's argument that HP organised an open bid, the Court would point out that Intel was an unavoidable trading partner for HP. The latter was therefore able to ask Intel — but not AMD — to make it an offer covering 95% of its requirements. There was therefore no open bid under equal conditions with respect to Intel and AMD to provide 95% of HP's requirements. AMD would not have been able to provide more than an additional 30% (on top of the 5%) of HP's requirements. Thus, by granting rebates conditional upon quasi-exclusive sourcing, Intel was able to use its economic power on the non-contestable share of HP's demand as leverage to secure also the contestable share (see paragraph 93 above). The anti-competitive mechanism of exclusivity rebates

granted by an undertaking in a dominant position is not offset by the fact that, before those rebates were granted, the customer of the undertaking in a dominant position had also given one of the dominant undertaking's competitors the opportunity to submit a bid relating to the contestable share of the demand.

#### 2.4) HP's freedom of choice and AMD's market access

794 The applicant submits that, unlike the loyalty rebates deemed unlawful in previous cases, the rebates in question were not 'capable, first, of making market entry very difficult or impossible for competitors ... and, secondly, of making it more difficult or impossible for its co-contractors to choose between various sources of supply or commercial partners'.

795 In that regard, the applicant claims that the structure of the contract, including its one-year term and 30-day termination provision, is compelling evidence that the HPA agreements were incapable of foreclosing AMD. AMD had the opportunity during each month of the HPA agreements to make HP an offer that would have been more attractive than Intel's offer.

796 In that regard, it should be recalled, first of all, that the right to terminate a contract in no way prevents its actual application until such time as the right to terminate it has been exercised (see paragraph 112 above). In the present case, the HPA1 and HPA2 agreements were concluded for a one-year term, which is not a short duration.

797 As regards the applicant's argument that AMD was able at any time to make HP a more attractive bid than Intel's, the Court makes the following observations. The possibility for HP to terminate the HPA agreements at 30 days' notice must not be viewed in isolation, but in conjunction with the duration of the contracts, which was one year in each case. The unwritten exclusivity condition agreed to by HP therefore concerned a one-year period, notwithstanding the possibility of terminating the commitment at 30 days' notice. Furthermore, HP had to fear that accepting an attractive offer from AMD and terminating the contract with Intel at 30 days' notice would have resulted in negative effects, namely a loss or disproportionate reduction of the rebates, for a longer period, namely all the remaining period of the contract.

798 It follows from all the foregoing that the Commission established to the requisite legal standard that the HPA agreements were subject to the unwritten 95% condition and that exclusivity rebates were involved which constituted an infringement of Article 82 EC.

#### b) The naked restrictions

799 It should be recalled that, in Article 1(f) of the contested decision, the Commission finds that the HPA agreements were, in addition to the 95% condition, subject to three unwritten conditions, namely that (i) HP was to direct its AMD-based x86 CPU business desktops to SMBs and GEM customers rather than to enterprise business customers, (ii) HP was to preclude its channel partners from stocking HP's AMD-based x86 CPU business desktops so that such desktops would only be available to customers by ordering them from HP either directly or via HP channel partners acting as sales agent, and (iii) HP was to delay the launch of its AMD-based x86 CPU business desktop in the EMEA region by six months (see paragraphs 35 and 667 above).

800 The Court observes that, in HP's Article 18 response, HP clearly referred to the existence of those three unwritten conditions (see paragraph 676 above).

801 As the applicant contests the existence of those unwritten conditions, it is necessary to examine, for each of those conditions, whether the Commission proved the existence thereof to the requisite legal standard.

##### 1) The condition that AMD-based x86 CPU business desktop systems were to be directed to SMB and GEM customers rather than to enterprise business customers

802 The Commission relies in the contested decision, in the first place, on HP's Article 18 response in order to prove the existence of the unwritten condition that HP was to direct its AMD-based x86 CPU business desktops to SMBs and GEM customers rather than to enterprise business customers. As was observed in paragraphs 680 to 685, 689 to 692 and 716 above, HP's Article 18 response is a particularly reliable item of evidence. In the circumstances of this case, HP's Article 18 response may, in principle, be sufficient on its own to demonstrate the existence of the unwritten conditions (see paragraph 725 above).

803 In any event, the Commission also relied, in the contested decision, on other elements which corroborate the veracity of HP's Article 18 response.

804 There is, first of all, the internal email of Mr H5, of HP, of 14 July 2002 which was cited in paragraph 729 above. In that email, which summarised the conditions attached to the contract that



was being negotiated, it was stated: 'If HP sells commercial desktop PC products using a non-Intel IA-32 compatible processor then: ... these products will be positioned for the SMB market.'

805 That email confirms that, during the negotiations, Intel and HP discussed a condition whereby HP was to direct its AMD-based business desktops to SMB customers rather than to enterprise business customers.

806 It is true that this does not suffice on its own to demonstrate that that condition was incorporated into the agreement that was ultimately concluded. However, for the reasons set out in paragraphs 736 to 739 above, it is not appropriate to deny any probative force to that element. It is therefore an element corroborating HP's Article 18 response.

807 Next, the HP internal presentation of 17 October 2002, cited in paragraphs 747 to 748 above, has a certain probative value as an element demonstrating the existence of a certain connection between the negotiations of the summer of 2002 and those which immediately preceded the conclusion of the HPA1 agreement (see paragraphs 749 to 752 above).

808 Moreover, in the contested decision, the Commission adduced several items of evidence with respect to the unwritten condition relating to the restriction of the distribution channels: (i) the HP internal emails of September 2004 cited in paragraphs 753 to 755 above and (ii) the elements set out in paragraphs 825 to 827 below.

809 It should be recalled that there is no reason to suppose that HP made incorrect statements regarding one of the unwritten conditions, when evidence corroborates its statements concerning one of the other unwritten conditions of that agreement (see paragraph 758 above). Thus, even on the assumption that HP's Article 18 response must be corroborated by other evidence, it should be borne in mind that an element corroborating very clearly the existence of one of the four unwritten conditions referred to in HP's Article 18 response also constitutes an element corroborating HP's Article 18 response in relation to the existence of the other conditions (see paragraph 759 above).

810 Given that HP's statement in its Article 18 response requires at most a weak degree of corroboration (see paragraph 727 above), the Commission furnished sufficient proof of the unwritten condition that HP was to direct its AMD-based x86 CPU business desktop systems to SMB and GEM customers, rather than to enterprise business customers.

811 It should be emphasised that that does not mean that the Commission proved the existence of an absolute ban on HP's selling those computers to enterprise business customers. The obligation to 'direct' those computers to SMB and GEM customers, rather than to enterprise business customers, implies an obligation not to offer them proactively to enterprise business customers, but does not preclude certain sales, for example following an express request from such a customer.

812 However, at recital 413(2) of the contested decision, under the heading 'Conclusion on facts', the Commission found the existence of an unwritten condition whereby HP's AMD-based business desktops could only be sold to SMB and GEM customers and not to mainstream business customers. That assertion, according to which there was a ban on HP's selling those computers to mainstream business customers, goes further than HP's statement in its Article 18 response. In the contested decision, the Commission adduced no evidence of such a kind as to confirm the existence of an absolute ban on HP's selling its AMD-based business desktops to mainstream business customers.

813 The applicant is therefore correct in stating that the assertion at recital 413 of the contested decision, as cited in paragraph 812 above, is not supported by the evidence in the case file.

814 In the defence, the Commission claims that the contested decision does not find that there was an absolute ban on HP's selling any AMD-based business desktops to large companies, but rather that HP was under the obligation not to direct sales of those products proactively to non-SMB or non-GEM customers. The Commission states that recital 413 of the contested decision is drafted more as a synthesis of the points above it. The Commission submits that, should there be a substantial difference between the two forms in which the condition is expressed, the wording used in the operative part should prevail, as it describes the condition in question in a more detailed manner.

815 In that regard, the Court observes that the wording chosen in Article 1(f) of the contested decision is correct and corresponds exactly to that chosen by HP in its Article 18 response. By contrast, the wording chosen at recital 413 of the contested decision, and which was reproduced at recital 1649, first indent, of that decision, is not less detailed, as the Commission claims, but incorrect.

816 In that context, it should be borne in mind that it is in the operative part of a decision that the Commission must indicate the nature and extent of the infringements which it sanctions. It should be noted that, in principle, as regards in particular the scope and nature of the infringements sanctioned, it is the operative part, rather than the statement of reasons, that is important. Only where there is a lack of clarity in the terms used in the operative part should reference be made, for the purposes of

interpretation, to the statement of reasons contained in the contested decision (Case T-61/99 *Adriatica di Navigazione v Commission* [2003] ECR II-5349, paragraph 43).

817 In the present case, it is clearly apparent from the operative part of the contested decision that the Commission did not sanction the applicant on account of an alleged unwritten condition according to which HP was banned from selling AMD-based x86 CPU business desktops to mainstream business customers, but on account of an unwritten condition according to which HP was to direct those computers to SMB and GEM customers rather than enterprise business customers.

818 Accordingly, it is not necessary to annul in part the contested decision, but it is sufficient to observe that the wording chosen at recitals 413(2) and 1649, first indent, of the contested decision is incorrect.

819 The applicant's line of argument that the alleged restriction merely reflected HP's own commercial choice will be examined in paragraph 858 et seq. below.

## 2) The condition relating to the distribution channels

820 According to Article 1(f) of the contested decision, the HPA agreements were subject to the unwritten condition that HP's channel partners were precluded from stocking HP's AMD-based x86 CPU business desktops so that such desktops would only be available to customers by ordering them from HP (either directly or via HP channel partners acting as sales agent).

### 2.1) The evidence cited in the contested decision and its probative value

821 The wording chosen in Article 1(f) of the contested decision corresponds to HP's Article 18 response cited at recital 348 of that decision (see paragraph 676 above). That statement by HP may, in principle, be sufficient on its own to demonstrate the existence of the unwritten condition in question (see paragraph 725 above). Moreover, that statement is corroborated by several items of evidence.

822 The strongest evidence corroborating that statement is the exchange of HP internal emails, between Mr H7 and Mr H2, of 3 September 2004, which was cited in paragraphs 753 and 754 above. It is clearly apparent from those emails that the [confidential] of HP banned the computers concerned from being made available through HP's channel partners, for fear of losing the funds granted by Intel.

823 Those emails were further explained by HP in its Article 18 response. As the Commission observes at recital 1652 of the contested decision, HP stated as follows:

'HP confirms that [Mr H7], in charge of HP [confidential], may, absent the direct-only distribution model, have distributed the D315 through HP's channel partners, at least in some countries in the EMEA and to some customer segments. The decision to accept the written and unwritten conditions in the HPA1 agreement and therefore not to distribute the D315 through HP's channel partners anywhere in the world (including in the EMEA) was taken by HP's management in the US, in particular [Mr H2]. Once that decision was taken, HP [confidential] implemented this policy.'

824 That statement provides an entirely clear and convincing explanation of the September 2004 email exchange. The applicant, for its part, has provided no plausible alternative explanation of those emails.

825 Moreover, at recitals 397 and 398 of the contested decision, the Commission provided further evidence relating to the restriction concerning the distribution channels. The Commission cites an HP internal email of 29 October 2002 which presented the alternatives HP was considering with respect to its AMD-based business desktop. One of the alternatives consisted of an 'offer to allow reseller inventory ... only if no Intel deal'.

826 At recital 398 of the contested decision, the Commission cites an internal HP presentation of 2004. That presentation refers to several scenarios that HP was considering:

'Today's decision:

- Should we widen distribution for BPC [Business PC] AMD? When?
- Should we continue long-term agreements like HPA with Intel?'

827 In that presentation, the following recommendation is made:

'Recommendation

- Sign 6-month extension of current HPA through [second half of 2004;]
- Then beginning [Fiscal Year 2005] ...
- [as regards] Enterprise (dc) platforms [, namely a series of HP desktop computers]:
- Sign HPA-like agreement only to align with Intel[;]

– [as regards] SMB (dx) platforms [, namely another series of HP desktop computers]:

– Widen distribution to indirect.’

828 That presentation constitutes an additional indication that HP considered that one of the advantages of breaking the alliance with Intel was that it could release itself from the restrictions concerning the distribution channels.

829 The evidence that the Commission provided in the contested decision is sufficient to prove the existence of an unwritten condition of the HPA agreements according to which HP was to preclude its channel partners from stocking HP’s AMD-based x64 CPU business desktops so that such desktops would only be available to customers by ordering them from HP either directly or via HP channel partners acting as sales agent.

## 2.2) The applicant’s arguments

830 The applicant claims that the Commission wrongly concluded, at recital 413(3) of the contested decision, that ‘HP’s channel partners could not sell AMD-based business desktops’. The Commission’s assertion is contradicted by HP’s Article 18 response and by the sworn testimony of Mr H3 of HP before the US FTC.

831 In that regard, the Court finds that the summary made at recital 413 of the contested decision is in fact imprecise. It is not apparent from HP’s Article 18 response that HP’s channel partners were generally precluded from selling the computers in question. According to HP’s statement, those computers could be ordered by customers from HP via its channel partners acting as sales agent. According to that statement, those partners could therefore sell those computers by acting as sales agent, but they could not stock them.

832 In reply to a written question put in that regard by the Court, the Commission stated that the finding, at recital 413 of the contested decision, that ‘HP’s channel partners could not sell AMD-based business desktops, so that these could only be obtained direct from HP’ is a succinct summary of the Commission’s findings confirming HP’s statement, quoted at recital 348 of the contested decision (see paragraph 676 above). The Commission observed that Article 1(f) of that decision is consistent with HP’s statement quoted at recital 348 of that decision.

833 In the present case, the wording used at recital 413(3) of the contested decision, which is also reproduced at recital 1649, second indent, of that decision, should be construed in the light of the more detailed wording in Article 1(f) of that decision as meaning that sales of AMD-based business desktops via HP channel partners acting as sales agent were not precluded.

834 Since the contested decision should be construed in that sense, there is no contradiction with HP’s Article 18 response, or with the sworn testimony of Mr H3 quoted by the applicant. Mr H3 stated before the US FTC as follows:

‘We always said in the beginning we would respond to commercial customer’s interest but wouldn’t go proactively. Because of the price, we couldn’t really sell this in the [distribution] channel in the traditional way anyway. We were willing to say no channel inventory, use the VARs [Value Added Resellers] and resellers as sales agents because that was the basic plan we had anyway.’

835 That statement confirms that sales via HP channel partners were not entirely precluded, but that those partners could sell the computers concerned only if they acted as sales agent and that they could not stock those computers. That corresponds to what was found in Article 1(f) of the contested decision.

836 The applicant’s line of argument that the limited distribution model was the result of a unilateral decision made by HP will be examined in paragraph 858 et seq. below.

## 3) The condition relating to HP’s deferral of the launch of its AMD-based business desktop in the EMEA region

### 3.1) The evidence cited in the contested decision and its probative value

837 In its Article 18 response, HP clearly stated that the HPA1 agreement was subject to the unwritten condition that HP would defer the launch of its AMD-based business desktop in the EMEA region by six months. As was made clear above, that statement is a particularly reliable item of evidence which may, in principle, be sufficient on its own to demonstrate the existence of the condition in question and which requires at most a weak degree of corroboration.

838 In the contested decision, the Commission cites inter alia the following items of evidence which corroborate HP’s Article 18 response in that respect.

839 The Commission refers, at recital 356 of the contested decision, to an HP presentation of 24 October 2002 which appears in Annex B.12 to the defence. That presentation mentions, on a slide entitled 'Potential HP-Intel Commercial Desktop PC Deal', under the heading 'HP to provide Intel this volume by putting restrictions on the D315 product' inter alia a delay, for the regional launch of the D315 (from August 2002), of six months in Europe.

840 It is true that that presentation predates the signing of the HPA1 agreement. It cannot therefore suffice, on its own, to prove the existence of the unwritten condition of a deferral of the launch of the D315 in Europe. It is none the less an element capable of corroborating HP's Article 18 response. It is a document which mentions a delay for the launch of the D315 of six months in the EMEA region in connection with the agreement between Intel and HP that was being negotiated.

841 Moreover, the Commission quotes, at recital 358 of the contested decision, an HP internal presentation of 2004 which mentions '[d]irect-only delayed EMEA launch despite being largest commercial AMD market'. It is apparent from Annex A.26 to the application that that quotation appears in that presentation on a page entitled 'Current status — assessment of HPA impact' under the heading 'Negative'. HP therefore mentioned the delay in the launch in the EMEA region as a negative consequence of the HPA agreement. This constitutes an element corroborating HP's Article 18 response.

842 Lastly, for the reasons set out in paragraphs 808 and 809 above, the evidence corroborating HP's Article 18 response as regards the unwritten condition relating to the restriction of the distribution channels also constitutes evidence corroborating HP's Article 18 response as regards the other unwritten conditions.

843 Given that HP's Article 18 response requires, at most, a weak degree of corroboration, the evidence cited in the contested decision must be considered sufficient to prove the existence of the unwritten condition of the HPA1 agreement relating to the deferral of six months of the launch of the D315 in the EMEA region.

### 3.2) The applicant's arguments

#### i) The timing set out in the HP presentation

844 The applicant claims that the Commission fails to account for the timing set out in the presentation cited at recital 356 of the contested decision, according to which HP had committed internally to launching the D315 in the EMEA region in February 2003. The HPA1 agreement was not executed until 21 December 2002, only two months before the scheduled launch date of the D315 in the EMEA region, so that the agreement was not conditional on a six-month delay of that launch.

845 In that regard, it should be noted that that presentation, which is dated 24 October 2002 and appears in Annex B.12 to the defence, contains the phrase '[d]elay in regional launches (from Aug[ust] 2002) ... Europe 6 months' (see also paragraph 839 above). The HPA1 agreement was signed by HP on 2 December 2002 and by Intel on 20 December 2002. It is apparent from the last sentence of the HPA1 agreement that it was concluded with retroactive effect from 1 November 2002.

846 The Court observes that there is nothing to preclude the parties having agreed to a deferral of six months for the launch of the D315 by reference to the initial scheduled launch date, even if a part of that period had already lapsed on the date on which the contract was signed and also on the retroactive date of entry into force provided for in the contract. There is nothing to preclude a party from complying provisionally with conditions of a future contract which are envisaged during the negotiations. That is particularly true of a condition relating to a delay in the launch of a given product. As the Commission states, if HP had launched the D315 before the HPA1 agreement was signed, it would have been very difficult for HP to cancel that launch after the entry into force of the HPA1 agreement, especially as that agreement took effect retroactively, from 1 November 2002. In order to be able to respect the obligation of a six-month delay of the launch of the D315 in Europe from August 2002 in an agreement finally signed in December 2002, HP therefore had to refrain from launching the D315 in Europe pending the signing of that agreement. In the present case, it is apparent from paragraphs 2.22 and 2.25 of HP's Article 18 response that it did not launch the D315 at all in the EMEA region, or for that matter its successor, the D325.

847 Accordingly, there is nothing to preclude Intel and HP from having agreed an unwritten condition of the HPA1 agreement relating to the deferral of six months of the launch of the D315 in the EMEA region, that deferral having been calculated from a date before the signing of the contract and before its entry into force. Contrary to the applicant's assertion, the timing set out in the presentation of 24 October 2002 is not therefore incompatible with the existence of the unwritten condition to which HP's Article 18 response refers.

848 It is not therefore necessary for the Court to adjudicate on the Commission's argument, presented in the context of the replies to the written questions put by the Court, that the belated conclusion of the HPA1 agreement resulted in a fresh delay of six months in the launch of the D315 in Europe being imposed, to run from the entry into force of the HPA1 agreement.

ii) The absence of any mention of that condition in certain documents

849 The applicant states that the HP internal email of 14 July 2002, cited at recital 352 of the contested decision, contains no mention of a condition requiring HP to delay its launch of the AMD-based business desktop. In that regard, the Court observes that that email, which is cited in paragraph 729 above and lists the conditions of the agreement that was being negotiated, does not indeed mention such a condition.

850 The applicant states moreover that that condition is not mentioned in an email of 14 August 2002 from HP to Intel communicating a 'summary of the terms' that Mr H5, of HP, felt 'were agreed to'.

851 The Court would point out that those elements might at the very most demonstrate that the condition relating to the deferral of the launch had not yet been agreed on the dates of the emails mentioned in paragraphs 849 and 850 above. Even if proved, this would not contradict the existence of such a condition in the HPA1 agreement. It is entirely possible that that condition was negotiated after 14 August 2002 and after Intel's negative reaction to the launch, on 19 August 2002, of the D315 in the United States.

852 In that context, the Court would point out that, in the contested decision, the Commission furnished sufficient proof of the existence of that unwritten condition. It is therefore for the applicant either to prove the contrary, or to establish that the evidence cited is not in fact sufficient to demonstrate the existence of that condition, for example on account of an inconsistency between that evidence and other evidence in the case file. In the present case, the applicant has not succeeded in demonstrating that the timing set out in the HP presentation cited at recital 356 of the contested decision was incompatible with the existence of an unwritten condition of the HPA1 agreement relating to the deferral of six months of the launch of the D315 in the EMEA region, or that the absence of any mention of such a condition in documents dated 14 July 2002 and 14 August 2002 was incompatible with the existence of such a condition.

853 The applicant further claims that this alleged condition is also not mentioned in HP's internal presentation of 17 October 2002 entitled 'Intel update' (see paragraph 746 above).

854 In that presentation, under the heading 'Commercial Desktop PC Discussions', it is stated *inter alia* as follows:

'Status:

1. Intel negotiations have resumed

...

2. Current HP actions

- shipping in the US per the potential terms (except for enterprise bids)
- about to launch in [Latin America] and [Asia Pacific] (Intel has been informed)
- European timing uncertain (difficult to implement the reseller model in Europe).'

855 It is true, as the applicant claims, that that presentation does not state that the uncertainty surrounding the timetable for Europe is attributable to Intel. However, this does not mean that this is an exculpatory item of evidence. The fact that HP presented the progress of the launch of the D315 in the various regions of the world in the context of the presentation of the negotiations of an agreement with Intel indicates rather the existence of a link between the launch of that computer and the negotiations of an agreement with Intel. The fact that it is stated in that context that Intel was informed of the imminent launch of that computer in Latin America and the Asia-Pacific region also indicates rather the existence of a certain link. The fact that that presentation does not mention expressly such a condition does not mean that, at the time, such a condition was not yet envisaged as a condition of the contract that was being negotiated.

856 The fact that that presentation mentions, as a reason explaining the uncertainty surrounding the timetable for Europe, the fact that it was 'difficult to implement the reseller model in Europe' does not preclude the delay of the launch in the EMEA region from having also been the subject of the negotiations as an unwritten condition of the HPA1 agreement. The fact that another reason might have played a role in the decision to defer the launch and that that reason was cited in that presentation is not decisive. Moreover, the difficulty in implementing the reseller model in Europe, to

which the presentation refers, may be linked to the unwritten condition envisaged concerning the restriction of the distribution channels.

857 It follows from the foregoing that the applicant's arguments are not capable of calling in question the sufficiency of the evidence presented in the contested decision in order to establish the existence of the unwritten condition of the HPA1 agreement relating to the deferral of the launch of the D315.

4) The applicant's arguments that the alleged conditions correspond in fact to HP's commercial choices

858 Lastly, it is necessary to examine the applicant's line of argument concerning all the 'naked restrictions', according to which the alleged conditions correspond in fact to HP's own commercial choices.

859 The applicant relies inter alia on a statement made by Mr H3 before the US FTC. In that statement, he indicated, in essence, that the purpose of the D315 was to target SMBs and that HP had not planned to promote proactively sales of that product with enterprise business customers.

860 Mr H3 also stated, in essence, that HP was prepared to offer Intel the concession of no stock with its channel partners, since it was HP's basic plan in any case (see paragraph 834 above). Mr H3 stated that '[t]hese were things we were willing to put on the table as part of the negotiations because it was effectively giving the sleeves out of our vest, we believed'.

861 Mr H3's statement constitutes an indication that it was indeed HP that introduced those conditions during the negotiations of the HPA1 agreement, since they corresponded at the time to its commercial intentions.

862 The Commission cited Mr H3's statement at recital 392 of the contested decision and stated, at recital 393 of the contested decision, that that passage of Mr H3's statement was contradicted by other passages of the same statement. Mr H3 also stated, in relation to those conditions: 'Well, we wouldn't have voluntarily done these unless it was part of a negotiation for [which] we would receive something else in return.' Mr H3 moreover stated that HP expected 'advantaged pricing' and, 'potentially', funds called 'exception to customer authorized pricing' ('ECAP'). The Commission considers that that calls in question the probative value of Mr H3's statement.

863 However, the Court observes that, in fact, there is no contradiction in Mr H3's statement. During contract negotiations, it is entirely natural that a party will attempt to offer concessions to the other party which do not constitute a real sacrifice for the former. That party will not however agree to those concessions being part of the contract if it receives nothing in return. Even if HP had from the outset planned to target SMBs and GEMs and restrict the distribution channels for the D315, it had no reason to enter into a commitment in that regard with Intel without receiving anything in return. Indeed, by entering into a commitment with Intel, at a minimum HP lost its freedom to alter its plans in the future.

864 The fact that those restrictions corresponded to HP's commercial plans at the time and that it introduced them in the negotiations is therefore in no way incompatible with the existence of unwritten conditions in the HPA agreements. There is therefore no inherent contradiction in Mr H3's statement, or any contradiction between Mr H3's statement and HP's Article 18 response.

865 Moreover, as the Commission states in the rejoinder, Mr H3 confirmed, in his statement, the existence of unwritten conditions. When questioned on the manner in which Intel would react if HP were to lift the restrictions on the D315, Mr H3 replied that he thought that Intel 'would consider that a violation of [the] agreement'.

866 From a legal perspective, the question of who took the initiative to propose those unwritten conditions of the HPA1 agreement is irrelevant. As regards exclusivity rebates, this is clearly apparent from *Hoffmann-La Roche*, paragraph 71 above (paragraph 89) (see paragraph 787 above). In *Irish Sugar*, paragraph 199 above (paragraph 228), the General Court also pointed out that it does not matter whether it is the undertaking in a dominant position or the retailer which took the initiative to exchange a competitor's product for the products of the undertaking in a dominant position.

867 The Court notes that the complaint made against the applicant in the contested decision is that it granted payments to HP that were subject to unwritten conditions whereby HP was required to implement restrictions in relation to the marketing of a competitor's products, in this case to direct the sales concerned to SMB and GEM customers and to limit the distribution channels. The fact that rebates or payments subject to those conditions were granted is independent, first, of the question of who took the initiative to introduce those restrictions in the negotiations and, second, of the commercial intentions that the customer of the dominant undertaking had before the agreement was concluded. Even if the conditions agreed corresponded to the commercial intentions that HP had before the agreement was concluded, the unwritten clauses on which the agreements granting the rebates were conditional prevented HP from changing that commercial strategy.

868 In the present case, it is apparent from the email exchange of September 2004 (see paragraphs 753 to 755 above) that, at that time, Mr H7, of HP, considered making the computers concerned available through its channel partners in the EMEA region, but that this possibility was not pursued for fear of losing Intel's rebates.

869 Moreover, the grant by an undertaking in a dominant position of payments or rebates subject to the condition that the marketing of a product incorporating the product of a specific competitor be restricted is conduct which is targeted directly against that competitor and which can only have the objective of harming that competitor (see paragraph 204 above). The illegality of such conduct is in no way dependent on whether the customer of the dominant undertaking had to change its commercial strategy in order to comply with the conditions to which the grant of the payments or rebates was subject.

870 As regards the condition relating to the delay of the launch of the D315 in the EMEA region, the applicant claims that the Commission concedes, at recital 409 of the contested decision, that HP's decision to delay that launch was the result of the go-to-market strategy HP had adopted, because its ability to fulfil sales in the EMEA region directly was not as well developed as its ability in North America. The applicant states that the Commission none the less concludes that the launch delay must have resulted from Intel's interference.

871 In that regard, the Court notes that, at recital 409 of the contested decision, the Commission found that it was indeed apparent from certain documents in the case file that the EMEA branch of HP had difficulties in launching the D315 product because of HP's go-to-market strategy. The Commission also found that that strategy was precisely the consequence of the restrictions in the distribution of that computer that HP had negotiated with Intel and that, as a result, the delay was itself a direct consequence of Intel's restrictive conditions. It must be stated that that reasoning is in no way contradictory.

872 In any event, the Court would point out that the finding that the grant of a rebate in consideration for postponement of the launch of a competitor's product is illegal is in no way dependent on whether the agreement on that condition did indeed have the effect of such postponement. The Commission was not therefore obliged to demonstrate the existence of a causal link between the grant of the rebates and HP's decision to postpone, or even cancel, the launch of the D315 in the EMEA region (see paragraph 212 above).

873 It follows from all the foregoing that the Commission was right in finding the existence of the unwritten conditions of the HPA agreements and their illegality as naked restrictions constituting an abuse of a dominant position within the meaning of Article 82 EC (see paragraph 206 above).

c) Analysis of the capability of the rebates to restrict competition according to the circumstances of the case

874 It should be noted that, in order to find that the exclusivity rebates and naked restrictions at issue in the present case were unlawful, the Commission is not required to analyse the capability of those practices to restrict competition according to the circumstances of the case at hand (see paragraphs 80 to 94 and 209 above).

875 For the sake of completeness, the Court would however point out that, in the contested decision, the Commission established that the HPA rebates were capable of restricting competition also on the basis of an analysis of the circumstances of the case at hand.

876 In that regard, it should be noted generally that the fact that the conditional rebates granted by the applicant to HP were part of an overall strategy aimed at foreclosing AMD's access to the most important sales channels and the fact that that strategy included two types of infringement which complemented and strengthened one another render the applicant's conduct capable of restricting competition (see paragraphs 181, 184 and 213 above).

877 Moreover, the fact that the applicant's conditional rebates and payments were granted to certain particularly important beneficiaries also constitutes a factor which suggests that those payments are capable of restricting competition (see paragraph 182 above).

878 In that regard, it should be recalled that HP possessed strategic importance (see paragraph 182 above). Thus, the fact that an undertaking in a dominant position gives an incentive to HP, by means of exclusivity rebates, to obtain almost all of its requirements, even if only in a specific segment, was capable of having particularly negative effects on the competition structure, as such conduct was capable of making it more difficult for AMD to gain access to a particularly important customer.

879 Moreover, the conditional rebates and payments were an important element for OEMs to consider on account of the strong competition on the OEM market and their low operating margins (see paragraph 179 above). Furthermore, the fact that those rebates and payments were actually taken into

account in the commercial decisions of those benefiting from them also constitutes a factor which suggests that those payments are capable of restricting competition (see paragraphs 180 and 212 above).

880 The Court finds that the rebates granted to HP under the HPA agreements were of great importance for HP, which is apparent from the email cited in paragraph 754 above, in which Mr H2 wrote: 'Without the money we do not make it financially.'

881 In the light of the importance of the conditional rebates for HP, those rebates constituted a strong incentive for HP to comply with the unwritten conditions and were therefore capable of restricting HP's freedom to choose its supplier solely on the basis of competition on the merits.

882 HP explicitly confirmed the importance of the rebates in terms of its decision to accept and comply with the unwritten conditions. In paragraph 2.21 of its Article 18 response, cited at recitals 954 and 957 of the contested decision, HP stated as follows:

'HP can confirm that Intel's inducements (in particular the block rebates) were a material factor in determining HP's agreement to the unwritten conditions. As a result:

(a) HP ... found it undesirable to offer AMD-based desktops to any substantial degree to "enterprise" customers;

(b) HP ... stayed at least 95% aligned to Intel;

(c) HP ... did not take advantage of AMD's one million free CPUs: HP only took a small number of these because the restricted distribution model adopted for the D315 and the other HPA1 requirements meant that HP was not producing the D315 in any significant volumes.'

883 Moreover, HP expressly confirmed, in its Article 18 response, that it regarded the possibility of termination of the agreements at 30 days' notice as having given it an incentive to comply with the unwritten conditions of the HPA agreements (see paragraph 779 above).

884 HP therefore confirmed that the rebates granted by Intel had an influence on its commercial decisions. In that context, the Court would draw attention to the intrinsic reliability of HP's Article 18 response (see paragraphs 680 to 685, 689 to 692 and 716 above).

885 Intel relies on the fact that, in paragraph 2.20 of its Article 18 response, HP stated that, in 2002, there were several reasons for HP to hesitate before deciding to launch an AMD-based computer targeted at mainstream enterprise customers and fully stocked by HP's channel partners. Intel states that HP mentioned that there was uncertainty as to market acceptance of AMD by enterprise customers and uncertainty as to AMD's ability to deliver on such a scale.

886 However, HP also stated, in paragraph 2.20 of its Article 18 response, that one of the reasons for its hesitation lay in the fact that Intel was willing to grant the HPA1 rebates, but only subject *inter alia* to the unwritten conditions listed in paragraph 676 above. HP even stated, in paragraph 2.21 of its Article 18 response, that the block rebates had been a 'material factor' in determining its agreement to the unwritten conditions (see paragraph 882 above).

887 The fact that, for HP, there were commercial reasons independent of Intel's conduct for hesitating before introducing an AMD-based computer targeted at mainstream enterprise customers and fully stocked by HP's channel partners does not preclude the possibility that the rebates offered by Intel also played a role in terms of HP's agreement to, and also its compliance with, the unwritten conditions.

888 Moreover, even on the assumption that the unwritten conditions relating to the targeting of SMB and GEM customers and to the restriction of the distribution channels corresponded to HP's commercial intentions in 2002, as Mr H3 indicated before the US FTC, it is also apparent from Mr H3's deposition that HP would not have agreed to those concessions being part of the unwritten conditions of the HPA agreements without receiving anything in return (see paragraphs 862 and 863 above).

889 Furthermore, it is clearly apparent from the exchange of emails between Mr H7 and Mr H2 of 3 September 2004, which was cited in paragraphs 753 and 754 above, that the [*confidential*] of HP banned the computers concerned from being made available through HP's channel partners for fear of losing Intel's funds.

890 Intel's rebates therefore had an influence on the commercial decisions taken by HP, at least inasmuch as HP, by agreeing to the unwritten conditions, limited its freedom to alter its commercial plans in the future and inasmuch as HP was given an incentive by the rebates to comply with the unwritten conditions.



891 That finding is not called in question by slide five of the HP internal presentation of 2004 (slides three and four of which were already cited in paragraphs 826 and 827 above), which is relied on by the applicant and which states:

‘Offer AMD in enterprise “dc” line?’

– No — Insufficient market demand. Roadmap complexity.’

892 In that regard, the Court observes, first of all, that only the ‘dc’ computer line was concerned by the comments relating to ‘[i]nsufficient market demand’ and ‘[r]oadmap complexity’. Moreover, those comments by HP do not preclude the possibility that other reasons may have had an influence on its commercial decisions.

893 Accordingly, the Court finds that the rebates granted by Intel subject to compliance with the unwritten conditions of the HPA agreements were capable of restricting competition.

d) Conclusion

894 It follows from the foregoing that it is necessary to reject all the complaints put forward by the applicant relating to the exclusivity rebates and naked restrictions with respect to HP.

3. NEC

895 According to Article 1(c) of the contested decision, Intel granted ‘rebates to NEC between October 2002 and November 2005 at a level that was conditional on NEC obtaining at least 80% of its client PC x86 CPU supplies from Intel’. It is apparent from footnote 559 of the contested decision (footnote 552 of the public version thereof) that, by ‘client PC’, the Commission was referring to desktop and notebook PCs, not including servers.

896 Until April 2005, NEC’s operations as an OEM were managed by two different fully owned subsidiaries: NEC Japan and NEC Computer International (‘NECCI’). NEC Japan managed NEC’s operations in Japan and the Americas, whereas NEC’s operations in the rest of the world were handled by NECCI. NECCI was based in Europe, but it also managed NEC’s operations in Asia — with the exception of Japan — via its Asia Pacific countries (‘APAC’) branch. As of April 2005, the corporate structure was modified: the APAC division was hived off from NECCI and transferred to NEC. In November 2005, NECCI’s EMEA division was renamed ‘Packard Bell BV’.

897 The Commission states, in the contested decision, that, between October 2002 and November 2005, Intel granted rebates to NEC in accordance with a so-called ‘Santa Clara agreement’ (‘the Santa Clara agreement’), adopted in May 2002, and that the rebates granted under that agreement were de facto conditional upon NEC agreeing to purchase 80% of its global requirements of x86 CPUs from Intel. This worldwide share was broken down to 70% for NECCI and 90% for NEC Japan.

898 In the application, the applicant stated that, under the Santa Clara agreement, Intel provided both ECAP discounts and ‘market development funds’ (‘MDFs’) to NEC. Only the USD 6 million in MDFs provided in the fourth quarter of 2002 and the first quarter of 2003 had any linkage to ‘market segment share’ (‘MSS’) targets. In point 426 of the application, the applicant denied that any other rebates were linked to MSS thresholds and that the term of the Santa Clara agreement extended beyond the first quarter of 2003.

899 At the hearing, the applicant admitted, however, that it was from the fourth quarter of 2002 to the second quarter of 2003 that MDFs were conditional on market shares. This was recorded in the minutes of the hearing.

a) Assessment of the evidence in the contested decision of the conditionality of the rebates

900 In the contested decision, the Commission relies, in particular, on the following items of evidence:

– NECCI’s response of 15 December 2005 to a request for information from the Commission (‘NECCI’s Article 18 response of 2005’);

– NECCI’s response of 3 April 2007 to a request for information from the Commission (‘NECCI’s Article 18 response of 2007’);

– various emails;

– various presentations.

901 Although the applicant expressly conceded at the hearing that the MDFs granted between the fourth quarter of 2002 and the second quarter of 2003 were conditional, it is first necessary to set out some of the evidence furnished by the Commission regarding the conditionality of the rebates granted during that period. That evidence supports the veracity of NECCI’s statements from which it results that a proportion of the rebates was conditional even after the second quarter of 2003 (see paragraphs 948 to 966, 976 and 977 below).

1) The evidence relating to the conditionality of certain rebates granted for the fourth quarter of 2002 and the first quarter of 2003

902 The Commission stated, in recital 456 of the contested decision, that, prior to the conclusion of the Santa Clara agreement, NEC intended to purchase from Intel only 59% of its x86 CPUs for 'client PCs' worldwide, with NEC Japan having a 68% share of such CPUs and NECCI one of 48%.

903 Moreover, the Commission stated, also in recital 456 of the contested decision, that, in the Santa Clara agreement, which was concluded in May 2002, NEC and Intel agreed on a 'realignment plan', namely a plan that reversed the trend of Intel's decreasing x86 CPU share at NEC. The realignment plan foresaw that NEC's worldwide share of Intel x86 CPUs in its 'client PCs' should reach at least 80%. This worldwide share was broken down to 70% for NECCI and 90% for NEC Japan. According to the contested decision, in return for the market share realignment, Intel awarded rebates in various forms.

904 In the contested decision, the Commission relied inter alia on the evidence examined below.

905 In recitals 456, 461, 464 and 476 of the contested decision, the Commission relied on a NEC presentation of 27 January 2003, entitled 'NEC/Intel [Worldwide] Meeting (Purchasing Session)' and, more particularly, on the fourth slide of that presentation, entitled '[Worldwide: Fourth Quarter of 2002] Achievements'. The content of that slide confirms, under the heading 'Original Plan', that NEC's intention was to use Intel for only 59% of its needs, namely 68% for NEC Japan and 48% for NECCI. Moreover, that slide indicates, under the heading 'Realignment Plan', first, the Intel market shares provided for, namely 70% for NECCI, 90% for NEC Japan and 80% globally and, second, certain rebates to be granted by Intel.

906 The Commission also cited, in recital 495 of the contested decision, an internal NEC email of 3 December 2002, in which it is stated: 'Enclosed find the detail file of our Intel and AMD split. To reach the 70% market share we will have to buy 24 [thousand] more CPU's from Intel than our current plan.'

907 Moreover, the Commission cites, in recital 477 of the contested decision, a NECCI email of 9 December 2002 which states: 'Concerning [the fourth quarter of 2002], we are currently not committed to any volume but to a split 70%/30%'.

908 Furthermore, the Commission cites, in recital 492 of the contested decision, an internal email of Mr N1 of NECCI of 13 January 2003, in which it is stated:

'We committed and on a worldwide level [sic] to this agreement. We have to adjust our mix to 70/30.'

909 In so far as concerns the first quarter of 2003, Mr N2 of NEC Japan wrote the following to Mr N1 in an email of 16 May 2003, which is cited in recital 487 of the contested decision:

'Intel is ready to pay [first quarter] 2003 MDF (total [USD] 6 [million] ...). Now Intel Japan asks me some proof. Can you give me the data of the following by return? [First quarter] Intel PC shipment ... [First quarter] [(January to March)] Total (Intel+AMD) PC shipment.'

910 That email shows that Intel sought to obtain evidence relating to its market share at NEC before paying the MDFs for the first quarter of 2003.

911 It is apparent from the emails cited in paragraphs 906 to 909 above that market-share thresholds were established between Intel and NEC and that those thresholds did not correspond to mere non-binding expectations. Moreover, it is clear from the presentation cited in paragraph 905 above and from the email cited in paragraph 909 above that certain rebates were contingent upon market-share thresholds.

912 The result is that, in the contested decision, the Commission showed to the requisite legal standard the existence of exclusivity rebates granted by Intel to NEC for the fourth quarter of 2002 and the first quarter of 2003.

913 In any event, Intel explicitly acknowledged, at the hearing, the conditional nature of the MDFs paid for the fourth quarter of 2002 and the first quarter of 2003.

914 The applicant submits that only the MDFs were related to the agreed market-share thresholds, whereas the Commission stated, in recital 464 of the contested decision, that other Intel payments were also contingent upon the market-share requirement.

915 In the present case, it is not necessary to examine whether the Commission proved to the requisite legal standard that, for the fourth quarter of 2002 and the first quarter of 2003, rebates other than the MDFs were contingent upon the market-share requirement.

916 For both of those quarters, for which MDFs were established, it does not matter whether only the MDFs were contingent upon that requirement or whether other rebates or payments were also contingent upon such a requirement. It is true that the exact amount of the conditional rebates granted

plays a role in the context of the AEC test. However, that test is not a necessary element for a finding that the exclusivity rebates are unlawful. In order for an infringement to be found in relation to those two quarters, it is sufficient that the USD 6 million in MDFs granted during each of those quarters was conditional on the attainment of the agreed market shares.

2) The evidence relating to the second quarter of 2003

917 As regards the second quarter of 2003, the Commission stated, in recital 463 and footnote 569 of the contested decision (footnote 562 of the public version thereof), that NECCI had received MDFs in the amount of USD 1.2 million during that quarter, and that it did not know the amount of MDFs paid to NEC Japan for that quarter. That figure results from a response from NECCI, now Packard Bell, of 29 March 2007. Moreover, NECCI also received ECAP rebates in the amount of USD 1.2 million.

918 In a NECCI email of 25 April 2003, the content of which is cited in part in recital 491 of the contested decision, the following is stated: 'During our discussion with Intel this morning we agreed that: Intel will give us [USD] 2.4 [million] for achieving 205 [thousand CPUs] purchased'.

919 During the written procedure, the applicant submitted that it resulted from that document that the rebate granted for the second quarter of 2003 was merely a quantity rebate and not a rebate linked to a market-share requirement.

920 However, as the Commission stated in recital 492 of the contested decision, NECCI confirmed that the agreed quantity corresponded to a market share of at least 70%. In its Article 18 response of 2005, in response to question 38, NECCI clearly stated, in relation to the payment for the second quarter of 2003, that '[t]he agreed volume does correspond to the +70% MSS'. Moreover, NECCI confirmed, in its Article 18 response of 2007, in response to question 7, that the USD 2.4 million were conditional on its purchasing 70% of its CPUs from Intel.

921 In that regard, it should be noted that, if the market share which has been established is converted into a volume which has been individually calculated for that undertaking in accordance with its needs, this does not call into question the existence of an exclusivity rebate. It is clear from NECCI's responses, as referred to in the preceding paragraph, that the USD 2.4 million of rebates granted in the second quarter of 2003 were contingent upon the MSS requirement and that the volume agreed corresponded to the requirement of a market share of 70% or, in other words, it was a mere conversion of that figure.

922 Furthermore, the Court has held that rebates which appear, at first sight, to be of a quantitative nature as far as concerns the connection with the grant of a total rebate could constitute a particularly elaborate form of loyalty rebate if they were rebates granted in accordance with the percentage of the estimated needs of a specific customer which would be met (see, to that effect, *Hoffmann-La Roche*, paragraph 71 above, paragraphs 98 to 100).

923 In support of its argument that the rebate granted for the second quarter of 2003 was simply a quantity rebate, the applicant also relied on an email of 22 May 2003 from Mr N1 to Mr N3, an NEC executive, in which Mr N1 wrote:

'Our commitment for this quarter [second quarter] is not market share based but volume. It is impossible to have both.'

924 At the hearing, the applicant explicitly admitted that the MDFs paid for the second quarter of 2003 depended on MSS (see paragraph 899 above). None the less, it also relied, at the hearing, on the email of 22 May 2003 cited in paragraph 923 above. In that regard, it should be pointed out that it is unclear why the applicant relied, at the hearing, on an email which suggests that the commitment for the second quarter of 2003 was not based on market share, but on quantity, after having explicitly admitted that the MDFs paid for the same quarter depended on MSS.

925 In any event, it must be found that that email is the response to an email written the same day in which Mr N3 wrote:

'Mr [N2] told me that Intel agreed to offer [USD] 2.4 [million] package ([USD] 1.2 [million] MDF + [USD] 1.2 [million] ECAP) for this quarter because of 205 [thousand] [units] for Intel and 70 [thousand units] for AMD. If so, we need to keep the Intel ratio (74.5%) even in [the third quarter] (July through Sep.).'

926 It results from that email that, on the basis of the information received from Mr N2, Mr N3 considered that those rebates granted for the second quarter of 2003 were contingent upon the market-share requirement. Mr N1's interpretation was thus different from that of other NEC executives.

927 In the present case, it must be considered that NECCI's Article 18 responses constitute particularly reliable evidence (see paragraphs 967 to 975 below). In the light of the unequivocal statement in NECCI's Article 18 response of 2007 pursuant to which USD 2.4 million were conditional on NECCI's purchasing of 70% of its CPUs from Intel (see paragraph 920 above), the email cited in

paragraph 923 above expressing Mr N1's different interpretation from that of other NEC executives is not decisive evidence.

928 The result is that, irrespective of the applicant's admission at the hearing, the Commission proved to the requisite legal standard that the sum of USD 2.4 million in rebates granted for the second quarter of 2003 was conditional on the attainment of the agreed market shares.

929 In any event, the applicant explicitly admitted, at the hearing, that the MDFs paid for the second quarter of 2003 were contingent upon market shares. It is true that that admission related only to a sum of USD 1.2 million, since a further sum of USD 1.2 million had been paid as ECAP rebates. In that regard, it should be pointed out, as noted in paragraph 916 above, that, although the exact amount of the conditional rebates granted plays a role in the context of the AEC test, that amount does not have to be determined precisely, since the AEC test is not a necessary element for a finding that the exclusivity rebates agreed on by an operator in a dominant position are unlawful. Even supposing that, for the second quarter of 2003, only the MDFs in the amount of USD 1.2 million were conditional, that would not call into question the existence of the exclusivity rebates or their unlawfulness.

930 It also follows that it is not necessary to examine the question whether, as submitted by the Commission, for the second quarter of 2003, rebates other than those in the amount of USD 2.4 million were also contingent upon market shares.

3) The evidence concerning the period from the third quarter of 2003 to November 2005

931 The Commission stated, in recital 466 of the contested decision, that, from 1 July 2003, the structure of Intel's payments had changed and that the MDFs had been incorporated into the ECAP rebates and renamed 'super ECAPs' ('super ECAPs').

932 At the hearing, the applicant submitted that it was necessary to distinguish between three types of rebate, namely (i) MDFs, which were paid from the fourth quarter of 2002 to the second quarter of 2003 and depended on MSS, (ii) ECAPs and, (iii) 'super ECAPs', also referred to as 'special ECAPs'.

933 In so far as concerns ECAPs, the applicant submitted that it is apparent from NECCI's Article 18 response of 2005 that they were not contingent upon market shares. In that regard, it relied on NECCI's response to question 21 — which is also cited in recital 466 of the contested decision — in which NECCI stated:

'The special or super [ECAPs]/MDFs offered to NECCI are indeed contingent upon NECCI meeting the 70%+MSS, NEC Japan 90% and NEC [worldwide] 80%+ market shares. [ECAPs] (as opposed to special or super [ECAPs]) are not contingent upon market share threshold.'

934 In so far as concerns super ECAPs, the applicant submitted, at the hearing, that they represented a very small category. NECCI submitted, in its Article 18 response of 2005, in response to question 7, that they were special prices which applied during the third quarter of 2003 to certain types of CPU in the consumer segment. The applicant submits that, consequently, super ECAPs were paid only for the third quarter of 2003. The applicant also relied, at the hearing, on the fact that NECCI declared, in its Article 18 response of 2005, in response to question 38, that, after the second quarter of 2003, it received only ECAP rebates.

935 In the light of NECCI's statement that the ECAP rebates, as opposed to special or super ECAPs, were not contingent upon market-share thresholds (see paragraph 933 above), it results, in the applicant's view, from NECCI's Article 18 response of 2005 that, after the second quarter of 2003, no rebates were conditional on compliance with market-share thresholds.

936 However, that interpretation of NECCI's Article 18 response of 2005 is incorrect.

937 First of all, as the Commission rightly pointed out at the hearing, it is necessary to take account of NECCI's response to question 7 as a whole — as it appears in its Article 18 response of 2005 — in particular of the following statement:

'From 1 July 2003, the system changed (although at country levels, MDFs continue to operate): instead of one single amount, the special pricing was included in the ecap price (for the consumer segment only) at beginning of each quarter, provided that at the end of the preceding quarter, NECCI had fulfilled the 70% threshold for NECCI, and 80% worldwide (NECCI + NEC Corporation).'

938 It is clear from that statement that part of the rebates was still contingent upon the market-share requirement after 1 July 2003.

939 In so far as concerns NECCI's statement that it had obtained only ECAP rebates after the second quarter of 2003, it should be pointed out that, by that expression, NECCI was referring to ECAPs taken as a whole, including super ECAPs, as is apparent from its Article 18 responses, read jointly.

940 NECCI's statement that '[ECAPs] (as opposed to special or super [ECAPs]) are not contingent upon [a] market[-]share threshold' must be understood as meaning that 'regular' ECAPs, which were not super ECAPs, were not contingent upon the market-share requirement. It is apparent from several of the answers given by NECCI in its Article 18 response of 2005 that it referred to super ECAPs as a subcategory of ECAP rebates, and not as a completely separate category. Thus, NECCI stated, in response to question 19, that, 'after [the second quarter of] 2003, [ECAP] funds included what were previously MDFs'. It also stated, in response to question 20, that '[ECAPs] were expanded with the creation of special/super [ECAPs] in [the second quarter of] 2003 to cover what was previously called MDF'.

941 Moreover, the applicant itself stated, in point 443 of the application, that 'NECCI's response also stated that, beginning in July 2003, ECAP rebates included both regular ECAPs and "special" or "super" ECAPs, and that only the latter (which NECCI equated with MDF) depended on market-share targets'. As regards the passage of NECCI's Article 18 response of 2005 pursuant to which '[ECAP] prices depend[ed] on the agreement on 70% [m]arket [s]hare, not on volumes', cited in recital 464 of the contested decision, the applicant added that the only plausible interpretation was that NECCI was referring to "super ECAPs", as distinct from the non-conditional regular ECAPs'.

942 Thus, in the application, the applicant itself submitted that NECCI's reference to ECAP rebates included a reference to both regular and super ECAPs. The applicant's argument at the hearing by which it claimed that it results from NECCI's statement, pursuant to which only ECAP rebates were paid after the second quarter of 2003, that no conditional rebates were granted after that quarter, contradicts the applicant's very own interpretation of that reference.

943 It should be pointed out, however, that there is a certain lack of clarity in NECCI's Article 18 responses regarding the question whether the ECAP rebates which were conditional were referred to as 'special ECAPs' until the end of the period taken into account in the contested decision.

944 Thus, as pointed out by the Commission in recital 488 of the contested decision, NECCI stated the following in its Article 18 response of 2005: 'Today, if NECCI does not fulfil the MSS obligation for a specific quarter, it compromises negotiations of special [ECAPs] for following quarters.' This would seem to suggest that the conditional rebates were still referred to as 'super ECAPs' at that time.

945 None the less, as submitted by the applicant at the hearing, NECCI also stated, in its Article 18 response of 2005, in response to question 7, that '[t]oday super [ECAPs] no longer apply'.

946 In that regard, it must be pointed out that NECCI stated the following directly after that sentence: 'Special pricing is included in "[ECAPs]"'. It is apparent from this that special tariffs still existed even if they were not termed 'super ECAPs'.

947 In any event, the lack of clarity of NECCI's Article 18 response of 2005 concerns only the question whether the special prices were referred to as 'super ECAPs'. It results very clearly from NECCI's Article 18 responses that, during the entire period taken into account in the contested decision, part of the rebates granted by Intel was contingent upon the market-share requirement, as is apparent from paragraphs 948 to 966 below.

948 In so far as concerns the duration of the Santa Clara agreement, NECCI stated the following in its Article 18 response of 2005:

'[T]he 2002 deal is still in force. No new deal ha[s] been struck.'

949 In its Article 18 response of 2007, NECCI stated the following:

'To the best of our recollection, there is no defined end date of the deal, but NECCI stopped enforcing it in November 2005.'

950 In recital 493 of the contested decision, the Commission found, by making reference to the statements cited in paragraphs 948 and 949 above, that the market-share requirement was still in force after the second quarter of 2003 and that NECCI '[had] explained that the Santa Clara agreement, and the associated conditions, remained in force until November 2005 at least'.

951 At the hearing, the applicant submitted that the Commission's interpretation of those statements, which do not contain any reference to the conditionality of the rebates, is contradicted by other NECCI statements which deny such conditionality.

952 In that regard, it should be pointed out, first of all, that NECCI's statements do not contain any assertion that the market-share requirement was no longer in force after the second quarter of 2003. The mere fact that NECCI stated that, after the second quarter of 2003, only ECAP rebates were granted does not mean that, as of that quarter, the rebates were no longer conditional (see paragraphs 939 to 942 above).

953 On the contrary, it results unambiguously from NECCI's statements that the market-share requirement remained in force after the second quarter of 2003.

954 As noted by the Commission in recital 495 of the contested decision, NECCI stated in its Article 18 response of 2005 that, since the second quarter of 2004 it had occasionally failed to meet the required threshold, but this had never been highlighted to Intel.

955 It is clear from this that the market-share requirement was still in force, since, if such a condition did not exist, it would have made no sense to refer to a 'required threshold'.

956 It should also be pointed out that, as noted by the Commission in recital 483 of the contested decision, NEC and NECCI were obliged to report their market shares to Intel on a quarterly basis. The applicant does not dispute that NECCI provided it with MSS data, but points out that NECCI provided that information to both Intel and AMD long before Intel offered the rebates at issue.

957 In that regard, the Court points out that it results from NECCI's Article 18 response of 2005, and in particular the response to question 1, that the obligation to notify market shares was put in place independently of the MSS requirement. It follows that the existence of the obligation to notify MSS does not constitute, as such, evidence of the existence of rebates which were contingent upon an MSS requirement.

958 None the less, in the light of the obligation for NECCI to notify its market shares to Intel, NECCI's statement that it never 'highlighted to Intel' the fact that it occasionally failed to meet the required threshold may be interpreted only as meaning that NECCI attempted to hide that fact from Intel.

959 Moreover, as pointed out by the Commission in recitals 483 and 975 of the contested decision, NECCI stated, in its Article 18 response of 2005, that Intel organised quarterly business review meetings and that, during those meetings, Intel assessed 'whether or not NECCI ha[d] complied not only with the reporting obligations, but also with the 70%+ market share agreed with Intel'.

960 Furthermore, in its Article 18 response of 2005, in response to question 32, NECCI referred to a presentation which it gave during a quarterly business review meeting, in which it presented how well the 70% threshold had been reached for the first three quarters of 2004.

961 In any event, the Court must reject the applicant's argument that it results from NECCI's Article 18 response of 2005 that the special ECAPs applied only in the third quarter of 2003. It is true that NECCI stated in its Article 18 response of 2005, in response to question 7, that the super ECAPs were 'special prices that applied in [the third quarter] of 2003' to sales of certain types of CPU used in the consumer segment. However, that statement should not be interpreted as meaning that the special ECAPs applied only in the third quarter of 2003. It follows from NECCI's statement in its Article 18 response of 2005 that '[MDFs] decreased in [the second quarter of] 2003 because Intel decided that funds previously paid under MDF would, from then onwards, be channelled through "special" (or "super") [ECAPs] applied on consumer products only', that special ECAPs were not limited to one quarter.

962 It is thus perfectly clear from NECCI's Article 18 responses that the market-share requirement agreed in the Santa Clara agreement remained in force even after the second quarter of 2003 and that the Santa Clara agreement itself remained in force at least until November 2005, when NECCI ceased to apply it.

963 The applicant relies on the fact that NECCI did not identify any conditional super ECAPs in its Article 18 responses and that, in a table provided by NECCI in a statement of 29 March 2007 concerning rebates received from Intel, nothing had been entered on the line relating to super ECAPs.

964 It is true that NECCI was not in a position to indicate the exact amount of the rebates which were conditional. In that regard, NECCI stated, in the Article 18 response of 2007, cited in recital 467 of the contested decision, that '[t]he credit claim internal process of NECCI/Packard Bell [did] not allow for a break down or distinction between ECAP and Special/super ECAP'.

965 However, the fact that NECCI was not able to indicate the exact amount of rebates which were conditional does not call into question the fact that it is clear from NECCI's Article 18 responses that, even after the second quarter of 2003, part of the rebates granted was conditional.

966 NECCI's Article 18 responses thus confirm the duration of the infringement taken into account by the Commission, namely from October 2002 to November 2005.

967 The Court points out that NECCI's Article 18 responses constitute particularly reliable evidence, since it is not apparent that NECCI had anything to gain from providing incorrect information which could be used by the Commission to establish an infringement of Article 82 EC committed by Intel, its unavoidable trading partner, and because incorrect information is punishable by a fine under Article 23(1)(a) of Regulation No 1/2003.

968 The applicant calls into question the reliability of NECCI's statement relating to the duration of the Santa Clara agreement, since NECCI did not have any direct experience with negotiating ECAP rebates during the period concerned. In that regard, it relies on NECCI's statement that the latter 'does not officially negotiate [ECAPs] with Intel separately from NEC Japan', but instead, 'NECCI and NEC Japan convene to discuss their respective expectations' prior to meeting Intel, and '[i]t is NEC Japan [which] presents these expectations to Intel', then 'the outcome is given to NEC Japan, which relays the information to NECCI'. In that regard, the Court points out that the Commission recognises, in recital 456 of the contested decision, that NEC Japan was Intel's main interlocutor in those negotiations.

969 The fact that the negotiations with Intel were led by NEC Japan is, however, not such as to call into question the reliability of NECCI's statement relating to the duration of the Santa Clara agreement. It can be ruled out that the conditionality of the rebates was removed during the negotiations between Intel and NEC Japan without the latter having communicated that fact to NECCI. If one of the branches of an undertaking carries out negotiations regarding rebates with a third company also on behalf of another branch of the same undertaking, it is self-evident that it will fully inform it of the outcome of the negotiations which concern it. Moreover, where those rebates are conditional, it is necessary to inform the other branch of the relevant conditions in order to ensure that it complies with them. If those conditions are later removed, it is also self-evident that the branch which has carried out the negotiations will inform the other branch of that fact. It can thus be ruled out that the condition relating to compliance with certain market-share thresholds was removed without NEC Japan having informed NECCI that the latter was no longer required to reach a 70% market share.

970 The applicant also points out that, in its Article 18 responses, NECCI stated, on several occasions, that it could not answer for NEC Japan.

971 In that regard, it must be found that it is true that NECCI stated, in its Article 18 response of 2007, in response to question 6, that it could not specify the amount of conditional rebates received by NEC Japan, and that NECCI also stated that it was not in a position to respond with respect to the position between Intel and NEC regarding servers.

972 Nevertheless, that fact is not such as to call into question the probative value of NECCI's Article 18 responses. In that respect, the Court points out that the applicant admits that part of the rebates granted for the period from the fourth quarter of 2002 to the second quarter of 2003 was contingent upon Intel's market share at NEC reaching 80%, namely 90% for NEC Japan and 70% for NECCI. The duration of the Santa Clara agreement and the fact that, during that entire period, part of the rebates was contingent upon the agreed market shares, result unambiguously from NECCI's Article 18 responses, notwithstanding the fact that, in relation to certain questions, NECCI could not respond on NEC Japan's behalf.

973 Moreover, the Court points out that, in order to establish an infringement of Article 82 EC, it was not necessary for the Commission to determine the exact amount of the rebates which were conditional. The fact that NECCI was not able to provide a response in relation to the situation between Intel and NEC regarding servers is irrelevant, since the Commission took account only of an infringement regarding CPUs for 'client PCs' and not CPUs for servers.

974 The applicant also points out that Mr N4, the senior NECCI executive involved in the negotiation of the Santa Clara agreement, had left NECCI several years before NECCI submitted its Article 18 responses. In that regard, it should be pointed out that the Commission rightly points out that it is apparent from the evidence in the file that Mr N4 was not the only person at NECCI who knew about the negotiations. The mere departure of a NECCI executive cannot call into question the reliability of the Article 18 responses which it has submitted. Moreover, it should be pointed out that the applicant acknowledged explicitly, at the hearing, that the MDFs paid for the period from the fourth quarter of 2002 to the second quarter of 2003 were contingent upon market shares. The departure of a NECCI executive who was involved in the negotiation of the Santa Clara agreement cannot, in any event, call into question the reliability of NECCI's statements regarding the issue of the duration of that agreement.

975 It is thus necessary to reject the applicant's arguments seeking to call into question the reliability of NECCI's Article 18 responses.

976 Moreover, the Court points out that several items of evidence corroborate the veracity of NECCI's Article 18 responses, in particular those set out in paragraphs 905 to 909 above.

977 It is true that they are items of evidence which relate to the fourth quarter of 2002 and the first quarter of 2003. However, in the light of the inherent reliability of NECCI's Article 18 responses, the required degree of corroboration — insofar as necessary at all — is weak at the most (see, in that regard, paragraph 725 above). In particular, it is not necessary for additional evidence to corroborate the existence of the infringement for the entire duration referred to in those responses. There is no

reason to believe that NECCI provided correct information for certain quarters and false information for others. Thus, the evidence corroborating NECCI's Article 18 responses for the fourth quarter of 2002 and the first quarter of 2003 is sufficient to corroborate those responses in their entirety.

978 Furthermore, the Court points out that the Commission also relied, in recital 481 of the contested decision, on extracts from an exchange of emails of July 2003 concerning ECAP rebates approved by Intel for the third quarter of 2003. An annex contained a list of ECAP rebates, to which was attached a list of 'conditions', which included: 'NEC-J[apan] will maintain current MSS position from [the second quarter of 2003 to the third quarter of 2003] ...90+%' and 'NECCI will increase current MSS to 80% (APAC+EMEA) across all major countries'.

979 That is evidence relating to the third quarter of 2003 and which thus confirms that part of the rebates was still subject to a market-share requirement even after the second quarter of 2003.

980 In the light of the fact that NECCI's Article 18 responses require at the most a weak level of corroboration, the contemporaneous documents cited by the Commission in the contested decision are sufficient to corroborate those responses.

981 It results from all of the foregoing that the evidence presented by the Commission in the contested decision is sufficient to show the existence and duration of the infringement in so far as concerns NEC.

b) The applicant's other arguments

1) The argument that NEC proposed 90% exclusivity

982 The applicant submits that, at the meetings in May 2002 which led to the Santa Clara agreement, NEC proposed a 'realignment plan' giving more than 90% of its CPU requirements to Intel. Intel rejected many elements of this proposal and NEC then modified its model on the basis of an 80% MSS. The Santa Clara agreement thus reflected a reduction in NEC's proposed purchases from Intel based on Intel's unwillingness to satisfy NEC's price demands. The contested decision fails to explain how Intel's rejection of NEC's original proposal is consistent with the finding that Intel's goal was to foreclose AMD from competing for NEC's business.

983 In that regard, it should be pointed out that the applicant admits, in point 450 of the application, that it did not want to agree to NEC's price demands. The fact that Intel rejected the initial offer based on a 90% market share, since it considered the price proposed by NEC to be inadequate, does not mean that Intel did not pursue an exclusionary strategy.

984 In so far as concerns the applicant's argument that it was NEC which proposed that rebates be granted in consideration for an obligation of quasi-exclusivity, the Court points out that such a line of argument is ineffective (see paragraphs 787 and 791 above).

985 For the sake of completeness, the Court notes that the Commission rightly points out that it results from an internal Intel document, written in preparation for a meeting between Intel and NEC held on 15 April 2002, that Intel's role during the negotiations was not passive. It is apparent from that document, cited in recital 469 of the contested decision, that Intel sought to get a commitment from NEC to increase its Intel MSS. As regards the applicant's argument that the document in question was a pre-meeting draft agenda prepared by a junior Intel employee, it should be pointed out that it is true that the content of a document written within the framework of the preparation for a meeting does not necessarily correspond to what was actually discussed at the meeting. Nevertheless, it is apparent from that document that the applicant pursued the objective of gaining a commitment from NEC to increase its Intel MSS, which indicates that the applicant did not play a purely passive role in the negotiations, independent from the question whether NEC took the initiative to propose that rebates be granted in consideration for quasi-exclusivity.

2) The argument that the Commission acknowledged in the Statement of Objections of 2007 that the ECAP rebates were not conditional

986 The applicant submits that the Commission concluded in recitals 1408 and 1444 of the contested decision that all the rebates granted by Intel to NEC were linked to MSS expectations. On the contrary, it was recognised in the Statement of Objections of 2007 that only the MDFs had any linkage to MSS targets, and the conclusion was reached that 'a proportion of the total rebates' provided by Intel to NEC was conditional on the attainment of MSS targets. The Commission has never explained its reversal of this conclusion.

987 In that regard, the Commission rightly points out that 'a proportion of the total rebates' does not mean a proportion limited to MDFs. The sentence, contained in point 247 of the Statement of Objections of 2007 and to which the applicant refers, states that 'the Commission concludes that a proportion of the total rebates paid by Intel to NEC from the third quarter of 2003 to November 2005 was conditional upon NEC fulfilling an Intel market share requirement of 80% in the client PC segment'. Given that the Commission found, in point 245 of the Statement of Objections of 2007, that



from 1 July 2003, the MDFs were integrated into the ECAP rebates and were renamed 'super ECAPs', it would have made no sense to interpret the expression 'a proportion of the total rebates' as meaning a proportion limited to MDFs, since, from 1 July 2003, Intel no longer paid MDFs to NEC.

988 Moreover, it should be pointed out that the Commission adopted the wording of point 247 of the Statement of Objections of 2007 in recital 973 of the contested decision in stating that, '[f]rom the third quarter of 2003 to November 2005, a proportion of the total rebates paid by Intel to NEC was conditional upon NEC fulfilling an Intel market share requirement of 80% in the client PC segment'.

989 There is thus no contradiction between the findings made in the contested decision and in the Statement of Objections of 2007 in so far as concerns the duration of the infringement.

990 As has been found above, the Commission established to the requisite legal standard that the Santa Clara agreement was in force until November 2005 and that, during that period, a proportion of the rebates granted was conditional.

991 The Court points out that recitals 1408 and 1444 of the contested decision fall within the part of the decision devoted to the AEC test. Possible errors which the Commission may have made in determining the amount of the conditional rebates in the context of the AEC test do not make it possible to call into question the lawfulness of the contested decision, since the AEC test does not constitute a necessary element for determining the unlawfulness of exclusivity rebates. It is thus not necessary to examine the Commission's argument that it did not claim, in the contested decision, that all of the rebates granted by Intel to NEC were conditional.

3) The argument that Intel never reduced its rebates even though purchases routinely fell below the alleged thresholds

992 The applicant submits that it never reduced its rebates even though purchases routinely fell below the alleged thresholds. That results, in particular, from data from Gartner ('Gartner data'), an information technology research and advisory company, and a NECCI presentation entitled 'CPU overview' which shows that Intel's share of NECCI's CPU requirements reached or exceeded 70% in only 4 out of the first 10 quarters at issue.

993 As regards the Commission's claim, in recital 500 of the contested decision, that it has not been demonstrated that NEC or NECCI 'occasionally' fell below the agreed MSS, the applicant submits that the burden of proof is on the Commission and that the failure to comply with the thresholds which were allegedly fixed was more than just 'occasional'. The Commission's position, which is set out in recital 495 of the contested decision, that Intel was unaware of NEC's breaches of the alleged conditions is unsustainable, since data on NEC's worldwide usage of CPUs was available through Gartner, to which Intel subscribed throughout the reference period.

994 The applicant considers that, under the Commission's theory of conditionality, NEC's and NECCI's consistent failure to achieve the purported share requirements should have resulted in the revocation of existing Intel rebates or the reduction of future Intel rebates.

995 The Commission points out that, even if NEC's purchases had fallen below its commitments under the Santa Clara agreement, and even if Intel had been aware of this at the time, which was not the case, the fact that Intel did not reduce its rebates does not prove in itself that unlawful exclusivity rebates did not exist.

996 It should be pointed out that, in response to a question concerning the implications which non-compliance with the MSS obligations in a specific quarter could have, NECCI gave the following explanations in its Article 18 response of 2005:

'At the time of global MDFs, if NECCI did not fulfil the MSS obligation for a specific quarter, it did not obtain any MDF payments. Today, if NECCI does not fulfil the MSS obligation for a specific quarter, it compromises negotiations of special [ECAPs] for following quarters.'

997 The Court points out that it is true that the fact that an undertaking in a dominant position does not annul the rebates granted or part of them following a failure to comply with the exclusivity requirement does not mean that the rebates were not conditional (see paragraph 527 above). Nevertheless, in the circumstances of the present case, which concerns a period of around three years, it must be considered that, if NEC had systematically infringed the MSS requirement by falling considerably below the agreed thresholds in a manner clearly visible for Intel, without that having had repercussions on the rebates, NEC would no longer have had to fear, after a given point in time, a disproportionate reduction in its rebates. In such a situation, the duration of the infringement would have been shorter. From the point at which the prospect of a disproportionate reduction in rebates would no longer have been credible for NEC, it would have had no incentive to use Intel for the vast majority of its supplies.

998 By contrast, where the obligation at issue has been infringed only occasionally, the fact that the undertaking in a dominant position does not reduce rebates disproportionately does not mean that the

prospect of a future reduction was no longer credible for the customer. Similarly, if the attained market shares remain close to those agreed the customer's incentive to use the dominant undertaking for the majority of its requirements remains. In such a situation, the dominant undertaking's customer must fear a disproportionate loss of rebates if its purchases fall further. It should be pointed out that the mere fact that a dominant undertaking allows a certain amount of flexibility regarding full compliance with objectives is not sufficient to rule out the existence of an abuse (see, to that effect, *Tomra*, paragraph 72 above, paragraphs 299 and 300). Moreover, if the undertaking in a dominant position is not aware of an infringement of the MSS requirement, or that undertaking's customer does not know that the dominant undertaking is in fact aware thereof, the prospect of a disproportionate reduction in rebates, in the event that the undertaking in a dominant position becomes aware of the infringement of the requirement, remains credible for the customer.

999 The burden of proof in that respect is on Intel. The Commission has proved to the requisite legal standard that Intel and NEC concluded the Santa Clara agreement which provided (i) for an MSS obligation for NEC to comply with, (ii) that that agreement was in force until November 2005 and that, (iii) throughout that period, a proportion of the rebates granted by Intel to NEC was subject to the MSS requirement. The conditionality of the rebates implies the threat that either agreed rebates could be cancelled, or that future negotiations of rebates could be compromised in the event of non-compliance with the requirement, irrespective of whether that threat was made explicitly or not. In those circumstances, the burden is on Intel to show that, exceptionally, that threat was no longer credible for NEC as of a certain point since that requirement remained permanently unenforced.

1000 The applicant relies, first, on Gartner data relating to the global Intel market share at NEC during the period concerned. It is apparent from Annex A.65 to the application that the Gartner data indeed shows an Intel market share of less than 80% during 9 of the 13 quarters concerned. From the fourth quarter of 2002 to the fourth quarter of 2005 inclusive, the respective quarterly data was as follows: 74.4%, 80.2%, 78.5%, 76.0%, 74.1%, 81.4%, 80.9%, 82.2%, 77.8%, 79.3%, 79.6%, 74.8% and 75.4%.

1001 It must, however, be pointed out that that quarterly data is relatively close to the agreed 80%, the difference being less than six percentage points in each quarter. The Intel market share was considerably higher than the market share of 59% which NEC had envisaged prior to the conclusion of the Santa Clara agreement (see paragraphs 902 and 905 above).

1002 It should also be pointed out that the Gartner data was not calculated using the same methodology as that agreed in the Santa Clara agreement; the method of calculation agreed on by Intel and NEC also took account of inventory.

1003 The Commission rightly points out that Intel stated, in point 458 of its response to the Statement of Objections of 2007, in relation to the Gartner data concerning NECCI for the fourth quarter of 2002, that 'NECCI [had] also provided additional data to NEC Japan, which indicated that the Gartner data did not accurately reflect NECCI's usage of Intel [CPUs] during the quarter'. Intel stated, in point 456 of its response to the Statement of Objections of 2007, that, according to the Gartner data, NECCI had purchased only 61% of its CPUs from Intel in the fourth quarter of 2002. None the less, NECCI was able to convince Intel that it had complied with the requirement of a 70% Intel market share, as is apparent from an internal NEC email of 7 February 2003, summarising the outcome of the discussions between representatives of Intel Japan and NEC. That email, which is cited in footnote 632 of the contested decision (footnote 625 of the public version thereof), states the following in relation to the fourth quarter of 2002: 'Using Mr [N5's] data sent to me yesterday, I explained that NECCI achieved more than [a] 70% Intel share and they understood the situation.' It results from the foregoing that Intel's perception at the time of the facts was that the Gartner data did not provide an exact indication of its market share at NECCI.

1004 The applicant submits that the effect of inventory changes cannot result in any long-term underestimation of its market share. Nonetheless, the Court points out that the Gartner data was not calculated in accordance with the same methodology as that agreed in the Santa Clara agreement, with the result that Intel could not rely solely on that data to verify compliance with the MSS requirement. Given that the figures indicated in the Gartner data are relatively close to those agreed, the applicant is not able to furnish evidence that it was aware at the time of a constant and considerable infringement by NEC of the MSS requirement on the basis of that data alone.

1005 Moreover, the applicant relies on a NECCI presentation entitled 'CPU overview' which shows that Intel's share of NECCI's CPU requirements reached or exceeded 70% in only 4 out of the first 10 quarters at issue, dipping as low as 63.7%. The Court points out, in that regard, that an internal NECCI presentation cannot demonstrate that Intel was aware of the non-compliance with the market-share requirement, or that NEC knew that Intel was aware of such non-compliance. It should be noted that NECCI stated in its Article 18 response of 2005 that, from the second quarter of 2004, it occasionally failed to meet the required threshold, but that this had never been highlighted to Intel (see paragraphs

954 and 958 above). Furthermore, as stated by the Commission in recital 495 of the contested decision, it is apparent from an internal NECCI email of 4 December 2002 that, in the figures which it had just sent to Japan, NECCI had reduced by several thousand the number of CPUs which it claimed to have purchased from AMD.

1006 Moreover, as the Commission points out, in paragraph 276 of the rejoinder, for the second quarter of 2003 the market share calculated in the presentation 'CPU overview' was 63.8%, whereas the market share communicated to Intel was 71.4%.

1007 The other documents which the applicant cites, in paragraph 430 of the application, namely internal NEC emails (Annexes A.67 and A.68 to the application), a presentation given by NECCI to AMD and NECCI's Article 18 response of 2005 are documents of which Intel was also not aware at the time of the facts.

1008 As the Commission points out in point 272 of the rejoinder, the applicant would have been able to base its arguments on the data with which NEC had provided it in relation to its market share during the period concerned. The General Court questioned the applicant in that respect at the hearing and asked it, in particular, which market-share data was communicated by NEC and NECCI.

1009 In response to that question, the applicant merely stated that the Gartner data was the industry standard, that Intel knew that it was reliable and that, even supposing that NECCI had communicated figures above the market-share thresholds, even though the Gartner data indicated figures below those thresholds, Intel would have been suspicious and reacted.

1010 However, as is apparent from paragraphs 1002 to 1004 above, the Gartner data alone was not sufficient to furnish evidence that, at the time of the facts, the applicant was aware of a constant and considerable infringement by NEC of the MSS requirement.

1011 The applicant also relies on an analysis which it prepared in mid-2005 and which constitutes, in its view, the only evidence of its perception of its market share at NECCI at the time of the facts. It claims that that document shows that Intel perceived its share of NECCI's business in Europe to be only around 60% in the period from 2003 to the first half of 2005.

1012 In that regard, the Commission rightly points out that that document represents only Intel's share of NECCI's business in Europe. However, Intel and NEC agreed on a calculation method whereby the APAC branch of NEC would be accounted for together with NECCI's sales. Since the APAC branch was using only Intel CPUs, its inclusion in the calculation resulted in an increase in Intel's market share as compared to NECCI's European business alone. It was thus evident for Intel that its estimate regarding its market share at NECCI only in Europe did not enable it to evaluate whether NECCI had complied with the MSS requirement of 70%, since Intel was aware of the calculation method agreed between itself and NEC.

1013 In the present case, Intel has not shown that, as of a given point in time, there was no longer any incentive for NEC to use Intel as its supplier for the majority of its CPU x86 requirements. On the contrary, it is apparent from NECCI's Article 18 response of 2005 that, when it did not attain the required market share, it tried to hide that fact from Intel (see paragraphs 954 and 958 above). NECCI would have had no reason to do so if it had considered that, as of a given point in time, the amount of rebates granted was no longer contingent upon compliance with the MSS requirement.

1014 It results from all of the foregoing that Intel did not prove that, as of a given point in time, the prospect of a disproportionate loss in rebates was no longer credible.

4) Intel's business dealings prior to the adoption of the Santa Clara agreement and its dealings with another OEM

1015 The applicant considers that the Commission's finding that the rebates granted by Intel were conditional is contradicted by both Intel's dealings with NEC prior to the adoption of the Santa Clara agreement and by its dealings with other OEMs that shifted substantial volumes of purchases to AMD. NEC received substantial rebates from Intel continuously during the period from 2001 through the first half of 2002, during which period the Commission alleged, in recital 454 of the contested decision, that 'NEC had decided to embrace AMD x86 CPUs more actively in its client PC offering'. Similarly, Intel's rebates to Acer increased even as Intel's market share at Acer declined dramatically.

1016 In that regard, the Court points out that the fact that the applicant granted considerable rebates to NEC in a period during which NEC had increased the level of its AMD purchases, prior to the conclusion of the Santa Clara agreement, is irrelevant in so far as concerns the finding that the rebates granted by Intel were conditional. The absence of sanctions for purchases from competitors, prior to the conclusion of an agreement providing for a quasi-exclusivity requirement, does not mean that, after that agreement had been concluded, NEC did not need to fear being penalised for infringing that requirement.

1017 The fact that the applicant increased the rebates granted to Acer in a period during which its purchases from AMD had increased is also irrelevant. The contested decision does not mention exclusivity rebates in relation to Acer, but only a naked restriction in relation to the postponement of the launch of AMD Athlon 64-based notebooks (see also paragraph 1360 below).

1018 It results from all of the foregoing that the Commission showed to the requisite legal standard that the applicant infringed Article 82 EC in granting exclusivity rebates to NEC from October 2002 to November 2005.

c) Analysis of the capability of the rebates to restrict competition according to the circumstances of the case

1019 It should be noted that, in order to find that the exclusivity rebates were unlawful, the Commission is not required to analyse the capability of those practices to restrict competition according to the circumstances of the case at hand (see paragraphs 80 to 94 above).

1020 For the sake of completeness, the Court also points out that, in the contested decision, the Commission established that the exclusivity rebates granted to NEC were capable of restricting competition also on the basis of an analysis of the circumstances of the case at hand.

1021 In that regard, it should be noted generally that the fact that the conditional rebates granted by the applicant to NEC were part of an overall strategy aimed at foreclosing AMD's access to the most important sales channels and the fact that that strategy included two types of infringement which complemented and strengthened one another render the applicant's conduct capable of restricting competition (see paragraphs 181, 184 and 213 above).

1022 Moreover, the conditional rebates and payments were an important element for OEMs to consider on account of the strong competition on the OEM market and their low operating margins (see paragraph 179 above). Furthermore, the fact that those rebates and payments were actually taken into account in the commercial decisions of those benefiting from them also constitutes a factor which suggests that those payments are capable of restricting competition (see paragraphs 180 and 212 above).

1023 As regards, more specifically, the conditional rebates granted to NEC, the following should be pointed out.

1024 The rebates granted by Intel were of significant importance to NEC.

1025 In that regard, the Commission pointed out, in recital 976 of the contested decision, that, at that time, NEC's computer business was hardly profitable, with NECCI's net income after tax being negative in 2003.

1026 Moreover, it is apparent from the minutes of the Supervisory Board meeting of NECCI of 2 June 2003, contained in that board's report of 27 June 2003 and cited in recital 977 of the contested decision, that '[t]he annual fund amount of [USD] 10 [million] from Intel, is a key point to achieve the budget'.

1027 Furthermore, it was noted in those minutes, cited in recital 978 of the contested decision, that:

'Mr [N4] mentions that, besides the fund issue, Intel is not competitive and therefore proposes to switch to AMD if Intel is not fulfilling its commitment. Mr [N6] mentions it will have consequences for the total NEC Group if NECCI decides to switch to AMD.'

1028 It results from those minutes that those statements were made in the context of a discussion concerning the payment of rebates in the amount of USD 2.4 million for the second quarter of 2003, which, according to those minutes, was 'conditional on the purchase of 205 [thousand CPUs] by NECCI', thus in the context of a discussion concerning the payment of a rebate which was in reality conditional on compliance with the agreed MSS, since that MSS had been converted into a volume (see paragraphs 920 and 921 above).

1029 The conditional rebates granted by Intel were thus capable of inducing NEC to limit its purchases from AMD and thus to restrict NEC's freedom to choose its supplier on the sole basis of competition by merit. In addition, it is apparent from the minutes of NECCI's Supervisory Board meeting, cited in paragraph 1027 above, that the conditional rebates granted by Intel were a factor taken into consideration by NEC in its business decisions.

1030 Moreover, the internal email of Mr N1 of NECCI, cited in paragraph 908 above, confirms that the commitment entered into under the Santa Clara agreement is a factor which was taken into consideration by NECCI in its business decisions.

1031 Accordingly, it has been proved that the exclusivity rebates granted to NEC were actually capable of restricting NEC's freedom of choice and thus of making access to the market at least more difficult for AMD.

d) Conclusion

1032 It results from all of the foregoing that all of the complaints raised by the applicant in relation to the exclusivity rebates granted to NEC must be rejected.

4. Lenovo

1033 According to Article 1(h) of the contested decision, Intel granted 'payments to Lenovo between June 2006 and December 2006 conditional on Lenovo delaying and finally cancelling its AMD-based x86 CPU notebooks'.

1034 Moreover, according to Article 1(d) of the contested decision, Intel granted 'rebates to Lenovo between January 2007 and December 2007 at a level that was conditional on Lenovo obtaining all of its notebook x86 CPU supplies from Intel'.

1035 At recitals 505 to 512 and 579 of the contested decision, the Commission states, in essence, that in 2005 and at the beginning of 2006, Lenovo experienced problems in its relationship with Intel. At the same time, Lenovo was also experiencing market demand for AMD-based notebooks. In view of the unreliability of Intel supplies and of the fact that in some executives' views the combination of price and performance favoured at times AMD over Intel, Lenovo contemplated a dual-source strategy for notebooks. Consequently, Lenovo and AMD agreed that Lenovo would introduce at least two AMD-based notebook models in 2006, called 'Snowboard 1.2' and 'Triathlon'. According to the contested decision, the two models were to be launched, first in China, in June 2006, and then at a worldwide level, in September or October 2006. It should be observed that, for the Chinese market, the two models were called 'Xuri' and 'Turin'.

1036 At recitals 513 to 518 of the contested decision, the Commission states, in essence, that Lenovo considered moving from a transactional-type relationship to a strategic alliance with AMD. According to the contested decision, the details of that cooperation between AMD and Lenovo were set out in a document called 'Statement of Work' ('the SOW') that was finalised between mid-March and the beginning of April 2006. The deal on the launch of the two notebook models was incorporated in the SOW. According to the contested decision, Lenovo was very concerned about Intel's reaction to that cooperation and feared an adverse reaction by Intel as a result of increased AMD use. Despite those concerns, Lenovo initially maintained its dual-source plans.

1037 At recitals 519, 520 to 523, 579 and 1663 of the contested decision, the Commission states, in essence, that, in the context of the negotiations with Intel relating to increased funding, a first decision to postpone was taken by Lenovo at the beginning of April 2006, the launch of AMD-based notebooks for China having then been postponed from June 2006 to September or October 2006, so as to coincide with the worldwide launch of those computers.

1038 At recitals 524 to 533, 579 and 1663 of the contested decision, the Commission states, in essence, that, in June 2006, a second decision to postpone was taken, whereby the worldwide launch of AMD-based notebooks, including in China, was postponed from September or October 2006 to January 2007. That decision was the result of a deal between Intel and Lenovo which was conditional on the postponement of the launch of AMD-based notebooks.

1039 At recitals 534 to 546 and 579 of the contested decision, the Commission states, in essence, that in December 2006 Lenovo finally agreed to enter into a strategic relationship with Intel through the negotiation of a Memorandum of Understanding ('the 2007 MoU'), which was signed by Lenovo and Intel on 30 December 2006 and 15 January 2007 respectively.

1040 The parties provided in the 2007 MoU expressly that Lenovo would purchase from Intel 9 million desktop CPUs and 8 million notebook CPUs in 2007, thus a total of 17 million CPUs. The rebates provided for in that regard amounted, according to the contested decision, to USD 180 million. According to recital 540 of the contested decision, an unwritten condition of the 2007 MoU was that Lenovo would grant exclusivity to Intel in the notebook segment. That implied that Lenovo would cancel the already twice postponed, but still envisaged, AMD notebook launch.

1041 At recitals 547 and 548 of the contested decision, the Commission states, in essence, that Lenovo tried to conceal the exclusivity agreement and the reasons for cancelling the launch of the AMD-based computer models.

1042 It is apparent from Article 1(h) of the operative part of the contested decision and from recital 1681(3) thereof that that decision does not make a finding of a breach of Article 82 EC in respect of the postponement of the launch of AMD-based notebooks in China (see paragraph 1037 above). The Commission explained in its defence that the circumstances relating to that postponement were

mentioned in the contested decision in order to illustrate the background of the subsequent postponement concerning the worldwide market (see paragraph 1038 above). Consequently, it is not necessary to adjudicate on the applicant's arguments relating to the postponement concerning the Chinese market. Even if the applicant succeeded in rebutting the evidence relied on in the contested decision relating to the postponement concerning the Chinese market, that would not rebut the evidence relied on in that decision relating to the postponement of the launch concerning the worldwide market. It is therefore necessary to examine the legality of that decision as regards, first, the findings relating to the postponement concerning the worldwide market and, second, the findings relating to the existence of an exclusivity condition.

a) The findings relating to the postponement concerning the worldwide market

1) Assessment of the evidence presented in the contested decision

1043 In order to prove that Intel granted payments to Lenovo between June and December 2006, conditional on the postponement and, finally, on the cancellation by Lenovo of the launch of AMD-based notebooks, the contested decision relies inter alia on the following items of evidence:

- an email of Mr L2 of 27 June 2006;
- an email of Mr L3 of 28 June 2006;
- a Lenovo internal presentation in preparation for a meeting with Intel of 29 June 2006;
- an email of Mr L4 of 6 July 2006;
- an email of Mr L5 of 12 July 2006.

1044 It is therefore necessary to present the content of those items of evidence and examine their probative value.

1.1) The content

1045 According to recital 527 of the contested decision, in an email of 27 June 2006, Mr L2, [confidential], reported to Ms L6, [confidential] of Lenovo, as follows:

'[Mr L5] and I had a dinner with [Mr I8], [confidential] tonight ... When we asked Intel what level of support we will get on [notebooks] in [the] next quarter, [he] told us ... the deal is base[d] on our assumption to not launch [the] AMD [notebook] platform. ... [The] Intel deal will not allow us to launch AMD.'

1046 According to recital 527 of the contested decision, in an email of 28 June 2006, Mr L3, Lenovo [confidential] wrote to Mr L7, also Lenovo [confidential], and to other Lenovo China executives as follows: 'As you know I have been negotiating a special deal with Intel. The net is that Intel has made us a very attractive offer that we will end up taking. Our part of this deal is that we will award all business for shipments for the rest of this calendar year to Intel. In exchange, Intel will give us a special deal for both China and [worldwide]. The deal is worth millions of [USD] ... We need to start managing the ... AMD program liability down to as small a number as possible ... We need to start adjusting our planning for AMD products ... We are resetting [our dual-source strategy] to launch in [the first quarter of 2007].'

1047 According to recital 528 of the contested decision, Mr L3's email of 28 June 2006 means that the decision to postpone had already been taken by or was taken on 28 June 2006. That was probably confirmed formally to Intel on 29 June 2006 at a meeting between Lenovo and Intel. A Lenovo internal presentation in preparation for a meeting with Intel of 29 June 2006 states, on slide 3, as follows:

'Intel made aggressive proposal for Lenovo's 2006 notebook business that yields [USD] ... [Million] gross ([USD] ... [Million] ... ) funding in [the second half of 2006] ... Plan => Agree to give Intel all of our notebook business in 2006 ... Award Xuri and Lenovo 3000 notebook business to Intel for 2006.'

1048 According to recital 533 of the contested decision, in an email of 6 July 2006, Mr L4, [confidential], asked Mr L8, [confidential], the following:

'When can I get more info allowing me to understand how I can leverage the additional Intel money you will get because of our decision to postpone the AMD [notebook] launch ...?'

1049 According to recital 533 of the contested decision, in an email of 12 July 2006, Mr L5, Lenovo [confidential], explained to a Lenovo executive as follows:

'[B]esides [USD] 3.4 [million Lump Sum Customer Authorised Price] for Xuri, Intel China has also committed [an] additional [USD] 8 [million] [Lump Sum Customer Authorised Price] to [Lenovo China] in [the third to fourth quarters] as a reward [for] postponing AMD [notebook] planning and more volume commitment for [notebook CPUs].'

## 1.2) The probative value

### i) The argument that the payments to Lenovo constituted merely an effort to win at-risk business

1050 The applicant submits, in essence, that the evidence relied on in the contested decision does not demonstrate that the payments to Lenovo were conditional on postponement or cancellation of the two AMD-based notebooks. The payments to Lenovo constituted merely an effort to win at-risk business. Lenovo organised a bidding process for the two computer models in question, which Intel won. In the applicant's submission, the fact that the business which was awarded to Intel could not also be awarded to AMD is an entirely normal consequence of the fact that Intel won that bidding process.

1051 In that regard, it must be stated that the applicant cannot call in question the conclusions of the contested decision by claiming that the payments to Lenovo constituted merely an effort to win at-risk business. It is true that, in principle, an undertaking in a dominant position cannot be criticised for submitting competitive offers to a customer as long as those offers do not constitute conduct falling outside the scope of competition on the merits. However, an offer no longer falls within the scope of competition on the merits when, instead of merely promoting the dominant undertaking's own sales, it is aimed directly at restricting the marketing of a competitor's products (see paragraphs 201 to 206 above). That is the case in respect of offers which make the grant of payments subject not only to the condition that business be awarded to the dominant undertaking, but, in addition, to the condition that the customer refrain from launching specific products equipped with components produced by a competitor.

1052 In the present case, it is apparent from the evidence relied on in the contested decision that the offer submitted to Lenovo by the applicant was conditional on Lenovo not launching the AMD-based notebook platforms that it had planned to launch in 2006, namely the 'Snowboard 1.2' and the 'Triathlon'.

1053 First, according to the email of Mr L2 of 27 June 2006, the [confidential] reported to Lenovo that the deal between Intel and Lenovo was based on the assumption that Lenovo would not launch the AMD-based notebook platform (see paragraph 1045 above). In the email of 6 July 2006, Mr L4 referred to the additional money that would be obtained on account of Lenovo's decision to postpone the launch of the AMD-based notebook (see paragraph 1048 above). According to Mr L5's email of 12 July 2006, Intel China committed USD 8 million to Lenovo China as a reward for postponing AMD-based notebook planning (see paragraph 1049 above). Those three emails therefore imply directly that the agreement between the applicant and Lenovo was concluded not only on condition that Lenovo would award CPU business to the applicant, but also on condition that Lenovo would refrain from launching the AMD-based notebook platforms that it had planned to launch in 2006.

1054 Second, Mr L3's email of 28 June 2006 and the presentation in preparation for the meeting of 29 June 2009 imply that the agreement between the applicant and Lenovo was concluded on condition that Lenovo would award all its business for the rest of 2006 to the applicant, as the following wording of the abovementioned email states: 'Our part of this deal is that we will award all business for shipments for the rest of this calendar year to Intel' (see paragraph 1046 above). Similarly, the presentation in preparation for the meeting of 29 June 2009 states as follows: 'Plan => Agree to give Intel all of our notebook business in 2006' (see paragraph 1047 above). The condition that Lenovo would award all its business for the rest of 2006 to the applicant implied at the same time that Lenovo had to refrain from launching the AMD-based notebook platforms that it had planned to launch in 2006. Mr L3's emails of 28 June 2006 and the presentation in preparation for the meeting of 29 June 2009 imply therefore that the agreement between the applicant and Lenovo was concluded not only on condition that Lenovo would award CPU business to the applicant, but also that it would refrain from launching the AMD-based notebook platforms that it had planned to launch in 2006.

1055 It is true that, as regards Mr L3's email of 28 June 2006 (see paragraph 1046 above), the applicant claimed, at the hearing, that the contested decision omits to state that, in that email, Mr L3 also wrote as follows: 'We are not changing our dual source strategy for AMD.' However, that passage does not call in question the conclusions reached in the contested decision that Intel's payments were conditional on Lenovo not launching AMD-based notebooks in 2006. Read in context, the passage in question states as follows: 'We are not changing our dual source strategy for AMD. We are resetting it to launch in [the first quarter of 2007].' Thus, Mr L3's email indicates that, in 2006, Lenovo was not yet planning to abandon completely its dual-source strategy plan, but that it did none the less have to postpone that plan until the beginning of 2007 on account of the agreement concluded with Intel. This confirms the findings of the contested decision. The passage on which the applicant relies does not however imply that Lenovo expected to be able to implement its dual-source strategy and benefit from the agreement with Intel at the same time.

1056 It follows that, by reason of the abovementioned evidence, the fact that Lenovo refrained from launching the two AMD-based notebook models that it had planned to launch in 2006 was not merely an indirect consequence of the agreement concluded with the applicant, but rather a direct condition of that agreement.

ii) The argument alleging that the emails of Mr L2 and Mr L5 of 27 June 2006 and of 12 July 2006 reflect the point of view of persons who did not take part in the relevant negotiations between Lenovo and Intel

1057 The applicant asserts that the emails of Mr L2 and Mr L5 of 27 June 2006 and of 12 July 2006 reflect the point of view of persons who did not take part in the relevant negotiations between Lenovo and Intel.

1058 As regards, first, Mr L2's email of 27 June 2006 (see paragraph 1045 above), it is necessary to set out the context of the extracts from that email which were presented in the contested decision. Mr L2 wrote as follows:

'[Mr I8], [confidential] told us ... the deal is base[d] on our assumption to not launch [the AMD-based notebook] platform. [Mr I8] is eager to know what's our answer on this deal. Both [Mr L5] and I don't know about this, so we cannot give him any feedback. Since [the] Intel deal will not allow us to launch AMD, and we all know [the] AMD[-based notebook] launch is pending now[,] I want to get your direction on what's our decision.'

1059 The email therefore shows that Mr L2 was not merely speculating about the details of Intel's offer, but that he passed on information he had received directly from [confidential]. Contrary to the applicant's claim, the mere fact that Mr L2 wrote that '[b]oth [Mr L5] and I don't know about this' does not deprive that email of its probative value. Whilst it is true that Mr L2 wrote that he and Mr L5 did not know about Lenovo's answer to Intel's offer, this does not however imply that Mr L2 and Mr L5 did not know about Intel's offer and the condition that an AMD-based notebook model could not be launched.

1060 As regards, second, Mr L5's email of 12 July 2006, which referred to a Lump Sum Customer Authorised Price of USD 8 million that Intel China committed to pay as a reward for postponing AMD notebook planning (see paragraph 1049 above), the Commission correctly observes that Mr L5 was Lenovo's [confidential]. It is permissible to conclude that, as such, Mr L5 was well informed of any agreement between Intel China and Lenovo China.

1061 The applicant submits in that regard that the contested decision did not find that a Lump Sum Customer Authorised Price of USD 8 million was part of Intel's 'meet-comp' proposal. That argument is not convincing. The fact that the Commission relied on Mr L5's email of 12 July 2006 to demonstrate that Intel's payments were conditional on Lenovo postponing the launch of AMD-based notebooks implies that, in the contested decision, the Commission characterised the Lump Sum Customer Authorized Price to the requisite legal standard as an element of the naked restriction. Moreover, the Court observes that, during the administrative procedure, the applicant itself admitted, in the Supplemental Economic Report drawn up by Professors P1 and P2, that a sum of USD 8 million was part of Intel's 'meet-comp' proposal. Lastly, the Court finds that the applicant has failed to demonstrate that Mr L5's email is incorrect in so far as it refers to that sum as a reward for postponing AMD-based notebook planning. Consequently, the applicant's line of argument cannot weaken the probative value of that email.

1062 Moreover, the Court observes that the probative value of the emails of Mr L2 and Mr L5 of 27 June 2006 and of 12 July 2006 is confirmed by the emails of Mr L4 and Mr L3 (see paragraphs 1046 and 1048 above). The applicant itself describes Mr L3 as one of the key Lenovo executives who were personally involved in the negotiations with AMD and Intel and as Lenovo's lead negotiator with Intel regarding the 2006 notebook agreement.

iii) Conclusion

1063 It follows from all the foregoing that, in the contested decision, the Commission presented a body of sufficient evidence of such a kind as to prove that Intel granted payments to Lenovo, between June and December 2006, conditional on Lenovo postponing the launch of AMD-based notebooks.

2) The applicant's other arguments

2.1) The argument based on what Mr L3 wrote in an email of 26 May 2006

1064 The applicant submits that, in an email of Mr L3 of 26 May 2006, Mr L3 confirmed to Ms L6 as follows:

'[Intel's] aggressive pricing has and will happen regardless of whether we remain loyal to Intel or introduce AMD.'



1065 However, the applicant omits to quote the remaining part of the relevant email extract which casts that statement in a different light with the following words:

'In parallel, Intel has approached me about what they might be able to do to win all of our business. ... [its] aggressive pricing has [happened] and will happen regardless of whether we remain loyal to Intel or introduce AMD. What Intel is going to offer us is Development and Market funding for the next two quarters with the intent of making it unnecessary for us to introduce a competitive [CPU] in our product line either in China or [worldwide].'

1066 The reading of the entire relevant extract of the email indicates that in May 2006, and thus one month before Lenovo and Intel agreed on the second postponement, Intel was willing to offer Lenovo 'aggressive pricing', which Mr L3 considered not to be dependent on whether Lenovo would introduce AMD or not, and, in addition, other payments in the form of MDFs. However, Mr L3 did not include those payments under its development and marketing funding in the 'aggressive pricing' that 'has [happened] and will happen regardless of whether [Lenovo] remain[s] loyal to Intel or introduce[s] AMD [CPUs]'. On the contrary, it is clear that Mr L3 understood Intel's intentions on pricing to be a separate matter from the payments in the form of MDFs. According to Mr L3, Intel was going to award payments in the form of MDFs 'with the intent of making it unnecessary for [Lenovo] to introduce a competitive [CPU] in [its] product line either in China or [worldwide]'. Moreover, Mr L3 wrote that Intel had approached him about what they might be able to do to win 'all of' Lenovo's 'business'. Contrary to the applicant's claim, Mr L3's email of 26 May therefore confirms the evidence relied on in the contested decision since it demonstrates unequivocally that Intel planned to offer Lenovo additional payments with the intention that Lenovo would not introduce AMD-based notebooks.

1067 That interpretation of Mr L3's email of 26 May is confirmed by his following email, dated 28 June 2006 (see paragraphs 1046, 1054 and 1055 above), in which he describes the terms of the 'special deal' in which Lenovo's part was to 'award all business of shipments for the rest of the calendar year to Intel'.

## 2.2) Lenovo's Article 18 response of Regulation No 1/2003

1068 The applicant submits that Lenovo's response, dated 27 November 2007, to a request for information from the Commission under Article 18 of Regulation No 1/2003 ('Lenovo's Article 18 response') flatly contradicts the Commission's case. At recital 573 of the contested decision, the Commission wrongly rejected Lenovo's submissions on the ground that that response was incomplete and, at least to a certain extent, inaccurate.

1069 In its Article 18 response, Lenovo stated in reply to question 6: 'Intel payments to Lenovo were not conditional on limited sourcing/postponement/cancellation of AMD.' In reply to question 5, Lenovo explained the reasons for cancelling its plans to launch AMD-based notebooks as follows:

'[W]e have explained the business reasons for the plans to launch AMD-based notebook computers. There were several reasons why such plans were not carried to completion. First, Lenovo needed to reduce complexity in the business and to rationalise the supply chain, thereby reducing costs globally as part of its drive to improve its competitiveness. Secondly, AMD's prices were no longer as competitive — ... AMD's price advantage had been eroded by increasingly competitive price offerings from Intel over time. Thirdly, there was a serious concern that AMD was not a reliable supply partner. Fourthly, it became apparent that AMD-based computers were not forecast to be successful and had not been successful with customers in Lenovo's key market segments. Essentially, Lenovo's strategy evolved during 2006 from one focused on the safety of a dual-sourcing strategy, owing to an unsatisfactory level of service and pricing from Intel, to one of reducing costs and maximising efficiencies through purchasing mainly from Intel, as a result of improved reliability of supply and pricing from Intel.'

1070 The Court finds that Lenovo's Article 18 response is not credible in so far as it states expressly that Intel payments 'were not conditional on limited sourcing/posponement/cancellation of AMD'. That statement is, first, contradicted by the abovementioned evidence, in respect of which Lenovo's Article 18 response does not provide a plausible explanation.

1071 In the first place, as regards Mr L2's email of 27 June 2006 (see paragraph 1045 above), Lenovo explained that, at that time, Intel was making intensive efforts to win back Lenovo business and this should be contrasted with the overall strategic importance for Lenovo of maintaining a strong relationship with AMD. For months after Mr L2's email, Lenovo continued to make detailed plans for AMD-based notebooks.

1072 However, that statement cannot explain how, according to the email of Mr L2, the [confidential] told Mr L2 and Mr L5 the following: '[T]he deal is base[d] on our assumption to not launch [the AMD-based notebook] platform. ... [The] Intel deal will not allow us to launch AMD.' The fact that Intel was making intensive efforts to win back Lenovo business does not explain why Intel had to base its

agreement with Lenovo on the assumption that Lenovo would not launch the two AMD-based notebooks. Moreover, the mere fact that Lenovo took the view that there was an overall strategic importance of maintaining a strong relationship with AMD and that Lenovo continued to make detailed plans for AMD-based notebooks does not preclude the agreement between Lenovo and the applicant having been concluded on the condition that Lenovo would not launch any AMD-based products in 2006. According to the contested decision, Lenovo did not abandon completely at the outset its plans to launch the two AMD-based notebooks that it had planned to launch in 2006. Initially, it rather merely postponed their introduction until a later date. It was only the conclusion of the 2007 MoU at the end of 2006 which ultimately led to their complete cancellation (see paragraphs 1038 to 1040 above).

1073 In the second place, with respect to Mr L3's email of 28 June 2006 (see paragraph 1046 above), Lenovo explained that Mr L3's statement, according to which '[o]ur part of this deal is that we will award all business for shipments for the rest of this calendar year to Intel', should not be read in isolation. According to Lenovo's Article 18 response, Intel gave Lenovo a special deal to win business to supply CPUs for a particular set of products. Intel did not seek exclusivity, but rather to win on this set of systems. According to Lenovo, the 'practical result' was that, by winning, Intel had all Lenovo business for a period of time.

1074 However, in that email, Mr L3 did not describe the fact that Lenovo would award all business for shipments for the rest of 2006 to Intel as a mere 'practical result', but as '[o]ur part of this deal' and therefore as a condition that Lenovo was required to comply with in order to fulfil its part of the agreement concluded with the applicant. Moreover, Lenovo's interpretation of Mr L3's email of 28 June 2006 in its Article 18 response is contradicted by the passage of Mr L3's email of 26 May 2006 according to which Intel was going to award payments in the form of MDFs 'with the intent of making it unnecessary for [Lenovo] to introduce a competitive [CPU] in [its] product line either in China or [worldwide]' (see paragraph 1065 above). That interpretation is, moreover, contradicted by Mr L2's email of 27 June 2006, according to which the deal with Intel was based 'on our assumption to not launch [the] AMD [notebook] platform' (see paragraph 1045 above), by Mr L4's email of 6 July 2006 mentioning 'additional ... money ... because of our decision to postpone the AMD [notebook] launch' (see paragraph 1048 above) and by Mr L5's email of 12 July 2006 referring to the 'reward [for] postponing AMD [notebook] planning' (see paragraph 1049 above).

1075 In the third place, as regards Mr L4's email of 6 July 2006 mentioning 'additional ... money ... because of our decision to postpone the AMD [notebook] launch' (see paragraph 1048 above), Lenovo's Article 18 response states that Mr L4, while holding a very senior position in Lenovo, was not integral to the decision-making process regarding the relationships between Lenovo and Intel or AMD. In any event, Mr L4 described the postponement of the launch as 'our decision' and not as an 'agreement'. Moreover, the email is from mid-2006, as Lenovo continued to pursue its dual-sourcing strategy.

1076 However, none of Lenovo's explanations concerning Mr L4's email deprives that email of its probative value in relation to the fact that the applicant's payments were conditional on Lenovo not launching the AMD-based notebook platforms that it had planned to launch in 2006. The fact that Mr L4 was not integral to the decision-making process regarding the relationships between Lenovo and Intel or AMD does not mean that his email does not reflect correctly the conditions of the agreement concluded between Intel and Lenovo. The veracity of the content of Mr L4's email is confirmed in particular by Mr L3's emails of 26 May and of 28 June 2006 (see paragraphs 1046 and 1065 above). The applicant itself describes Mr L3 as one of the key Lenovo executives who were personally involved in the negotiations with AMD and Intel and as Lenovo's lead negotiator for the negotiations with Intel that led to the 2006 notebook deal. Next, in so far as Lenovo states that Mr L4 described the postponement of the launch as 'our decision' and not as an 'agreement' concluded with Intel, the Court would point out that Mr L4 spoke about additional money that Lenovo had obtained 'because' of its decision to postpone the AMD notebook launch. This demonstrates the conditional link between the grant of additional money and Lenovo's decision to postpone the launch. Lastly, the fact that Lenovo was continuing to pursue its dual-sourcing strategy in mid-2006 does not preclude the agreement between Lenovo and the applicant having been concluded on the condition that Lenovo would not launch any AMD-based products in 2006 (see paragraph 1072 above).

1077 In the fourth place, the Court notes that Lenovo's Article 18 response does not contain any observations on the Lenovo internal presentation in preparation for the meeting with Intel of 29 June 2006 (see paragraph 1047 above), or on Mr L5's email of 12 July 2006 (see paragraph 1049 above). Those two items of evidence confirm however that the agreement between Lenovo and the applicant was concluded on condition that Lenovo would not launch any AMD-based products in 2006 (see paragraphs 1053 and 1054 above and 1133 below).

1078 It follows from the foregoing considerations that Lenovo's Article 18 response does not provide a plausible explanation of the evidence relied on in the contested decision to establish that Intel's

payments were conditional on Lenovo not launching any AMD-based products in 2006. Given that that evidence contradicts Lenovo's statement that Intel payments 'were not conditional on limited sourcing/postponement/cancellation of AMD', that statement cannot be regarded as credible.

1079 Second, in so far as Lenovo's Article 18 response highlights other business reasons for which Lenovo might have abandoned its plan to launch the two AMD-based notebooks in 2006, the Court finds that, for the reasons mentioned below, those reasons are not capable either of calling in question the proof that the applicant's payments were conditional on Lenovo not launching any AMD-based notebooks in 2006.

1080 By its arguments, Lenovo attempts to explain the cancellation of its plan to launch two AMD-based notebook models in 2006 by reference to reasons other than the existence of a cancellation condition in the agreement concluded with the applicant. However, Lenovo's arguments alleging that there were independent reasons for the cancellation of its plan do not relate directly to the precise and consistent evidence mentioned above, in respect of which Lenovo's Article 18 response does not contain a plausible explanation. Those arguments rather merely call in question that evidence indirectly by setting out an alternative explanation for the cancellation of Lenovo's plan. Such an indirect challenge is not capable of calling in question the probative value of the evidence relied on in the contested decision.

1081 Moreover, by providing an alternative explanation for the cancellation of its plan to launch two AMD-based notebooks in 2006, Lenovo does not deny that the Intel payments were conditional on Lenovo not launching those models. Even on the assumption that Lenovo cancelled its plans solely for the reasons put forward in the Article 18 response and not on account of a condition laid down in that regard in its agreement with Intel, that would not call in question the fact that Intel's payments were conditional on Lenovo not launching those models, but would mean only that the applicant's conditional payment had no actual effect on Lenovo's decision (see, as regards Dell, paragraphs 540 to 544 above).

1082 Although, in general, answers given on behalf of an undertaking as such have considerable probative value (see paragraphs 557 and 691 above), it follows from all the foregoing that Lenovo's Article 18 response is not credible, in so far as it states expressly that Intel payments 'were not conditional on limited sourcing/postponement/cancellation of AMD'. The Commission did not therefore err in concluding that Lenovo's Article 18 response was incomplete and, at least to a certain extent, inaccurate. On the contrary, the Court finds, as the Commission correctly also found at recital 573 of the contested decision, that the incomplete and inaccurate nature of Lenovo's Article 18 response confirms the conclusion, set out in more detail in paragraphs 1168 to 1171 below, that Lenovo attempted to conceal the anti-competitive nature of its relationship with Intel.

2.3) The argument alleging that the Commission may not rely on the internal impressions of a customer in order to establish an infringement of Article 82 EC

1083 The applicant claims, in essence, that, at recitals 516 to 517 and 532 of the contested decision, the Commission wrongly relied on Lenovo's alleged impression regarding a disproportionate loss of discounts in order to establish the existence of the naked restriction. That approach by the Commission is contrary to the requirements of the principle of legal certainty.

1084 The Court points out that, in the contested decision, the Commission did not base its conclusion concerning the existence of a naked restriction on the findings on which the applicant relies, but on the evidence set out in paragraphs 1045 to 1049 above.

1085 It is true that recitals 516 and 517 of the contested decision refer to the fact that Lenovo feared an adverse reaction by Intel to its plans to intensify its cooperation with AMD. Recital 532 thus concerns Lenovo's estimate of the value of Intel's offer.

1086 However, those findings of the contested decision constitute merely additional background information. They do not have any relevance as regards proof of the naked restriction.

1087 In any event, it should be borne in mind that nothing precludes the Commission from relying on the internal estimates of a customer in order to establish evidence of the actual conduct of the dominant undertaking (see, as regards Dell, paragraphs 522 to 525 above). In that regard, the evidence on which the Commission relied in the contested decision in order to establish the existence of a naked restriction demonstrates clearly that the condition that Lenovo would not launch AMD-based notebooks in 2006 did not constitute merely internal speculation by Lenovo, but that that condition formed part of the negotiations between Lenovo and the applicant. Indeed, Mr L2's email of 27 June 2007 implies that Mr L2 had received information from Mr I8, [confidential], at a joint dinner (see paragraph 1045 above). Mr L3, in his email of 28 June 2006, referred to an attractive offer by Intel (see paragraph 1046 above). The presentation in preparation for the meeting of 29 June 2006 refers to an 'aggressive proposal' by Intel (see paragraph 1047 above).

2.4) The argument that Lenovo's continuing efforts to launch AMD-based computers contradict the conclusions of the contested decision

1088 The applicant claims that, by the end of the first quarter of 2006, Intel had fixed its relationship with Lenovo by improving supply and lowering prices. Lenovo tried to reach a price agreement with AMD after Intel gave Lenovo its improved pricing. In the applicant's submission, this shows that Intel's price offer could not have been conditioned on Lenovo stopping its plans to source from AMD. According to the applicant, if Intel's March 2006 offer was conditioned on Lenovo dropping AMD, there is no consistent, persuasive reason to explain why Lenovo continued for months, first, to try to reach an agreement with AMD on pricing that would justify Lenovo's launch of AMD-based notebooks or, second, to obtain demand forecasts from its sales organisation for the AMD-based notebooks in light of Intel's new pricing.

1089 However, it must be stated that the fact that, even after Intel's improved price offer, Lenovo continued to try to reach an agreement on prices with AMD and the fact that it assessed demand for AMD-based notebooks in light of Intel's new pricing do not refute the conclusion reached in the contested decision that the applicant granted payments to Lenovo conditional on Lenovo not launching the two AMD-based notebooks that it had planned to launch in 2006 (see paragraphs 1072 and 1076 above).

2.5) The argument that the applicant's practice constitutes a common practice in the industry

1090 The applicant claims that the funding challenged in the contested decision was part and parcel of 'normal competition' for Lenovo's 'Xuri' and 'Turin' notebook designs, and that it was consistent with common practice in the industry. In that regard, the applicant relies in particular on the fact that the SOW included AMD's proposed development and marketing funding for the 'Xuri' and 'Turin' notebooks, and provided that part of AMD's funding was conditional upon the public announcement of the launch of the AMD-based notebooks.

1091 The applicant's argument therefore amounts to a submission that the grant of funding by CPU producers to OEMs in order to induce them to produce computers equipped with their CPUs constitutes a common practice in the industry concerned. However, it should be recalled that the criticism made against the applicant in the contested decision is that it granted payments conditional not on Lenovo producing notebooks equipped with the applicant's CPUs, but on Lenovo not launching AMD-based notebooks in 2006. The applicant does not put forward any arguments capable of showing that such a practice, which is aimed not only at promoting its own CPUs, but also at restricting the marketing of competing CPUs, was also implemented by AMD or that such a practice is common in the industry. Moreover, even on the assumption that such a practice is common in the industry, the applicant may not rely on this, given that as a dominant undertaking it has a special responsibility.

2.6) The argument alleging that Lenovo decided not to launch the two AMD-based notebooks for independent reasons

1092 The applicant claims that Lenovo started work on the possible procurement of AMD CPUs in order to force Intel to reduce its prices. It submits that, as Intel's price reduction eliminated AMD's price advantage, Lenovo's business case analysis for AMD-based notebooks had to be based upon the merits of the AMD offering, and the business case for launching AMD did not materialise. In the applicant's submission, Lenovo decided not to launch the AMD systems for independent reasons having to do with the lack of a meaningful price advantage between AMD and Intel CPUs and the lack of market demand at premium price levels for an AMD-based system.

1093 In support of that argument, the applicant relies, in particular, on the following evidence.

1094 In the first place, the applicant relies on an extract from Intel's internal minutes of a meeting between Intel and Lenovo on 27 April 2006, which reads as follows:

'Lenovo is very interested in leading with Intel [in notebooks] and is only doing AMD to protect themselves from potential issues with Intel on supply and pricing. Per [Mr L3], "I do not want to use other CPU suppliers. I may want to use other wireless or chipset suppliers in some products, but using other CPU suppliers introduces unneeded complexity and expense." [Mr L8] assured us that he will make a point to allow Intel to compete for all the business, but Intel needs to decide if they are satisfied with 95% or if they want all the volumes.'

1095 In the second place, the applicant relies on the extract from Lenovo's Article 18 response cited in paragraph 1069 above, in which Lenovo explained its reasons for refraining from launching the two AMD-based notebooks.

1096 In that regard, the Court finds, first, that the applicant's arguments are ineffective in so far as they seek to rebut the evidence that the applicant's payments were conditional on Lenovo not launching AMD-based notebooks in 2006.

1097 By its arguments, the applicant attempts to explain the fact that Lenovo cancelled its plan to launch the two AMD-based notebook models in 2006 by reference to reasons other than the agreement concluded with the applicant. However, in the contested decision, the Commission did not infer the existence of the naked restriction at issue from the mere fact that Lenovo cancelled its plan to launch the two AMD-based notebooks in 2006, so that, in order to rebut that evidence, the applicant could merely provide an alternative explanation. On the contrary, by relying on the evidence mentioned in paragraphs 1045 to 1049 above, the Commission established by means of precise and consistent evidence that the applicant granted payments to Lenovo, between June and December 2006, conditional on Lenovo not launching those two models. The applicant's arguments relating to Lenovo's alleged independent reasons for cancelling its plan do not however concern directly that evidence relied on in the contested decision. Those arguments rather merely call in question that evidence indirectly by offering an alternative explanation for the cancellation of Lenovo's plan. Such an indirect challenge is in no way sufficient to rebut the probative value of the evidence relied on in the contested decision.

1098 Moreover, it is apparent from the case-law that, when the Commission relies on evidence which is in principle sufficient to demonstrate the existence of the infringement, it is not sufficient for the undertaking concerned to raise the possibility that a circumstance arose which might affect the probative value of that evidence in order for the Commission to bear the burden of proving that that circumstance was not capable of affecting the probative value of that evidence. On the contrary, except in cases where such proof could not be provided by the undertaking concerned on account of the conduct of the Commission itself, it is for the undertaking concerned to prove to the requisite legal standard, on the one hand, the existence of the circumstance relied on by it and, on the other, that that circumstance calls in question the probative value of the evidence relied on by the Commission (*E.ON Energie v Commission*, paragraph 67 above, paragraph 56).

1099 By providing an alternative explanation for the cancellation of Lenovo's plan to launch the two AMD-based notebook models in 2006, the applicant does not call in question the fact that Intel's payments were subject to a cancellation condition. Even if the applicant succeeded in proving that Lenovo cancelled its plan solely for the reasons put forward by the applicant and not on account of a condition laid down in that regard in the agreement between Intel and Lenovo, that would not rebut the evidence adduced in the contested decision of the existence of a naked restriction, but would mean that that naked restriction merely had no actual effect on Lenovo's decision to cancel its plan. Thus, the evidence put forward by the applicant would be capable only of refuting the causal link between the naked restriction, the existence of which was proved to the requisite legal standard in the contested decision, and Lenovo's decision to cancel its plans. However, that evidence would not be capable of refuting the existence of the naked restriction as such.

1100 As the Commission correctly found, at recitals 556 and 557 of the contested decision, it is quite possible that the applicant's overall offer was better than AMD's and it is probable that Lenovo's decision to cancel its plan to launch the two notebook models in 2006 was the result of a global analysis which took account in particular of the absolute level of Intel and AMD's offered prices and of the advantages and disadvantages of those two suppliers. However, neither of those findings contradicts the conclusion of the contested decision that the applicant's offers were conditional on Lenovo cancelling its plan to launch the two AMD-based notebook models in 2006.

1101 It follows that the applicant's arguments are ineffective in so far as they seek to refute the fact that the applicant's payments were conditional on Lenovo not launching any AMD-based notebooks in 2006.

1102 Second, the Court finds that the applicant's arguments are also ineffective in so far as they seek to call in question the legal characterisation of the naked restriction as abusive. In that regard, it should be recalled that characterisation of a naked restriction as abusive does not require proof either of an actual effect on the market or of a causal link (see paragraph 212 above). Such a practice is unlawful on account of its capability to restrict competition. Even if the applicant succeeded in refuting the existence of a causal link between the naked restriction and Lenovo's decision to cancel its plan to launch the two AMD-based notebooks in 2006, that would not call in question the inherent capability of the naked restriction to restrict competition. Any financial advantage granted on condition that the beneficiary may not launch products equipped with parts from a competitor is necessarily capable of inducing the customer not to launch such products, and it is irrelevant that the customer might have also refrained from launching such products in the absence of a financial incentive subject to such a condition.

1103 Accordingly, the Court concludes that the applicant's arguments that there were other reasons why Lenovo cancelled its plan to launch the two AMD-based notebook models in 2006 are ineffective. They are in no way capable of rebutting the evidence of the existence of a naked restriction, or of its legal characterisation as abusive. Consequently, it is not necessary to adjudicate on whether the applicant established to the requisite legal standard that Lenovo cancelled its plan to launch the two AMD-based notebook models in 2006 solely for reasons other than the applicant's conditional payments (see, as regards Dell, paragraphs 540 to 546 above).

2.7) The argument alleging that the contested decision misinterprets Lenovo's sourcing strategy

1104 The applicant claims that the contested decision makes three main mischaracterisations regarding Lenovo's sourcing strategy.

1105 First, at recital 506 of the contested decision, the Commission suggests that Lenovo concluded that a dual-source strategy was the only solution to Lenovo's concerns concerning the problems that affected the relationship between Lenovo and Intel in 2005 and at the beginning of 2006. However, as Lenovo considered whether to implement this dual-source strategy for notebook PCs, Intel improved its supply reliability and pricing, which caused Lenovo to re-evaluate the wisdom of a dual-source strategy.

1106 Second, in the contested decision, the Commission overstated the importance and extent of demand for AMD-based notebooks. After Intel lowered its prices, AMD refused to cut prices to levels which Lenovo believed would be competitive against Intel-based systems. Without a price advantage, Lenovo's forecasted demand for AMD-based notebooks plummeted.

1107 It is clear that those arguments amount to a submission that Lenovo did not decide to cancel its plan to launch the two AMD-based notebook models in 2006 on account of the conditionality of Intel's payments, but on account of the improvement of Intel's performance and the collapse in the demand for AMD-based products following the reduction of Intel's prices. Those arguments therefore overlap with the argument that Lenovo decided to cancel the launch of the two AMD-based notebook models for independent reasons. Consequently, those arguments must be rejected for the same reasons as those set out in paragraphs 1096 to 1103 above.

1108 Third, the applicant claims that nothing in relation to (i) Lenovo's execution of the SOW with AMD, (ii) its preliminary technical work on AMD-based notebook models, or (iii) the fact that Lenovo incurred some development expenses when making an AMD-based notebook is inconsistent with Lenovo's ultimate decision to award the contested sales to Intel for the remainder of 2006.

1109 The Court observes that, by that argument, the applicant attempts to weaken the probative value of the additional circumstances on which the Commission relied to describe the context of the infringement at issue in the contested decision. However, by relying, in that decision, on the evidence set out in paragraphs 1045 to 1049 above, the Commission demonstrated to the requisite legal standard that the applicant granted payments to Lenovo, between June and December 2006, which were conditional on the postponement of the launch of AMD-based notebooks. However, that decision is not based on the findings concerning the SOW, Lenovo's preliminary technical work on AMD-based models and the development expenses incurred by Lenovo. Consequently, the applicant's arguments which relate to those findings are irrelevant and it is not necessary to adjudicate on their merits.

2.8) The depositions made before the Delaware court

1110 The applicant submits, in essence, that the contested decision is irreconcilable with the testimony of the key Lenovo executives who were personally involved in the negotiations with AMD and Intel. First, the applicant claims that, in that decision, the Commission failed to have regard to the fact that Mr L3's deposition, excerpts of which the applicant provided to the Commission before the adoption of that decision, were exculpatory in its regard. Second, the applicant relies on depositions by Ms L6 and Messrs L9, L8 and L10 which were made only after the adoption of that decision.

1111 With respect to Mr L3's deposition, the Commission found, at recital 552 of the contested decision, that the applicant provided the Commission with excerpts from that deposition only on 8 May 2009, after the Advisory Committee had already given its opinion on the draft Decision earlier on the same day. According to that decision, the consultation of that committee represents the final stage of the procedure before the adoption of a decision (Joined Cases T-213/01 and T-214/01 *Österreichische Postsparkasse und Bank für Arbeit und Wirtschaft v Commission* [2006] ECR II-1601, paragraph 149) and, in accordance with Article 11 of Regulation No 773/2004, the undertaking concerned should, in principle, exercise its right to be heard before that consultation. In that decision, the Commission none the less examined the excerpts from Mr L3's deposition with which the applicant had provided it, since the applicant had argued that it had provided the Commission with Mr L3's deposition at the earliest possible date. The Commission reached the conclusion that the only excerpt

from the deposition which directly related to the issue of the conditionality of the applicant's payments and rebates was not capable of altering its assessment of the relevant facts.

1112 In the context of this action, the Commission contends, in essence, that it was not required to take into account all the depositions of the Lenovo executives on which the applicant relies. In any event, those depositions are not capable of calling in question the conclusions of the contested decision.

1113 In the present case, it is not necessary to adjudicate on whether testimonies, sent by Intel to the Commission after consultation of the Advisory Committee or which were made at the time of or after the adoption of a decision finding the existence of an infringement of the competition rules and imposing a fine on the addressee thereof, may be taken into consideration as exculpatory evidence in an action for annulment of that decision. It must be stated that the testimonies on which the applicant relies are not, in any event, capable of calling in question the evidence relied on in the contested decision.

1114 In that regard, it should be noted, as a preliminary point, that the applicant initially only submitted excerpts from the depositions of Ms L6 and Messrs L8, L9 and L10. However, in the context of a measure of organisation of procedure, the applicant produced the full versions of those depositions. The main parties submitted observations on those testimonies in writing on 23 May 2012 and 14 June 2012 (see paragraphs 53 to 60 above).

1115 The Court notes that the applicant relies on the excerpts from the depositions mentioned in paragraph 1114 above all in order to demonstrate that Lenovo decided to cancel its plan to launch the two AMD-based notebook models in 2006 for reasons which were independent of the existence of conditionality in the agreement concluded between Lenovo and the applicant. However, it should be recalled that those arguments are ineffective (see paragraphs 1096 to 1103 above). Consequently, it is not necessary to adjudicate on the probative value of the depositions relied on by the applicant in that regard.

1116 For the rest, the Court observes that only the depositions of Mr L3 and Mr L8 contain excerpts relied on by the applicant which relate directly to the fact that the applicant's payments were conditional on Lenovo refraining from launching the AMD-based notebook platforms that it had planned to launch in 2006. However, the excerpts from those depositions relied on by the applicant are not capable of calling in question the evidence relied on in the contested decision.

i) Mr L3's deposition

1117 The applicant asserts that, in the deposition made by Mr L3 on 12 March 2009, he confirmed that Intel did not require Lenovo to postpone its AMD offerings. In support of its argument, the applicant relies on the following passage of the deposition, which was examined by the Commission at recital 552 of the contested decision:

'Q. Was it understood that this offer was to win the XuRi and Turin business and that Lenovo would not launch AMD in those product lines?

R. I think it was understood that the offer was to win the business for Turin and XuRi, and the likely consequence was that if I was using Intel, I wasn't using somebody else. But it wasn't they, you know — I don't — I don't believe that the word "exclusive" or, you know, "drop AMD" or anything like that was — were part of Intel's requirements.

Q. Okay. And — and your view was that if you had not awarded Intel the XuRi and Turi business, that Intel's offer would have been [USD] 26 million less?

R. They offered me money to make their products competitive if I used them. If I decided not to use them [Intel CPUs], that — that offer was — I wouldn't have fulfilled my part of the offer. The offer wouldn't have — wouldn't have been valid.'

1118 The Court notes, as a preliminary point, that, in the contested decision, the Commission did not regard that passage of Mr L3's deposition as inculpatory evidence. The Commission only found that that deposition was not capable of altering the assessment of the relevant facts. According to the contested decision, the wording of that deposition reflects the conclusion that Intel's payments were granted on condition that plans relating to AMD were discontinued. The fact that the term 'exclusive' was carefully avoided in no way detracts from the fact that the offer was understood as meaning that the AMD plans would be cancelled, as is moreover confirmed by Mr L2's email of 27 June 2006, according to which 'the deal is base[d] on our assumption to not launch [the] AMD [notebook] platform' and the 'Intel deal will not allow us to launch AMD' (see paragraph 1045 above).

1119 The applicant submits that Mr L3's deposition does not establish any link between Lenovo refraining from buying AMD CPUs and the Intel payments. The quoted testimony is no more than a statement of a normal, competitive rebate offer, i.e. if Lenovo buys more products from Intel or awards

specific platforms to Intel, it will receive the greater rebates associated with those volumes or platforms.

1120 The Court finds that the passage of Mr L3's deposition relied on by the applicant is not capable of refuting the conclusions of the contested decision.

1121 It is true that Mr L3 stated that the fact that Lenovo did not use any AMD CPUs was only a 'likely consequence' of the deal concluded with Intel and that he did not believe that the word 'exclusive' or 'drop AMD' were part of Intel's requirements. Moreover, it is true that, in reply to the second question, Mr L3 only stated that, in order to fulfil its part of the deal with Intel, Lenovo was required to use Intel CPUs.

1122 However, at the same time Mr L3 admitted that it was 'understood' that the likely consequence of the deal with Intel was not to use the AMD CPUs. That means that the agreement between Lenovo and Intel was based on the joint assumption that Lenovo would refrain from using AMD CPUs. Moreover, Mr L3 only stated that the term 'exclusive' or the expression 'drop AMD' were not part of Intel's requirements. Thus, he refrained from giving an unequivocal reply as regards whether Intel gave Lenovo to understand in a more subtle manner that the rebates were conditional on cancellation of the launch of the two AMD-based computer models. Lastly, by merely stating that, in order to fulfil its part of the deal, Lenovo was required to use Intel CPUs, Mr L3 did not state that Lenovo was free to launch AMD-based platforms on condition that it used Intel CPUs for other notebook models. On the contrary, in the light of his statement that it was 'understood' that the likely consequence of the deal with Intel was not to use AMD CPUs, his testimony gives the impression rather that the agreement between Intel and Lenovo was based on the joint assumption that the use of Intel CPUs, which was a direct condition of the deal according to Mr L3's own words, did not allow Lenovo to equip the two computer models with AMD CPUs. In summary, it is therefore clear that Mr L3's presentation of the cancellation of the launch of the two AMD-based computer models as an indirect consequence and not as a direct condition of the agreement between Intel and Lenovo must be regarded as artificial and not credible.

1123 Moreover, it should be recalled that, in his email of 26 May 2006, Mr L3 stated that Intel was going to award payments in the form of MDFs 'with the intent of making it unnecessary for [Lenovo] to introduce a competitive [CPU] in [its] product line either in China or [worldwide]' (see paragraph 1065 above). In his email of 28 June 2006, Mr L3 stated the following:

'Our part of this deal is that we will award all business for shipments for the rest of this calendar year to Intel' (see paragraph 1046 above).

1124 Lastly, the Court observes that there is evidence showing that both Intel and Lenovo attempted to disguise the anti-competitive nature of their relationship. As regards Intel, it should be noted that at recital 526 of the contested decision, the Commission cites the following extracts from an email of 18 June 2006, in which Mr I2, the [*confidential*] of Intel, wrote as follows to Mr L1, the [*confidential*] of Lenovo (see also paragraphs 448 and 460 above):

'[T]he information in this note is incredibly sensitive and would be embarrassing to me and Intel if it was known. I am asking you as a matter of trust to read it and delete it with no sharing to your team ... Your primary concern is price competitiveness versus Dell I believe. ... In my opinion, — it is inevitable that Dell will eventually put other cpu's into their client roadmap ... I believe that from your perspective, this changes the game dramatically. ... any meet-comp program that we may have had with Dell will get nullified as they introduce competition — this opens vistas of opportunities for Lenovo/Intel that I have only hinted at in the past. ...'

1125 The Court considers that that email constitutes evidence that Mr I2 sought to conceal the anti-competitive nature of the applicant's relationships with Dell and Lenovo (see paragraph 1541 below).

1126 With respect to Lenovo, the Court observes that it made non-credible statements in its Article 18 response (see paragraphs 1070 to 1078 above and 1176 to 1181 below). Moreover, it will be demonstrated in more detail in paragraphs 1168 to 1171 below that Lenovo attempted to conceal the anti-competitive nature of its exclusive relationship with Intel. It should be noted that those elements demonstrate that Lenovo followed the general approach designed to conceal the conditionality of the payments received from the applicant.

1127 In the light of those considerations, the abovementioned passage of Mr L3's deposition must be considered evasive. It seems probable that Mr L3 followed the Lenovo approach of denying the conditionality of payments received from the applicant. Consequently, Mr L3's deposition is not capable of rebutting the body of precise and consistent evidence on which the Commission relied in the contested decision.

ii) Mr L8's deposition



1128 In its submission of 14 June 2012, the applicant claimed that Mr L8's testimony confirms that Intel did not require Lenovo to postpone the 2006 launch of AMD-based notebooks.

1129 First, the applicant submits that Mr L8 stated as follows: 'I don't recall Intel requiring that ... we could not introduce AMD. I believe they understood that we had no need to introduce AMD anymore if they gave us this deal.'

1130 However, it is necessary to place that deposition in context.

1131 The Lenovo presentation in preparation for its meeting with Intel of 29 June 2006 was put before Mr L8 (see paragraph 1047 above). In that regard, a more complete extract than that set out in the contested decision was submitted to him which contains the following:

'Plan => Agree to give Intel all of our notebook business in 2006, contingent on additional [USD] 10 million in MDF to offset [Intel Inside program].'

1132 In reply to whether that slide of the presentation accurately reflected the terms of the notebook agreement concluded between the applicant and Lenovo regarding the second half of 2006, Mr L8 stated as follows: 'This is how [Mr L11] portrayed it, yes.' Mr L8 was once again asked whether that slide was accurate and made the following statement, on which the applicant relies: 'I don't recall Intel requiring that ... we could not introduce AMD. I believe they understood that we had no need to introduce AMD anymore if they gave us this deal.' Next, when asked whether he recalled having corrected that slide, Mr L8 stated that he did not recall.

1133 First of all, it must be stated that the slide of the presentation in preparation for the meeting of 29 June 2006 which was submitted to Mr L8 at his deposition confirms unequivocally the existence of a conditional link between the applicant's payments and Lenovo's decision to award Intel all its CPU business in the area of notebooks in 2006. Next, the Court finds that the explanation that Mr L8 gave of that slide of the presentation is evasive. Mr L8 did not state expressly that the slide of the presentation was inaccurate. He merely stated that he did not recall that Intel required Lenovo not to introduce AMD. Moreover, he stated that he did not recall having corrected that slide of the presentation. Lastly, Mr L8 above all made no attempt whatsoever to provide a plausible explanation as to why, in the presentation, the award, by Lenovo, of all its CPU business in the area of notebooks in 2006, was presented as being linked to the condition of an additional payment of USD 10 million in MDF.

1134 Second, the applicant relies on an extract from Mr L8's deposition the content of which is set out below.

1135 Mr L8 was presented with an email of 4 April 2006 in which he stated that he had told Intel that he accepted an improved pricing offer, but that he absolutely did not agree to stop using the AMD CPUs and that he had not led Intel on to assume that he would. In reply to a question put to him, Mr L8 confirmed that the pricing that Intel had offered him 'was not contingent on stopping AMD'. Mr L8 continued by explaining as follows: 'The way — the way that we positioned it to Intel was that we would still — at this point, that we would still launch the AMD notebook, but that I felt that it was well within their powers to make the volumes on that notebook either large or small, and it was all contingent on what pricing they offered.' Next, Mr L8 was asked to read the following passage of his email of 4 April 2006: 'I did tell Intel ... it was completely in their control to make AMD sales small or large, i.e. make me look dumb for ever considering to do AMD.' Mr L8 continued by confirming that Intel had responded with improved pricing. When asked whether one of the conditions of that improved pricing was that Lenovo had to agree not to offer AMD-based products, he stated as follows:

'They never explicitly stated that condition to me, no.'

1136 It must be stated that that passage of Mr L8's deposition gives the impression that the negotiations between the applicant and Mr L8 essentially related to the question to what extent Lenovo was going to source from AMD and not to what extent Lenovo was going to source from Intel. Mr L8 confirmed that he indicated to the applicant that it was within the applicant's power to make the volume of AMD-based notebooks small or large. However, the extract from the deposition mentioned in paragraph 1135 above contains no reference to the volume of the applicant's sales to Lenovo. This gives the impression that the negotiations between Mr L8 and the applicant related to payments with a view to restricting the marketing of the AMD-based products and not to promoting the marketing of the products equipped with the applicant's CPUs. The mere fact that AMD and the applicant were, in principle, the sole operators on the market concerned, so that Lenovo's choice not to source from AMD automatically meant more extensive sourcing from the applicant, cannot explain Mr L8's choice of words.

1137 Moreover, although Mr L8 did not expressly offer the applicant cancellation of the plan to launch the AMD-based notebooks, he none the less indicated to the applicant that 'it was all contingent on what pricing they offered' and that the applicant's power extended to 'mak[ing Mr L8] look dumb for

ever considering to do AMD'. Those two passages give the impression that Mr L8 wished to make the applicant understand implicitly that Lenovo was ready to cancel its plan to launch the AMD-based notebooks on condition that the applicant offer it sufficiently large financial advantages.

1138 Consequently, the statement of Mr L8 on which the applicant relies, according to which the applicant had never 'explicitly' informed him of a condition of Lenovo cancelling its plan to launch the AMD-based notebooks, must be regarded as evasive. His assertion that the price that Intel offered him 'was not contingent on stopping AMD' cannot be regarded as credible.

1139 Third, the applicant states that, when questioned on Mr L4's email of 6 July 2006, Mr L8 confirmed that it was 'an improved deal from Intel' that resulted in Intel winning the contested sales.

1140 However, it should be recalled that, in that email Mr L4 asked Mr L8 the following: 'When can I get more info allowing me to understand how I can leverage the additional Intel money you will get because of our decision to postpone the AMD [-based notebook] launch ...?' (see paragraph 1048 above).

1141 Mr L8's full reply to the question whether he could explain what Mr L4 had asked him was as follows: 'What [Mr L4] is asking for since we, you know, did not launch the AMD notebooks, but he was aware that there was an improved deal from Intel that made that possible, he was asking how his geography, his sales region would — would benefit from that, and, hence, what he should do.'

1142 Mr L8 therefore interpreted Mr L4's email as meaning that the fact that Lenovo did not launch AMD-based notebooks was made possible by 'an improved deal from Intel'. It is true that Mr L8's statement could, in theory, be understood as meaning that the fact that Lenovo did not launch AMD-based notebooks was not a condition of the improved deal from Intel, but merely an indirect consequence of that deal. However, given that Mr L8 does not specify whether the result that Lenovo did not launch AMD-based notebooks was a direct or indirect consequence of the deal from Intel, his deposition is at least ambiguous in that regard. By contrast, the fact that Mr L4's email refers to 'the additional Intel money you will get because of our decision to postpone the AMD [-based notebook] launch' means unequivocally that Lenovo would receive additional payments from Intel because of its decision to postpone the launch of the AMD-based notebooks. In the light of that email, Mr L8's statement must be regarded as evasive.

1143 In the light of all the foregoing considerations, it seems probable that Mr L8 followed the Lenovo approach of denying that the applicant's payments were conditional on Lenovo not launching AMD-based notebooks in 2006. Consequently, Mr L8's deposition is not capable of rebutting the body of precise and consistent evidence on which the Commission relied in the contested decision.

### 3) Conclusion

1144 It follows from all the foregoing that the Commission established to the requisite legal standard that the applicant granted payments to Lenovo, between June and December 2006, conditional on Lenovo postponing the launch of AMD-based notebooks.

#### b) The exclusivity rebates

##### 1) Assessment of the evidence presented in the contested decision

1145 In order to prove that an unwritten condition of the 2007 MoU was that Lenovo would grant exclusivity to Intel in the notebook segment, the Commission relied inter alia on the following items of evidence:

- a report by Mr I9, [*confidential*], on his accomplishments in 2006;
- an Intel presentation of June 2007 entitled 'Lenovo Plan 2007';
- an internal Lenovo presentation of November 2006;
- an email of 7 December 2006 from Mr L12, [*confidential*] of Lenovo, to Mr L1 entitled: 'Internal positioning of the AMD [NoteBook] decision';
- an email of 11 December 2006, from Mr L13, [*confidential*], to Mr W1, of Wistron, a supplier of Lenovo;
- an email of Mr L12 of 14 December 2006.

1146 It is therefore appropriate to present the content and examine the probative value of those items of evidence.

##### 1.1) The content

1147 According to recital 541 of the contested decision, Mr I9, [*confidential*] at Intel, wrote in his report on his accomplishments in 2006 as follows:

'Top 5 ACCOMPLISHMENTS in 2006: ... 2. Reached formal agreement with Lenovo (signed MoU) on [2007] deal that awards Intel 100% Lenovo NB CPU business in [2007].'

1148 According to recital 542 of the contested decision, slide 5 of an Intel presentation of June 2007 called 'Lenovo Plan 2007' is entitled '[2007] Framework Review'. The benefits of the MoU 2007 were described in that slide as follows: 'Intel Gets: 17 [million] CPU[s] in [2007], which equates to 100% [notebook] and >80% [desktop worldwide]; Intel Gives: [USD] 100 [million] incremental funding on top of MFC pricing and existing programs.' Slide 7 of that presentation states as follows:

'Lenovo 100% aligned with Intel in [2007] in [notebook] space.'

1149 According to recital 543 of the contested decision, in an internal Lenovo presentation of November 2006, it is stated: 'Intel-Lenovo moving to a more Strategic relationship.' Moreover, the following is mentioned:

'[Notebook] business will be 100% Intel — No AMD[-based notebook]'

1150 At recital 547 of the contested decision, the Commission sets out the content of an email of 7 December 2006 which was sent by Mr L12, [confidential], to Mr L1. According to that email, Lenovo executives drafted some 'positioning messages for consistent internal communication of the [AMD/Intel] decisions'. According to those positioning messages, 'the decision [to postpone the launch of AMD-based notebooks indefinitely] was driven by the need ... to significantly reduce complexities and costs and improve operating efficiencies and serviceability'. Moreover, Mr L12 wrote as follows:

'I intentionally excluded mention of increased strategic engagement with Intel from the messages because I think it would be prudent to communicate that separately.'

1151 At recitals 543 and 548 of the contested decision, the Commission cites an email, dated 11 December 2006, from [confidential], Mr L13, to Mr W1 of Wistron, a Lenovo supplier, with the following content: 'Late last week Lenovo cut a lucrative deal with Intel. As a result of this, we will not be introducing AMD based products in 2007 for our Notebook products. Naturally, this is a major strategy shift with significant implications as we have incurred expense and parts for these programs. ... What I am asking you to do today is CEASE AND DESIST ALL ACTIVITY ASSOCIATED WITH AMD PRODUCT.' At recital 548 of the contested decision, the Commission notes that that email triggered a very sensitive reaction from Lenovo's executives. In an email of 14 December 2006, Mr L12 wrote the following to another Lenovo executive:

'Procurement guys goofed ... note went to Wistron and Compal [another Lenovo supplier] ... they have retracted the email from the ODM's [Original Design Manufacturers] and are in damage control mode but if it leaks to AMD then they'll have evidence of a direct link & our execs could be confronted ... pls don't forward.'

## 1.2) The probative value

1152 It is clear that the abovementioned items of evidence constitute precise and consistent evidence that an unwritten condition of the 2007 MoU was that Lenovo would grant exclusivity to Intel in the notebook segment.

1153 The report on Mr I9's accomplishments, the Intel presentation of June 2007, the internal Lenovo presentation of November 2006 and the email of Mr L13 of 11 December 2006 indicate consistently that, both on Intel's and Lenovo's side, the 2007 MoU was understood as requiring Lenovo to source exclusively from the applicant in the notebook sector. According to Mr I9's report, the deal with Lenovo 'awards Intel 100% Lenovo [notebook] CPU business in [2007]' (see paragraph 1147 above). According to the internal Intel presentation of June 2007, the applicant took the view that one of the benefits of the 2007 MoU was that Lenovo was '100% aligned with Intel in [2007] in [notebook] space' and that the applicant would get: '17 [million] CPU[s] in [2007], which equates to 100% [notebooks] and >80% [desktops worldwide]' (see paragraph 1148 above). According to the internal Lenovo presentation of November 2006, the move to a more strategic relationship with the applicant implied that '[Notebook] business will be 100% Intel — No AMD[-based notebook]' (see paragraph 1149 above). Lastly, according to the email of Mr L13 of 11 December 2006, Lenovo would not be introducing AMD-based products in 2007 for notebook products 'as a result' of the deal with the applicant (see paragraph 1151 above). In the absence of a plausible explanation as regards those items of evidence, it is permissible to conclude that the fact that the 2007 MoU was understood as requiring Lenovo to source exclusively from the applicant in the notebook segment means that the 2007 MoU was de facto subject to an exclusive supply condition.

1154 In the present case, the applicant did not provide a plausible explanation.

1155 The applicant claims, in essence, that the 2007 MoU was based on expected volume targets. According to Exhibit A thereto, the 2007 MoU anticipated that Lenovo would purchase 8 million notebook CPUs out of an anticipated notebook demand of 8 million units. Clause A of the 2007 MoU

expressly stated that that expected volume target set out in Exhibit A was a good faith forecast which did not bind the parties. While the applicant sought to structure the 2007 MoU to provide incentives for Lenovo to reach that volume target, Lenovo was free not to buy the volume anticipated in Exhibit A. Lenovo could have achieved the target, received all possible Intel rebates, and still increased its AMD volumes if it had achieved a sufficient increase in its overall notebook sales. The applicant submits, in essence, that the fact that the abovementioned items of evidence refer to sourcing rates of 100% from it is explained by the fact that, according to Exhibit A to the 2007 MoU, the expected volume target of 8 million CPUs corresponded to Lenovo's entire expected demand.

1156 The Court notes, at the outset, that, at recital 540 of the contested decision, the Commission did not conclude that the 2007 MoU contained a written exclusivity commitment, but that exclusivity was an unwritten condition of the agreement between the two parties.

1157 Next, the Court notes that it is true that the Intel presentation of June 2007 contains references both to volume targets and to 100% sourcing rates. However, that document does not present the correspondence between the volume that Lenovo would purchase from the applicant and the sourcing rate of 100% as a future possibility, but as a *fait accompli*, as follows: '17 [million] CPU[s] in [2007], which equates to 100% [notebooks] and >80% [desktops worldwide] ... Lenovo 100% aligned with Intel in [2007] in [notebook] space' (see paragraph 1148 above). The fact that, already in June 2007, Intel had presented Lenovo's 100% sourcing rate from it as a *fait accompli* provides at least prima facie evidence that the agreement between the applicant and Lenovo was not based solely on expected sales targets anticipated expressly in Exhibit A to the 2007 MoU, but that it also included the unwritten condition that Lenovo would grant exclusivity to Intel in the notebook segment.

1158 That is also true of the internal Lenovo presentation, which already in November 2006 stated that '[Notebook] business will be 100% Intel — No AMD[-based notebook]' (see paragraph 1149 above), of Mr I9's report on his accomplishments in 2006, which stated that the deal with Lenovo 'awards Intel 100% Lenovo [notebook] CPU business in [2007]' (see paragraph 1147 above), and of Mr L13's email, which, already on 11 December 2006, stated that, as a result of the deal with Intel, Lenovo would not be introducing AMD-based notebooks in 2007 (see paragraph 1151 above).

1159 Moreover, it should be noted that neither Mr I9's report, the internal Lenovo presentation of November 2006 nor Mr L13's email of 11 December 2006 contains any reference to an expected volume target. Those documents merely mention either a sourcing rate from Intel of 100%, or that Lenovo would not launch any AMD-based products in 2007. However, the applicant did not provide any plausible explanation regarding that manner of presenting the agreement between the applicant and Lenovo.

1160 As regards, in the first place, Mr I9's report on his accomplishments in 2006 (see paragraph 1147 above), the applicant claims that there is an element of hyperbole and self-aggrandisement inherent in such a document. However, that cannot suffice to explain why Mr I9, on the one hand, made no mention of the existence of an expected volume target and, on the other, mentioned a sourcing rate of 100% from Intel when describing the agreement with Lenovo. The other items of evidence relied on in the contested decision, which do not originate from Mr I9, also contain references either to a sourcing rate from Intel of 100%, or to the fact that Lenovo would not launch AMD-based products in 2007. Consequently, it is not plausible that the wording used in Mr I9's report on his accomplishments is based solely on hyperbole and self-aggrandisement.

1161 In the second place, as regards the internal Lenovo presentation from November 2006 (see paragraph 1149 above), the applicant submits that it contains only internal strategy statements made during the month before the parties adopted the 2007 MoU or mere descriptions of what Lenovo proposed to do in light of Intel's offers.

1162 In that regard, the Commission rightly states that this interpretation is unconvincing as it disregards the actual timing of the events. According to recital 535 of the contested decision, the negotiations between Lenovo and Intel regarding their new strategic relationship were to be finalised on 28 November 2006 and only the technical details of the 2007 MoU were to be finalised during December 2006. The applicant does not challenge those findings. Thus, it is permissible to conclude that the parties' main contractual obligations were already finalised at the beginning of December 2006. Even though Intel's presentation cannot be attributed to a specific date in November 2006, it appears however that it summarises the state of play of the negotiations between Lenovo and Intel towards the end of November 2006. Several details to which the presentation makes reference, such as a most-favoured-customer clause, a three-year warranty and access to a supply hub, are also amongst the applicant's contractual obligations laid down in the 2007 MoU. Moreover, the presentation adopts a definitive tone, stating that '[Notebook] business will be 100% Intel' and that 'Intel will provide Lenovo'. If it were only an internal strategy statement or mere descriptions of what Lenovo proposed to do in light of Intel's offers, Lenovo would probably have used different language. In any event, given that the content of the internal Lenovo presentation is consistent with the content

of the report of Mr I9 of Intel (see paragraph 1147 above) and the internal Intel presentation of June 2007 (see paragraph 1148 above), it is not plausible that the internal Lenovo presentation contains only an internal strategy statement or mere descriptions of what Lenovo proposed to do in light of Intel's offers.

1163 As regards, in the third place, Mr L13's email of 11 December 2006 (see paragraph 1151 above), the applicant submits that Mr L13 does not say therein that the deal was conditional, since a normal competitive response to a lower price offer is to prefer that supplier over the rival. In any event, Mr L13 had no personal knowledge of the relevant negotiations, and Mr L2, [*confidential*], immediately repudiated Mr L13's statement.

1164 First of all, the Court observes that, in his email of 11 December 2006, Mr L13 does not present the fact that Lenovo would refrain from launching AMD-based notebooks in 2007 as a unilateral reaction by Lenovo to a lower price offer from Intel. Mr L13 states rather that Lenovo would refrain from launching AMD-based notebooks in 2007 'as a result of' a lucrative deal with Intel. Thus, Mr L13's email gives the impression that that decision did not constitute a unilateral decision by Lenovo, but the consideration agreed upon as part of the agreement with Intel. That conclusion is confirmed by Mr L12's interpretation of Mr L13's email in his email of 14 December 2006. Mr L12 described Mr L13's email as 'evidence of a direct link' (see paragraph 1151 above). On the basis of the context, the 'evidence of a direct link' refers to a direct link between the agreement concluded with the applicant and the fact that Lenovo would not be introducing any AMD-based notebooks in 2007.

1165 Next, it should be noted that the fact that Mr L13 had no personal knowledge of the negotiations regarding the 2007 MoU does not mean that he might not have been informed about them by his superiors. Given that Mr L13 held a position of [*confidential*] and that, in his email of 7 December 2006, Mr L12 stated that he would communicate the increased strategic engagement with Intel 'separately' to Lenovo staff (see paragraph 1150 above), it is likely that Mr L13 was already informed of the content of the agreement concluded with the applicant when he wrote his email of 11 December 2006. In any event, since Mr L13's email is confirmed by the other evidence relied on in the contested decision, it is permissible to conclude that it correctly reflects the agreement between the applicant and Lenovo.

1166 Lastly, nor is the probative value of Mr L13's email weakened by Mr L2's reaction. It should be noted that, in support of its argument, the applicant relies on an email of Mr L2 of 12 December 2006 which reads as follows:

'It's right to have a quick communication with ODM. But, I saw one problem in the note. Why [did] we [tell] them we "cut a lucrative deal with Intel"? The reason we stop AMD NB is because ... we need to reduce product complexity and reduce cost at this time, it has nothing to do with Intel! [Mr L1] has sent a note out. I attached it at the bottom. This is the message for [Mr L1] and all [of] us to communicate with outside. We should not let ODMs have a wrong message on this.'

1167 Contrary to the applicant's claim, that email of Mr L2 does not demonstrate that Mr L13's email did not reflect correctly the reality regarding the agreement between the applicant and Lenovo. Mr L2's email confirms only that the content of Mr L13's email was not consistent with the positioning message which was circulating in Lenovo and according to which 'the decision [to cancel the launch of AMD-based] notebooks indefinitely] was driven by the need ... to significantly reduce complexities and costs and improve operating efficiencies and serviceability' (see paragraph 1150 above).

1168 In that regard, the Court finds that the existence of that positioning message and the manner in which Mr L2 insisted on compliance therewith when communicating with people from outside Lenovo constitute indicia that Lenovo attempted to conceal the existence of a link between its decision to source exclusively from the applicant in 2007 and the agreement with the applicant. Those indicia are confirmed by the email of 14 December 2006, by which Mr L12 reacted to Mr L13's email by writing that '[p]rocurement guys goofed' and by expressing his concern that AMD might obtain evidence 'of a direct link' (see paragraph 1151 above). That email cannot reasonably be understood other than as meaning that Mr L12 stated that Lenovo's procurement team had revealed to people outside Lenovo that there was a 'direct link' between the financial advantages granted by the applicant and the fact that Lenovo would not be introducing AMD-based notebooks in 2007 and that Lenovo's strategy was to conceal that fact (see recitals 548 and 554 of the contested decision).

1169 Mr L12's emails of 7 and 14 December 2006 and Mr L2's email of 12 December 2006 therefore demonstrate consistently that Lenovo was attempting to give the impression externally that Lenovo's decision not to launch AMD-based notebooks in 2007 had absolutely nothing to do with the agreement with Intel. Mr L12 suggested a positioning message in which any reference to increased strategic engagement with Intel was intentionally excluded (see paragraph 1150 above). Mr L2 requested Mr L13 not to communicate externally what was envisaged in that positioning message. In addition, Mr L2 dwelt expressly on the fact that Lenovo's decision not to launch any AMD-based notebooks had

nothing to do with Intel (see paragraph 1166 above). Lastly, in the email of 14 December 2006, Mr L12 stated that Lenovo had retracted the email from the OEMs and that Lenovo was 'in damage control mode' out of concern that AMD might obtain evidence of a direct link between the deal with Intel and Lenovo's decision not to introduce any AMD-based notebooks in 2007 (see paragraph 1151 above).

1170 It is true that the applicant claims that it is mere speculation that Lenovo concealed the existence of an exclusivity condition. When questioned on that point at the hearing, the applicant claimed, in essence, that the content of the positioning message confirms that the deal entered into with it was not based on an exclusivity condition and that Mr L13's email caused concern at Lenovo solely on account of Lenovo's interest in maintaining a good business relationship with AMD with a view to other joint projects.

1171 However, it is not credible that Lenovo was attempting merely to conceal an agreement based on expected volume targets. In addition to Mr L13's email, Mr I9's report on his accomplishments in 2006 (see paragraph 1147 above), the Intel presentation of June 2007 (see paragraph 1148 above) and the internal Lenovo presentation of November 2006 (see paragraph 1149 above) indicate consistently that the 2007 MoU was subject to an unwritten exclusivity condition. In the light of that evidence, the existence of the positioning message, Mr L13's email and Mr L2's and Mr L12's reactions cannot reasonably be understood other than as meaning that Lenovo attempted to conceal the existence of a link between its decision to source exclusively from the applicant in 2007 and the agreement with the applicant. That confirms that Lenovo followed the general approach of concealing the conditionality of the payments received from the applicant (see paragraph 1126 above).

1172 It is apparent from all the foregoing considerations that the applicant has been unable to explain in convincing fashion why the report on Mr I9's accomplishments, the Intel presentation of June 2007, the internal Lenovo presentation of November 2006 and Mr L13's email of 11 December 2006 indicate consistently that both on Intel's and Lenovo's side, the 2007 MoU was understood as requiring Lenovo to obtain supplies exclusively from the applicant in the notebook sector. By contrast, the positioning message contained in Mr L12's email of 7 December 2006, the manner in which Mr L2 insisted on compliance therewith and the reaction to Mr L13's email expressed by Mr L12 in his email of 14 December 2006 serve to support the conclusion that Lenovo attempted to conceal any link between the agreement with the applicant and Lenovo's decision to source exclusively from the applicant in 2007. Viewed as a whole, those circumstances demonstrate to the requisite legal standard that an unwritten condition of the 2007 MoU was that Lenovo would grant exclusivity to Intel in the notebook segment.

## 2) The applicant's other arguments

### 2.1) Lenovo's Article 18 response

1173 The applicant submits that Lenovo's Article 18 response flatly contradicts the Commission's case. At recital 573 of the contested decision, the Commission wrongly rejected Lenovo's submissions on the ground that that response was incomplete and, at least to a certain extent, inaccurate. The applicant claims that, in its Article 18 response, Lenovo confirmed unequivocally that there was no 'unwritten condition' of exclusivity in the 2007 MoU, that the 2007 MoU between Intel and Lenovo 'is not based on exclusivity' and was 'in no way conditional on [Lenovo] pursuing an Intel-only strategy'.

1174 The Court notes that, in its Article 18 response, Lenovo stated as follows:

'The Lenovo-Intel deal is not based on exclusivity. The MoU is an agreement on a broad range of matters, including pricing, which is in no way conditional on ... pursuing an Intel-only strategy. Lenovo independently decided not to pursue an AMD-based notebook for the present time, for the detailed reasons explained above, and the MoU concluded with Intel properly reflects, in Lenovo's opinion, the deal that was concluded, and the deal that has been adhered to. Lenovo executives were surprised to be confronted in a meeting with AMD with the allegation that Intel and Lenovo had concluded an exclusive deal. It is plain that this is not the case. Whilst some employees of Lenovo may have referred to there being an exclusive deal, these statements are from people not sufficiently close to the facts to be able to make an informed judgement.'

1175 In so far as that extract from Lenovo's Article 18 response refers to 'the detailed reasons' that 'Lenovo independently decided not to pursue an AMD-based notebook', the Court would point out that those reasons are the same as those already set out in paragraph 1069 above.

1176 It must be stated that Lenovo's Article 18 response is not credible in so far as it denies expressly that the 2007 MoU contained an unwritten exclusivity condition. That statement is, first, contradicted by the abovementioned items of evidence, in respect of which Lenovo's Article 18 response does not provide a plausible explanation.

1177 As regards, in the first place, the Lenovo presentation of November 2006, in which it is stated that '[Notebook] business will be 100% Intel — No AMD[-based notebook]' (see paragraph 1149 above), Lenovo explained that that statement reflected 'the consequence of the situation that developed — that it no longer made sense to proceed with AMD for the planned notebooks — not the *basis* of the agreement with Intel'.

1178 However, the Court notes that, in that presentation, the statement that '[Notebook] business will be 100% Intel — No AMD[-based notebook]' is not portrayed as the consequence of a 'situation that developed' as described by Lenovo. It was stated in paragraph 1162 above that the November 2006 presentation appears to summarise the state of play of the negotiations between Lenovo and Intel on the 2007 MoU towards the end of November 2006. The statement that '[Notebook] business will be 100% Intel — No AMD[-based notebook]' appears in that presentation under the headings 'Intel Strategic Relationship' and 'Intel-Lenovo moving to a more Strategic relationship'. Moreover, below that statement, on the same slide of the presentation, details are given, which appear in the applicant's contractual obligations under the 2007 MoU. The statement that '[Notebook] business will be 100% Intel — No AMD[-based notebook]' is therefore presented in the immediate context of the facts contained in the 2007 MoU and under headings referring to the strategic relationship with Intel. By contrast, the presentation does not refer to the fact, highlighted by Lenovo in its Article 18 response, that it no longer made sense to proceed with AMD for the planned computer. The presentation therefore gives the impression that the statement that '[Notebook] business will be 100% Intel — No AMD[-based notebook]' reflected a condition of the 2007 MoU and not the consequence of a 'situation that developed', as described by Lenovo. Given that that conclusion is consistent with Mr I9's report on his accomplishments in 2006 (see paragraph 1147 above), Mr L13's email of 11 December 2006 (see paragraph 1151 above) and Mr L12's email of 14 December 2006 (see paragraph 1151 above), the interpretation ascribed by Lenovo to its presentation of November 2006 in its Article 18 response is not credible.

1179 As regards, in the second place, Mr L12's email of 14 December 2006, according to which '[p]rocedure guys goofed', Lenovo merely stated that '[t]he proper reason is given by [Mr L2], namely, that there was a need to reduce product complexity'.

1180 However, the Court finds that the mere statement that '[t]he proper reason is given by [Mr L2]' is not capable of calling in question the conclusion set out in paragraphs 1166 to 1171 above that the positioning message contained in Mr L12's email of 7 December 2006, the manner in which Mr L2 insisted on compliance therewith and Mr L12's reaction to Mr L13's email demonstrate that Lenovo attempted to conceal any link between the agreement with the applicant and Lenovo's decision to source exclusively from the applicant in 2007. In the light of that conclusion, Lenovo's claim in its Article 18 response regarding Mr L12's email of 14 December 2006 is not credible.

1181 In the third place, it should be recalled that, in its Article 18 response, Lenovo admits that some of its employees may have referred to there being an exclusive deal. In so far as Lenovo attempts to explain that fact by asserting that those statements were from people not sufficiently close to the facts to be able to make an informed judgement, the Court observes that that abstract statement is not capable of calling in question the probative value of the internal Lenovo presentation of November 2006 (paragraph 1148 above) or of Mr L13's email of (paragraph 1151 above). In any event, the probative value of the internal Lenovo presentation of November 2006 and of Mr L13's email is confirmed by the fact that that evidence is consistent with the internal Intel presentation of June 2007 (see paragraph 1148 above) and Mr I9's report on his accomplishments in 2006 (see paragraph 1147 above) and by the manner in which Lenovo attempted to conceal the existence of any link between the 2007 MoU and its decision to source exclusively from the applicant (see paragraphs 1168 to 1171 above).

1182 Second, in so far as Lenovo's Article 18 response highlights other business reasons for Lenovo's decision to source exclusively from the applicant in 2007, it must be stated that, for reasons corresponding to those set out in paragraphs 1079 to 1081, those reasons are also not capable of calling in question the fact that an unwritten condition of the 2007 MoU was that Lenovo would grant exclusivity to Intel in the notebook segment.

1183 Although, in general, answers given on behalf of an undertaking as such have considerable probative value (see paragraphs 557 and 691 above), it is apparent from all the foregoing that Lenovo's Article 18 response is not credible in so far as it denies expressly that the 2007 MoU contained an unwritten exclusivity condition. The Commission did not therefore err in concluding that Lenovo's Article 18 response was incomplete and, at least to a certain extent, inaccurate. On the contrary, the Court finds, as the Commission correctly also found at recital 573 of the contested decision, that the incomplete and inaccurate nature of Lenovo's Article 18 response is consistent with the conclusion, set out in more detail in paragraphs 1168 to 1171 above, that Lenovo attempted to conceal the anti-competitive nature of its relationship with Intel.

2.2) The argument alleging that Lenovo decided to source exclusively from the applicant in 2007 for reasons other than the alleged existence of an unwritten exclusivity condition

1184 The applicant claims, in essence, that Lenovo decided to source exclusively from the applicant for reasons independent of the alleged existence of an unwritten exclusivity condition. It relies, in that regard, in particular on the reasons set out by Lenovo in its Article 18 response (see paragraph 1069 above). The applicant states that the contested decision ignores that in late 2006, before the 2007 MoU was finalised, Lenovo grew concerned about AMD's reliability as a supplier when AMD began supplying Dell. AMD favoured Dell at the expense of many longstanding customers and Lenovo was harmed by AMD's supply strategy in the face of AMD's capacity constraints.

1185 Those arguments overlap with the argument alleging that Lenovo decided to cancel the two AMD-based notebooks in 2006 for reasons independent of the existence of a naked restriction. However, it should be recalled that that argument is ineffective. Consequently, it must be rejected for reasons corresponding to those set out in paragraphs 1096 to 1103 above.

2.3) The depositions made before the Delaware court

1186 The applicant submits, in essence, that the contested decision is irreconcilable with the testimony of key Lenovo executives (see paragraphs 1110 to 1114 above)

1187 It should be noted that the applicant relies on excerpts from the abovementioned depositions above all to demonstrate that Lenovo decided to source exclusively from the applicant for reasons which were independent of the existence of an unwritten exclusivity condition. However, it should be recalled that those arguments are ineffective (see paragraphs 1096 to 1103 above). Consequently, it is not necessary to adjudicate on the probative value of the depositions relied on by the applicant in that regard.

1188 For the rest, the Court observes that only the depositions of Mr L10 and Mr L8 contain excerpts on which the applicant relied and which relate directly to evidence of the existence of an unwritten exclusivity condition. However, those excerpts are not capable of calling in question the probative value of the evidence relied on in the contested decision.

i) Mr L10's deposition

1189 On the one hand, the applicant claims that Mr L10 testified under oath that Lenovo 'committed to volume targets with Intel' and that Lenovo did 'not commit to exclude another party'. He moreover confirmed that Lenovo 'never committed to 100 percent'. The applicant submits that Mr L10 stated unambiguously that '[i]t was a consequence of our own internal decision making to do an AMD notebook or not do an AMD notebook that we were 100 percent Intel' and not the result of a condition or requirement imposed by Intel.

1190 In order to assess the probative value of those excerpts from Mr L10's deposition, it is necessary to present them in their context.

1191 First of all, Mr L10 was questioned on an email that he wrote on 17 July 2007 which reads as follows:

'I heard from AMD that we are talking to them about a Notebook. ... We are also precluded from launching non-Intel based notebooks for the foreseeable future. ... Any conversation with AMD around notebooks will put our negotiations with Intel at risk.'

1192 Mr L10 explained that email in his deposition, in essence, by stating that it was a bad email that he wrote and that his real intention, when he wrote it, was to ensure that Lenovo's discussions with Intel and AMD were conducted in a centralised fashion in order to get the best possible agreement at any time with either one of the vendors. According to Mr L10's deposition, he merely used a little 'flavor and color' in order to get Lenovo employees to follow Lenovo's standardised process of engaging with Intel and AMD.

1193 The applicant relies on the fact that, next, on whether he testified that he never committed to purchase 100% of Lenovo's requirements from Intel, Mr L10 stated as follows:

'We committed to volume targets with Intel. We did not commit to exclude another party ... we have never committed to 100 percent.'

1194 The Court notes also that, in reply to the question 'Never?', Mr L10 then replied as follows:

'In my discussions, I don't believe I ever committed to 100 percent. We committed volume targets.'

1195 Subsequently, Mr L10 was questioned on the internal Lenovo presentation of November 2006 (see paragraph 1149 above). Mr L10 was first asked whether that document roughly summarised the terms of the MoU 2007. In reply, he stated that '[t]he intention of the document is to summarise what was agreed upon' and that 'he would have to verify to the MoU if it was accurately summarising



everything in the MoU or not'. Next, Mr L10 was presented directly with the passage of the presentation according to which '[n]otebook business will be 100% Intel — no AMD[-based notebook]'. He was asked whether that passage was an accurate summary of the MoU 2007. The applicant relies on Mr L10's reply, which reads inter alia as follows:

'That was an implication of the agreement, not part of the agreement ... It was a consequence of our own internal decision making to do an AMD notebook or not to do an AMD notebook that we were 100 percent Intel.'

1196 Mr L10 was then asked about an email of 9 May 2007 that he had written to [confidential] of Lenovo. The subject of that email was 'Intel, please do not forward' and read as follows: 'We already have technically the commitment that Consumer notebook has to be 100% Intel through December so this would be to extend for another six months.' In reply to the question whether it was correct that he had written that Lenovo was 'committed to be 100 percent Intel in consumer notebook through December 2007', Mr L10 stated as follows:

'I - I see the words on the document, correct. The — context behind that is if you looked at our consumer notebook roadmap at that time, the implication of our roadmap is we were 100 percent Intel. It was not because of an agreement we had with Intel. It was an implication of that's what the consumer notebook roadmap had laid out. So when you're sitting in May, we had already — we already have our product roadmap laid out for the next 12 to 18 months.'

1197 The Court considers that the fact that, in his email of 9 May 2007, Mr L10 himself referred to a technical commitment to be 100% Intel and that, in his email of 17 July 2007, he wrote that Lenovo was 'precluded from launching ... notebooks' indicates the existence of an exclusivity condition. Although the Commission did not rely on the content of those emails in the contested decision, it was entitled to do so in order to reply to the applicant's arguments based on Mr L10's deposition (see, to that effect, *JFE*, paragraph 62 above, paragraph 176). The interpretation that it follows from those two emails that the 2007 MoU included an unwritten exclusivity condition is, moreover, consistent with the items of evidence relied on in the contested decision one of which is the internal Lenovo presentation of November 2006.

1198 By contrast, the manner in which Mr L10 attempts to explain the content of that latter presentation and of his emails of 9 May and of 17 July 2007 is not convincing. If Lenovo's sole sourcing from Intel had really only been an indirect consequence of the 2007 MoU, and not a condition thereof, it would not have been necessary to mention either that Lenovo was 'precluded from launching non-Intel based notebooks for the foreseeable future' (see paragraph 1191 above) or that Lenovo had 'technically the commitment that Consumer notebook ha[d] to be 100% Intel through December' (see paragraph 1196 above). The *ex post* explanation that this was merely a bad choice of words is not plausible. With respect to the internal Lenovo presentation of November 2006, the explanation that the slide according to which '[Notebook] business will be 100% Intel — No AMD[-based notebook]' indicated merely 'an implication of the agreement, not part of the agreement' is contradicted by the manner in which that slide is presented in the immediate context of the facts contained in the 2007 MoU and under headings referring to the strategic relationship with Intel (see paragraphs 1162 and 1178 above). Moreover, it should be recalled that Mr L10 first of all himself stated, in a general manner, that the intention of that presentation was to summarise what was agreed upon in the 2007 MoU. It was only after he was presented directly with the slide that '[Notebook] business will be 100% Intel — No AMD[-based notebook]', that Mr L10 provided his explanation that that slide meant 'an implication of the agreement, not part of the agreement'.

1199 On the other hand, the applicant claims that, in his deposition, Mr L10 confirmed that Mr L13's statement did not accurately reflect Lenovo's reasons for deciding not to launch AMD-based notebooks. The applicant relies in that regard on the fact that Mr L10 identified complexity, supply chain efficiency and AMD's unreliability as a supplier, in that it favoured Dell over Lenovo, as reasons for Lenovo's decision not to launch AMD-based notebooks.

1200 However, that passage of Mr L10's deposition is not capable of calling in question the probative value of Mr L13's email of 11 December 2006 (see paragraph 1151 above). When questioned on that email and in reply to the question whether Mr L13 might have been under the impression that the 2007 MoU required Lenovo not to introduce AMD-based products, Mr L10 mentioned complexity, efficiency and AMD's unreliability as reasons that would have militated in his 'personal opinion' against the launch of AMD-based notebooks. Thus, Mr L10 did not expressly say that Mr L13's statement did not reflect the reality. Similarly, he could not explain why Lenovo would have instructed Wistron, the addressee of Mr L13's email, to delete this message. The replies given by Mr L10 when presented with Mr L13's email therefore give the impression of being evasive. That impression is confirmed by the fact that, when questioned on his email of 17 July 2007, Mr L10 stated as follows:

'In my discussions, I don't believe I ever committed to 100 percent' (see paragraph 1194 above).

1201 Lastly, it should be recalled that Lenovo attempted to conceal any link between the agreement concluded with the applicant and its decision to source exclusively from it in 2007 (see paragraphs 1168 to 1171 above) and that Lenovo made non-credible statements in its Article 18 response (see paragraphs 1070 to 1078 above and 1176 to 1181 above). In the light of those facts and of the lack of any convincing explanation by Mr L10 regarding the content of the internal Lenovo presentation of November 2006 and of his emails of 9 May and 17 July 2007, and of the evasive manner in which Mr L10 replied to the questions concerning Mr L13's email of 11 December 2006, it is permissible to conclude that Mr L10's deposition is not credible in so far as it contradicts the existence of an unwritten exclusivity condition. On the contrary, it seems probable that Mr L10 followed the Lenovo approach of denying that the 2007 MoU was subject to such a condition. Consequently, Mr L10's deposition is not capable of calling in question the body of precise and consistent evidence on which the Commission relied in the contested decision.

#### ii) Mr L8's deposition

1202 In its submission of 14 June 2012, the applicant relied on the following excerpt from Mr L8's deposition.

1203 Mr L8 was shown the internal Lenovo presentation of November 2006, in which it is stated: '[Notebook] business will be 100% Intel — No AMD[-based notebook]' (see paragraph 1149 above). When asked whether it was his understanding, going into 2007, that Lenovo was not going to use AMD CPUs in its notebooks for the entirety of 2007, Mr L8 replied as follows:

'My understanding at the time was that we had competitive prices on Intel, and the consequence of that was no AMD.'

1204 However, that statement by Mr L8 is contradicted by the manner in which the slide according to which '[Notebook] business will be 100% Intel — No AMD[-based notebook]' is set out, in Lenovo's presentation, in the immediate context of the details contained in the 2007 MoU and under headings referring to the strategic relationship with Intel (see paragraphs 1162 and 1178 above). Mr L8's statement is not therefore credible.

1205 Moreover, in its submission of 23 May 2012, the Commission correctly drew attention to the following passage of Mr L8's deposition.

1206 Mr L8 was shown Mr L10's email of 17 July 2007 in which the latter wrote as follows: 'We are also precluded from launching non-Intel based notebooks for the foreseeable future. ... Any conversation with AMD around notebooks will put our negotiations with Intel at risk' (see paragraph 1191 above). When Mr L8 was asked why Mr L10 had thought that Lenovo was precluded from launching non-Intel based notebooks, Mr L8 replied: 'I can't comment on exactly why he believed he was precluded.' Next, when asked whether he knew why Mr L10 believed that conversations with AMD around notebooks would put the negotiations with Intel at risk, Mr L8 replied: 'My understanding would be that he was concerned on Intel's reaction.'

1207 Lastly, it was stated in paragraphs 1128 to 1143 above that it is probable that Mr L8 followed the Lenovo approach of denying that the applicant's payments were conditional on Lenovo not launching any AMD-based notebooks in 2006. That conclusion also applies to Mr L8's statements concerning the existence of an unwritten exclusivity condition in the 2007 MoU. Consequently, Mr L8's deposition is not capable of calling in question the body of precise and consistent evidence on which the Commission relied in the contested decision.

#### 3) Conclusion

1208 It follows from all the foregoing that the Commission established to the requisite legal standard that the applicant granted rebates to Lenovo between January 2007 and December 2007 at a level that was conditional on Lenovo obtaining all of its notebook x86 CPU supplies from the applicant.

1209 In that regard, the Court observes that the 2007 MoU represented an extension of the payments granted by Intel to Lenovo in 2006, which were conditional on postponement of the launch of AMD-based notebooks. Given that the Commission demonstrated the conditionality of those payments to the requisite legal standard, it is hardly conceivable that, after December 2006, Intel did not offer a 'reward' to Lenovo to stay '100% Intel'.

1210 Accordingly, it is permissible to conclude that the Commission has demonstrated to the requisite legal standard that Intel granted payments to Lenovo, between June and December 2006, conditional on Lenovo postponing the launch of the two AMD-based notebook models and that, in December 2006, Intel and Lenovo concluded the 2007 MoU which was subject to an unwritten exclusivity condition, which implied, at the same time, the complete cancellation of the launch of those two models.

c) Analysis of the capability of the applicant's practices vis-à-vis Lenovo to restrict competition according to the circumstances of the case

1211 It should be noted that, in order to find that the exclusivity rebates and naked restrictions at issue in the present case were unlawful, the Commission is not required to analyse the capability of those practices to restrict competition according to the circumstances of the case at hand (see paragraphs 80 to 94 and 209 above).

1212 For the sake of completeness, the Court points out that, in the contested decision, the Commission established that the conditional rebates and payments granted to Lenovo were capable of restricting competition also on the basis of an analysis of the circumstances of the case at hand.

1213 In that regard, it should be noted generally that the fact that the conditional rebates granted by the applicant to Lenovo were part of an overall strategy aimed at foreclosing AMD's access to the most important sales channels and the fact that that strategy included two types of infringement which complemented and strengthened one another render the applicant's conduct capable of restricting competition (see paragraphs 181, 184 and 213 above).

1214 Moreover, the conditional rebates and payments were an important element for OEMs to consider on account of the strong competition on the OEM market and their low operating margins (see paragraph 179 above). Furthermore, the fact that those rebates and payments were actually taken into account in the commercial decisions of those benefiting from them also constitutes a factor which suggests that those payments are capable of restricting competition (see paragraphs 180 and 212 above).

1215 As regards in particular the characterisation of the applicant's conditional rebates and payments vis-à-vis Lenovo, it should be noted that they had an impact on Lenovo's choice of supplier during the period in question in the contested decision (see recitals 519, 532, 559 to 561, 572 and 989 of the contested decision). In that regard, it is appropriate to note *inter alia* the following:

– Mr L2's email of 26 June 2006, according to which: 'Intel deal will not allow us to launch AMD' (see paragraph 1045 above);

– Mr L3's email of 28 June 2006, according to which Lenovo's part in the agreement concluded with Intel presupposed that Lenovo would award all business for shipments for the rest of 2006 to Intel (see paragraph 1046 above);

– the internal Lenovo presentation in preparation for the meeting with Intel of 29 June 2006 which read as follows: 'Intel made aggressive proposal for Lenovo's 2006 notebook business ... Plan => Agree to give Intel all of our notebook business in 2006' (see paragraphs 1047 and 1131 above);

– and Mr L13's email of 11 December 2006 according to which Lenovo would not be introducing AMD-based products in 2007 for its notebooks on account of the lucrative deal cut with the applicant (see paragraph 1151 above).

1216 It is true that the applicant attempts to refute that impact by claiming that Lenovo decided to cancel its plan to launch AMD-based notebooks in 2006 and to source solely from the applicant in the notebook segment in 2007 for reasons entirely independent of the existence of conditions to that effect in the agreements that it concluded with Lenovo (see paragraphs 1092 to 1095 and 1184 above).

1217 In that regard, it should first of all be borne in mind that, in the contested decision, the Commission demonstrated to the requisite legal standard that the agreements between the applicant and Lenovo included payments that were subject to unwritten conditions according to which Lenovo would cancel its plan to launch AMD-based notebooks in 2006 and that it would source exclusively from the applicant in the notebook segment in 2007 (see paragraphs 1043 to 1207 above)

1218 Next, the Court finds that the applicant's arguments are not such as to rule out that the agreements between it and Lenovo had any influence on Lenovo's choice of supplier. In order to call in question the evidence of the impact of its practices on Lenovo's choice of supplier, the applicant ought to have demonstrated that Lenovo would have also made the same sourcing choices in the absence of the payments granted in consideration for compliance with the conditions that Lenovo would postpone and cancel its plan to launch AMD-based notebooks in 2006 and that it would source solely from the applicant in the notebook sector in 2007. In the present case, the applicant specifically underlined the importance of its improved pricing as one of the decisive factors for Lenovo's decisions (see paragraphs 1088, 1092, 1105 and 1106 above). However, it must be stated that the absolute level of that improved pricing depended on the payments at issue in the contested decision, the conditionality of which was established to the requisite legal standard. Consequently, it is permissible to conclude that the applicant's conditional payments to Lenovo had an impact on Lenovo's choice of supplier.

1219 Moreover, a customer's decision to use one supplier instead of another is necessarily a multi-faceted decision. In so far as it is established in the present case that the payments, granted in consideration for the conditions that Lenovo would postpone and cancel its plans to launch AMD-based notebooks in 2006 and that it would source solely from the applicant in the notebook sector in 2007, had an impact on Lenovo's choice of supplier, that evidence cannot be refuted by the mere fact that other reasons might also have influenced that choice (see paragraph 597 above).

1220 It follows that the Commission demonstrated to the requisite legal standard that the agreements between the applicant and Lenovo had an impact on Lenovo's choice of supplier. Accordingly, the Court finds that the applicant's practices vis-à-vis Lenovo were capable of restricting competition.

#### d) Conclusion

1221 It follows from the foregoing that it is necessary to reject all the complaints put forward by the applicant relating to the exclusivity rebates and naked restrictions with respect to Lenovo.

#### 5. Acer

1222 According to Article 1(g) of the contested decision, Intel granted 'payments to Acer between September 2003 and January 2004 conditional on Acer delaying an AMD-based x86 CPU notebook'.

1223 The Commission states in the contested decision that, in January 2003, Acer made plans to launch both desktop and notebook platforms with a new Athlon 64 CPU in the autumn of 2003. Pursuant to recital 417 of the contested decision, the launch was scheduled for 23 September 2003. The Athlon 64 CPU is an x86 CPU of AMD with a 64-bit architecture. 'K8' was the code name used by Intel for the Athlon 64 CPU.

1224 At that time, Intel had not yet placed an x86 CPU with a 64-bit architecture on the market, as is apparent from the dates set out in recital 146 of the contested decision, according to which Intel's first x86 CPU with a 64-bit architecture was announced in the first quarter of 2004 and launched in September 2004.

1225 According to recital 450 of the contested decision, Acer postponed the launch of its Athlon 64 CPU-based notebooks until January 2004 because of Intel's request for it to do so. Acer's understanding was that if it did not postpone the launch, the previously agreed ECAP funding would be reduced.

1226 According to the applicant, the contested decision fails to offer firm, precise and consistent evidence to support its findings (i) that Acer's 'understanding' was that Intel would reduce funding absent a postponement, or (ii) that Intel 'indicated' to Acer that such reductions would occur. Instead, the evidence shows that Acer decided to postpone the launch of its AMD Athlon 64 CPU-based notebook after running into a serious technical issue and in the face of a worldwide shortage of that type of CPU. According to the applicant, Acer also had concerns about whether the market was ready for the product and whether Acer might lose some of its rebates from Intel. Acer's executives agree that no one from Intel told Acer that it would lose any of its rebates if it launched Athlon 64 CPU-based models.

1227 It thus needs to be examined whether the evidence furnished by the Commission in the contested decision is sufficient to show the existence of the naked restriction found in that decision.

1228 It should be pointed out, at the outset, that the Commission appears to have submitted, in point 401 of the defence, read in conjunction with point 400(b) and (c) thereof, that the mere fact that Intel requested Acer to postpone the launch of a notebook equipped with an AMD CPU was sufficient to establish the unlawful nature of the naked restrictions which Intel applied vis-à-vis Acer.

1229 In that regard, the Court points out that the infringement which Intel committed, according to Article 1(g) of the contested decision, consisted in 'granting payments to Acer' conditional on Acer's postponing the launch of a notebook (see paragraph 1222 above). The infringement, as found in the contested decision, did not thus consist in a mere request by Intel to Acer to postpone the launch of a notebook equipped with an AMD CPU, but in granting payments conditional on such a postponement.

1230 The Court, which is called on to review the legality of the contested decision, cannot substitute a finding of a different infringement for the infringement found in the contested decision.

1231 In any event, when questioned on that point at the hearing, the Commission stated that it had not intended to submit that a request from Intel to Acer was sufficient in itself to characterise the infringement, but had meant a request coupled with a financial incentive.

1232 It is thus not sufficient to find that the Commission proved to the requisite legal standard that Intel requested Acer to postpone the launch of an Athlon 64 CPU-based notebook. It needs to be examined whether the Commission proved to the requisite legal standard, first, that Intel communicated to Acer

that it was requesting it to postpone the launch of an AMD-based x86 CPU notebook and, second, that Intel made it clear to Acer that the level of future rebates was contingent upon that postponement.

1233 The Court also points out that, in the present case, the Commission did not state that Intel had offered Acer an increase in rebates as compared with previous quarters if it were to postpone the launch of its Athlon 64 CPU-based notebook. According to the contested decision, it was rather a communication on the part of Intel regarding the fact that future rebates would be lower if Acer failed to comply with Intel's request. None the less, the wording of the operative part of the contested decision remains correct. The proportion of the rebates to be granted in the future, which Intel made it clear to Acer that it risked losing if Acer failed to postpone the launch, constitutes, in other words, a rebate which Intel granted on the condition that Acer postpone the launch at issue.

1234 The abusive conduct at issue in the present case consisted in granting a financial incentive to Acer on the condition that it postpone the launch of an AMD Athlon 64 CPU-based notebook. It should be pointed out that a financial incentive can work in two ways, that is to say that the undertaking in a dominant position can either offer additional payments if the launch of the competing product is postponed, or can point out to its customer that the level of future rebates risks being lower if the customer fails to postpone the launch.

a) The evidence relied on in the contested decision and its probative value

1235 The Commission relies, first of all, on an Acer submission of 28 April 2006, in which Acer stated that there were 'certain more or less explicit requests by Intel that Acer curtail or scale back its use of AMD products, including but not limited to the postponement of the launch of certain AMD[-]based Acer products'.

1236 The Commission also pointed out that, by email of 29 January 2003, Mr I10 of Intel sent a draft letter of intent to Mr A1, Acer's head negotiator with Intel, in which he stated the following:

'Acer decides, per its own business discretion, will not plan K8 desktop product to be launched before 4/14 internal executive meeting.'

1237 In his reaction of the same day, Mr A1 responded:

'No such commitment, as this is beyond Acer's executive conclusion recently which was based on "no K8 notebook" requested by Intel's management and thus concluded in our executives meeting, if we need to add so, Acer needs to go through another executives meeting.'

1238 The Commission also points out, in recital 422 of the contested decision, that the letter of intent was consequently amended and that the version sent the following day no longer contained a reference to a postponement of the launch in respect of desktops, but only notebooks.

1239 It results from that exchange of emails between Intel and Acer that Intel requested Acer to postpone the launch of Athlon 64 CPU (K8)-based notebooks.

1240 Moreover, the Commission relies on an email of 26 August 2003, in which Mr A1 wrote the following to Intel:

'In view of Intel shows tremendous concerns on Acer's move on K8 launch on [23 September 2003], after our internal review, here is our adjusted actions accordingly, I am sure Intel could perceive Acer's sincerity to respond to Intel's request, and let's quickly conclude [fourth quarter] business plan to continue enhancing business scale between two companies, whereas, we assume Intel would recogni[s]e Acer's sincerity and continue to provide same, or even better support to Acer as in last 3 quarters.

– Acer will not launch and ship K8 products in [APAC] and Greater China in 2003.

– Acer will have only Acer Europe to join AMD Europe on launch event, simply because this has been a continuous activity in where business has been a constant base. Shipments of K8 will also be effective.'

1241 It is apparent from that email, first, that Acer pointed out to Intel that it had adjusted its plans to comply with its request and, second, that Acer expected to obtain in exchange rebates or payments at least as high as those granted during the previous quarters. This implies that Mr A1 feared that, if Acer failed to respond positively to Intel's request, the rebates could be lower than those granted during the previous quarters. Furthermore, it results from that email that the initial commitment which Acer undertook concerned only a postponement of the launch in the APAC region and in China.

1242 In recital 424 of the contested decision, the Commission stated that, in an email of 27 August 2003, Mr I11 of Intel none the less pointed out the following to Mr I12, an Intel executive, and Mr I13, [confidential] of Intel:

'APAC Summary: K8 launch planned for Sept 23. ... [Mr 15] [*confidential*] met [with] their key players. This is a HUGE issue and a richter scale 10 issue for [Mr 113]. He is [meeting with Mr A1 of Acer] in [Hong Kong] in two weeks — will be VERY blunt. We had a commit [with] them — US, co-[marketing], tv ads, on today show, etc.'

1243 The Commission states, in recital 424 of the contested decision, that it is apparent from that email that Intel's perception was that Acer was not living up to what Intel had requested in that it was still launching Athlon 64 CPU-based computers in the APAC region in 2003. The applicant points out that that email did not refer to any Intel request with which Acer had failed to comply, nor did it point to any threatening or punitive conduct on the part of Intel.

1244 In that regard, it should be noted that it results from that email that Intel considered that there was a commitment on the part of Acer not to launch the products concerned in the APAC region at that stage. Although it is true that it does not result from that email that such a commitment had been requested by Intel, Intel's request to that effect results none the less from the emails cited in paragraphs 1237 and 1240 above. It should be noted that those emails constitute very reliable evidence that Intel had requested Acer to postpone the launch of Athlon 64 CPU-based notebooks in the Asia Pacific region. They constitute communications between Acer and Intel and it is not plausible that Acer would have mentioned, in its emails to Intel, a request from Intel to postpone the launch if Intel had made no such request. In any event, Intel, as the addressee of those emails, could have disputed their content had they not reproduced accurately the content of those discussions.

1245 On 3 September 2003, Mr 114 of Intel wrote an internal email entitled 'Thoughts on [Fourth Quarter] Strategy, please comment!' As pointed out by the Commission in recital 425 of the contested decision, Mr 114 wrote: 'Name of our [Fourth Quarter] Strategy — Scale Down of ECAP (similar tone to their response on K8 to us) 1. Reduce the ECAP dollar to between [USD] 5 [million]~[USD] 6 [million] (around half) 2. Reduce the [worldwide] MDF by half too 3. Reduction in the CPU/Chipset samples support ... If we still continue to offer the [fourth quarter] ECAP (as it is today), Acer will think Intel is "chicken", despite they will launch K8 this month ... Acer is saying one thing in front of our management to enjoy [dollars], benefits, support yet doing another thing at the back so we will punish them' and 'Like what we concluded yesterday, ECAP to Acer is like sniffing drugs that they can't withstand without it in the long term basis'.

1246 In recital 426 of the contested decision, the Commission stated that, just two days after the date of the email referred to in the preceding paragraph, Acer agreed to comply with Intel's requests, even going beyond what it had undertaken on 26 August 2003.

1247 Acer decided to postpone the launch of Athlon 64 CPU-based notebooks in all regions, including in Europe. Accordingly, by internal mail of 5 September 2003, Mr 110 of Intel announced the following:

'All, a thrilled good news just came from Acer [*confidential*] [Mr A1] that Acer decides to drop AMD K8 throughout 2003 around the world. We've been talking with them all the way up to [Mr 115's] level recently including [Mr 112], [Mr 113] and [*confidential*] [probably Mr 115] through [face-to-face] or con call to understand their [business] plan and their ideas of launching AMD K8 product when industry ecosystem is not ready for 64bit CPU. They keep pushing back until today, after the call with [*confidential*] this morning, Acer [*confidential*] [Mr A1] just confirmed that they decide to drop AMD K8 throughout 2003 around the world. Acer [*confidential*] [Mr A2] has got this direction from [Mr A3] as well and will follow through in [the] EMEA [region] ...'

1248 In so far as concerns the internal Intel email cited in paragraph 1245 above, the applicant submits that it reflects the 'thoughts' of a lower-level Intel employee shared with more senior Intel employees and that there is no evidence that the 'thoughts' in question were ever communicated to Acer or implemented, or even that they were ever taken seriously by anyone at Intel.

1249 In that regard, the Court points out that it is true that that internal email does not indicate, in itself, what action was taken as a result, and in particular what Intel subsequently communicated to Acer. However, it is apparent from that email that, in the perception of its author, if the launch by Acer of an Athlon 64 CPU-based computer did not lead to a reduction in rebates, Acer would no longer take Intel seriously or, to use the wording of that email, would think Intel is 'chicken'. That constitutes an indication that Intel had communicated to Acer that the level of future rebates was contingent upon the postponement of the launch. If such communication had not occurred, it would have been unnecessary for the author of that email to worry about whether Acer would no longer take Intel seriously if the launch of the computer did not lead to a reduction in rebates.

1250 Moreover, it is apparent from the sentence 'Acer is saying one thing in front of our management to enjoy [dollars], benefits, support yet doing another thing at the back' that, the perception of the author of the email in question was that Acer informed Intel that it would postpone the launch of an Athlon 64 CPU-based computer in order to receive payments or rebates.

1251 That is in line with Acer's perception, as it appears in the email of Mr A1, of Acer, of 26 August 2003, cited in paragraph 1240 above. Acer informed Intel that it would postpone the launch of Athlon 64 CPU-based products in the APAC region and considered itself able to obtain in exchange rebates at least as high as those obtained in the previous quarters.

1252 Those two items of evidence taken together, namely the email showing the perception of the Intel employee and the email showing Acer's perception, enable the conclusion to be reached that Intel communicated to Acer, irrespective of how it did so, that the level of future rebates was contingent upon the postponement of the launch of Athlon 64 CPU-based computers. It is true that the Commission does not have direct evidence of such communication. The Court points out, in that regard, that such communication must not necessarily be explicit. It would have sufficed for Intel to have made it clear to Acer implicitly that future rebates or payments would be at risk if Acer did not postpone the launch of the products concerned.

1253 The mere fact that the way in which that communication took place is not set out in the contested decision does not prevent the shared perception of Acer and Intel, that the level of future rebates was contingent upon the postponement of the launch of Athlon 64 CPU-based computers, from enabling the conclusion to be reached that some form of communication — whether explicit or implicit — must have taken place.

1254 In so far as concerns the applicant's argument that Mr I14, the author of the email cited in paragraph 1245 above, is a lower-level Intel employee, the Court points out that Mr I14 addressed that email to his superiors requesting their comments and that Intel does not specify the reaction of the addressees of that email. Intel merely states that 'there is no evidence' that that email was taken seriously.

1255 In addition, Intel does not explain how Mr I14 was able to perceive that Acer had indicated that it would postpone the launch of Athlon 64 CPU-based computers 'to enjoy [dollars], benefits, support', nor why he considered that Acer would no longer take Intel seriously if the launch of such computers did not lead to a reduction in rebates if, in reality, there was no relationship between the postponement of the launch of those computers and Intel payments. Moreover, it results from that email that Mr I14 was also involved in the discussions of his superiors regarding Acer. Accordingly, Mr I14 also wrote: 'Like what we concluded yesterday, ECAP to Acer is like sniffing drugs.' That extract shows that Mr I14 was aware of the discussions between Intel and Acer, with the result that it cannot be considered that he wrote the email of 3 September 2003 without knowledge of the relevant facts. Furthermore, it is apparent from that extract that, during the discussion which took place between Mr I14 and his superiors, they noted that Acer was dependent on ECAP rebates. That indicates that the relationship between the launch of an Athlon 64 CPU-based computer by Acer and ECAP rebates had already been raised in the discussion which took place between Mr I14 and his superiors. In any event, since the email was written after a discussion which Mr I14 had had with his superiors, the applicant cannot call into question the probative value of that email by submitting that 'there is no evidence' that the email was taken seriously by anyone at Intel. It results from the foregoing that the probative value of the email of 3 September 2003 is not called into question by the fact that its author was a lower-level employee.

1256 It should be noted, however, that the Acer email of 26 August 2003, cited in paragraph 1240 above, did not concern the postponement of the launch of Athlon 64 CPU-based computers in Europe. It was not until 5 September 2003 that Acer informed Intel that it would not launch Athlon 64 CPU-based notebooks in 2003 in any region of the world, including the EMEA region.

1257 It is apparent from the internal email of Mr I10 of Intel of 5 September 2003, cited in paragraph 1247 above, that Acer's communication to Intel was made after the intervention of Intel's high-level executives. It is true that, in the contested decision, the Commission did not provide direct evidence regarding the content of the discussions between those Intel executives and Acer. That is not surprising, however, since it results from that email that it concerned discussions which took place at meetings in person or during conference calls.

1258 In so far as concerns the content of the discussions, it is stated in that email that the meetings in person and the conference calls were aimed at 'understand[ing] [Acer's business] plan and their ideas of launching AMD K8 product when [the] industry ecosystem [was] not ready for 64bit CPU'. In that regard, the Court points out that it is not very plausible that high-level Intel executives intervened solely so as to understand the business plan of a customer and why that customer wished to launch a competitor's product, even though the industry ecosystem was not ready for the technology concerned. When the industry ecosystem is not ready for a given model, either that model will sell badly or customers will be dissatisfied. It is not clear why Intel should have been worried about computers equipped with a competitor's CPU selling badly or dissatisfying customers. Moreover, it results from the next sentence of that email that Intel did not limit itself to attempting to understand Acer's business plan. According to that sentence, '[t]hey [kept] pushing back until today, [but] after the

call with [confidential] this morning, Acer [confidential] [Mr A1] just confirmed that they [have decided] to drop AMD K8 throughout 2003 around the world'. The fact that Acer initially 'kept pushing back' means that there was a request from Intel to that effect, irrespective of whether that request was made explicitly or implicitly.

1259 When questioned on that point at the hearing, the applicant stated that the expression 'pushing back', used in the email cited in the previous paragraph, could refer to pushing back the conference call. However, that interpretation is not convincing. It results from the preceding sentence of the email that meetings and conference calls had taken place prior to the telephone call of 5 September 2003. It would thus make no sense for the author of that email to claim that Acer continued to push back the conference call 'until today'. In the light of the context of the email, the only plausible interpretation of the expression 'pushing back' is that Acer resisted a request from Intel before eventually confirming that it had decided not to launch an Athlon 64 CPU-based computer around the world in 2003.

1260 Moreover, the Commission relies, in recitals 427, 428 and 433 of the contested decision, on several internal AMD emails as evidence. In those emails, Mr C2 of AMD described the content of discussion in which he participated with Acer executives.

1261 In an email of 9 September 2003 addressed to AMD's [confidential], Mr C2 stated the following:

'[Mr A1] indicated to me that Acer participation was compromised by the extremely specific request from Intel to avoid any public support to AMD64 and Athlon 64 [CPU]. He volunteered to tell me that this [was] the first time he ha[d] ever seen [Mr I5] PERSONALLY intervene in such a matter ... The threat to Acer was described to me as not completely defined yet but could be as drastic as 100% suppression of their Intel marketing funds. [Mr A1] indicated that with 85% of their business coming from Intel, the damage to Acer would be significant. Thus, although he reassured me of his commitment to the relationship, and the long term success of AMD64, he told me that Acer is reviewing what compromise they can reach to still support us yet satisfy Intel's ultimatum. He indicated that there were several alternatives Acer was contemplating: delaying the official launch until next year ...'

1262 As regards AMD's internal emails, the applicant rightly points out that Mr C2 of AMD, who sent those emails, had no direct knowledge of the content of the discussions between Intel and Acer.

1263 In the email cited in paragraph 1261 above, Mr C2 summarised the content of a conversation which he had had with Mr A1 of Acer, during which Mr A1 pointed out to him that there was an 'extremely specific' request from Intel to avoid any public support for the Athlon 64 CPU and that Intel's threat was not clearly defined yet but could be as drastic as 100% suppression of marketing funds.

1264 The Court notes that the intrinsic probative value of such evidence is quite limited. Possible incorrect information which Mr A1 could have given to Mr C2 is not punishable by a fine. Moreover, that evidence is an email which Mr C2 sent to AMD's [confidential] after AMD had lodged the complaint against Intel with the Commission. Thus, it appears that it was an email aimed at being used in the context of AMD's complaint against Intel.

1265 However, such an email cannot be regarded as being devoid of any probative value. In spite of its inherently limited probative value, it may constitute evidence which may be used as part of a body of evidence.

1266 In the present case, the Commission presented, inter alia, first, an email of 26 August 2003 from which it results that, in Acer's view, there was a link between the postponement of the launch of Athlon 64 CPU-based computers and the grant of future payments or rebates (see paragraphs 1240 and 1241 above). Second, it presented an internal Intel email of 3 September 2003 which shows that an Intel employee proposed to its hierarchy that Acer be 'punished' for the launch of an Athlon 64 CPU-based computer by reducing the rebates and payments. It is also apparent from that email that the perception of the author of the email was that Acer had promised to postpone that launch in order to receive rebates or payments and that Acer would no longer take Intel seriously if the launch of an Athlon 64 CPU-based computer did not lead to a reduction in rebates (see paragraphs 1249 and 1250 above). Third, the Commission presented an internal Intel email of 5 September 2003 which shows that, following discussions involving high-level Intel executives, Acer decided, after resisting initially, to postpone the launch of the Athlon 64 CPU-based computer in all regions of the world. Fourth, the Commission relied on an internal AMD email of 9 September 2003, pursuant to which Mr A1 of Acer informed Mr C2 of AMD that Intel had threatened Acer with a reduction in, or suppression of, rebates.

1267 Those items of evidence complement one another. In that respect, the Court points out that it is apparent from the case-law that it is sufficient if the body of evidence relied on by the institution, viewed as a whole, provides evidence of the infringement (see paragraph 64 above).



1268 Although it is true that part of the evidence concerns only a postponement of the launch of Athlon 64 CPU-based computers in the APAC region, it is necessary to view the commitment which was ultimately undertaken by Acer to postpone the launch of Athlon 64 CPU-based computers in all regions of the world in the light of the initial discussions which concerned a postponement in the APAC region, and from which it results that there was a link between Acer's commitment regarding that postponement and Intel rebates.

1269 It was during the discussions which took place because Intel considered that Acer was not fulfilling its initial commitment that Acer committed to postponing the launch worldwide. There is thus a close link between Acer's successive commitments. The evidence which shows a link between Acer's initial commitment to postpone the launch in the APAC region and the level of future rebates to be granted by Intel thus also has probative value in relation to the subsequent commitment to postpone the launch of Athlon 64 CPU-based computers worldwide. Moreover, that would make no sense if only the commitment relating to the postponement of the launch of Athlon 64 CPU-based computers in the APAC region, and not that concerning such a postponement in other regions of the world, were linked to future rebates.

1270 Finally, the Commission relied, in recital 429 of the contested decision, on a statement of Mr A2, [confidential], of 19 July 2005, made pursuant to Article 19 of Regulation No 1/2003 and in which he stated that:

'Acer agreed to postpone [the launch of an Athlon 64 CPU-based notebook] to January 2004 mainly because of Intel's request.'

1271 That statement is also evidence which corroborates the existence of a request from Intel to Acer to postpone the launch of that Athlon 64 CPU-based computer. Moreover, that statement suggests that there was a causal link between Intel's request and Acer's decision.

1272 It results from the foregoing that the evidence presented in the contested decision, taken as a whole, is sufficient to prove, first, that Intel communicated to Acer that it was requesting it to postpone the launch of an Athlon 64 CPU-based notebook and, second, that Intel made it clear to Acer that the level of future rebates was contingent upon that postponement.

b) The other arguments raised by the applicant

1) The arguments based on Acer's statement

1273 The applicant submits that, in Acer's response of 9 February 2006 to a request for information from the Commission pursuant to Article 18 of Regulation No 1/2003 ('Acer's Article 18 response'), Acer stated that 'no specific demand to delay the launch was ever made by Intel'.

1274 As rightly pointed out by the Commission, that sentence was quoted out of context. In response to question 43 put by the Commission to Acer, inviting it to indicate whether there were reasons other than technical problems which pushed it to postpone the launch of the CPU Athlon 64, Acer stated the following in its Article 18 response:

'The minor initial technical problems experienced regarding the Athlon 64 [CPU] could be fixed rather quickly and were only a minor factor contributing to the delay. More importantly, at the end of 2003, Acer was also in negotiations for several million USD of ecap funding with Intel for the next quarter. At that time, Acer's economic position was such that this ecap funding could have made the difference between nearly breaking even or showing a profit for Acer's computer sales operations. Intel had made it quite clear that the participation in the ecap program was not a right but a privilege to be renewed at Intel's discretion in any given quarter. Acer had already observed previously that Intel never put forth specific demands as to any specific business objectives Intel sought in a particular round of negotiations; in particular, no specific demand to delay the launch was ever made by Intel. Rather, it was Acer's perception that Intel was waiting for Acer to "voluntarily" offer certain conduct or commitments and once Acer had spoken the "magic words", Intel was quick to commit to the ecap funding under discussion. In this case, Intel had failed to respond to repeated advances by Acer regarding the ecap funding for the next quarter, and initially, Acer was at a loss to understand this behavior. Only (and there is no recollection as to why this came to Acer's mind), when Acer offered to postpone the launch of the AMD Athlon 64 [CPU] voluntarily, Intel began to respond to Acer's ecap requests, and the matter was settled rather quickly ...'

1275 That statement confirms, in reality, the conditionality of rebates granted by Intel in the sense that Intel made it clear to Acer that the level of future rebates was contingent upon the postponement of the launch. In that regard, it is of little importance whether Intel made an explicit threat to reduce rebates if Acer proceeded with the launch of Athlon 64 CPU-based notebooks or whether Intel made it clear to Acer in a more subtle manner that the ECAP rebates would be at risk if Acer did not comply with Intel's request. The fact that, according to Acer, 'no specific demand to delay the launch was ever made by Intel' does not preclude the fact that it results from the evidence cited in the contested

decision that Acer had understood that Intel's communications in that regard, even if formulated indirectly, corresponded in reality to a request on the part of Intel. In the emails sent to Intel and cited in paragraphs 1237 and 1240 above, Acer's main negotiator with Intel referred to a 'request' from Intel.

1276 The applicant's argument that the negotiations regarding the ECAP rebates at issue were not unusually delayed will be examined in paragraphs 1317 to 1331 below.

1277 At the hearing, the applicant also submitted that, in recital 450 of the contested decision, the Commission stated that 'Acer's understanding was that if it did not [delay the launch], the previously agreed ECAP funding would be decreased'. According to the applicant, that wording assumes a pre-existing agreement on ECAPs and a refusal to pay rebates due under the agreement. Acer's submission of 28 April 2006 refutes the existence of a refusal to pay rebates due under a pre-existing agreement on ECAP rebates.

1278 The Court points out, however, that the wording used in recital 450 of the contested decision does not assume a refusal to pay rebates due under a pre-existing agreement. Such wording can also be taken as a reference to the fact that future ECAP rebates to be granted by Intel will be lower than those granted for the previous quarters. Acer's submission thus does not contradict the finding made by the Commission in recital 450 of the contested decision.

1279 At the hearing, the applicant also submitted that Acer had stated that there was no arrangement with Intel not to launch an AMD product.

1280 In that regard, it should be pointed out that, in its Article 18 response, Acer stated, in response to question 22, that there was no arrangement with Intel in place 'which preclude[d] the use of AMD [CPUs] in the Americas and [APAC] regions and [which] is worth millions of dollars'. It is also true that, in its Article 18 response, Acer stated that it had not agreed to use Intel as its exclusive supplier.

1281 However, the Commission did not rely, in the contested decision, on the existence of an exclusivity agreement concluded between Intel and Acer which precluded Acer from using AMD CPUs in general. The fact that Acer denied the existence of an exclusivity agreement does not call into question the fact that it results from the answer given to question 43 of its Article 18 response, cited in paragraph 1274 above, that Acer had understood that the level of future rebates was contingent upon the postponement of the launch of a computer equipped with a specific CPU, namely the Athlon 64 CPU. The grant by Intel of rebates contingent upon such a postponement does not fall within the definition of an agreement between Intel and Acer which precludes the use (in a general manner) of AMD CPUs.

1282 It results from all of the foregoing that the applicant cannot usefully rely on Acer's Article 18 response as exculpatory evidence.

## 2) The arguments based on Mr A1's witness statement

1283 In the application, the applicant relies to a large extent on a sworn witness statement made by Mr A1 of Acer on 12 June 2009 during the proceedings before the Delaware court which, in the applicant's view, shows that the internal emails of Mr C2 of AMD are unreliable, and contradicts a number of findings in the contested decision.

1284 The Commission contends that that evidence is inadmissible, since it postdates the contested decision. In any event, that deposition would not be such as to call into question the conclusions reached in that decision.

1285 In the present case, it is not necessary to adjudicate on whether witness statements made after the adoption of a decision finding the existence of an infringement of the competition rules and imposing a fine on the addressee thereof may be taken into consideration as exculpatory evidence in an action for annulment of that decision. It must be stated that the witness statement on which the applicant relies is not, in any event, capable of calling into question the conclusions reached in the contested decision, as will be explained below.

1286 The applicant argues, first of all, that it results from Mr A1's witness statement that the internal emails of Mr C2 of AMD are not reliable.

1287 The applicant submits that Mr A1 of Acer, when shown the email cited in paragraph 1261 above, responded that 'the story [Mr C2] wrote here is not exactly ... the story'. What Mr A1 actually told Mr C2 is that there were many reasons for Acer's decision to postpone the launch of Athlon 64 CPU-based computers and that a concern that Acer might lose rebates was just one of the reasons mentioned by Mr A1.

1288 According to the applicant, Mr A1's witness statement shows, moreover, that Mr C2 also failed to report accurately even the one reason for Acer's postponement that he mentioned in his email. Mr A1

stated that he did not say that Acer was concerned about losing '100%' of its marketing funds, contrary to what Mr C2 asserted.

1289 In that regard, the Court points out that Mr A1's witness statement does not really contradict the essence of Mr C2's report. It is true that Mr C2 failed to mention the other reasons which Mr A1 had given, according to his witness statement, for the postponement of the launch of Athlon 64 CPU-based computers; however, that fact shows at best that Mr C2 failed to provide an exhaustive account of all of the reasons of which Mr A1 may have informed him. It should be noted that Mr A1 explicitly confirmed that he had also mentioned Intel marketing funds. The Court points out that the fact that Acer may have had other grounds for postponing the launch of Athlon 64 CPU-based computers has no bearing on the unlawful nature of the grant of payments which are contingent upon that postponement (see paragraph 1102 above).

1290 Moreover, Mr A1 did not state that he did not say that he was concerned about losing 100% of Intel's marketing funds. He merely said that he did not recall whether he had mentioned the figure 100%. He in fact stated the following:

'I don't remember that's [sic] mentioned about 100 percent. I did mention about worry about losing the marketing support, yes.'

1291 The applicant also submits that Mr A1 also stated that, contrary to what Mr C2 alleged, Mr I5 did not request Acer to postpone the launch of its computer equipped with an AMD CPU. He in fact stated the following:

'I explained to him that we have to consider for our own business decision for that, that is basically what we talk about, yeah, instead of putting here, say, Mr [I5] asked to request to hold or stop something.'

1292 In that regard, the Commission rightly points out that Mr C2 stated only that Mr A1 told him that it was the first time that he had seen Mr I5 intervene personally in such a matter, which does not necessarily mean that Mr I5 was the person who formulated the request that the launch be postponed. Moreover, Mr A1 chose his words very carefully in stating that, to his memory, in a specific meeting, nobody made such a 'request ... in a format of requesting'. That wording rules out that a request was made explicitly at that meeting, but not that one may have been made implicitly.

1293 It results from Mr A1's witness statement that, at that meeting, the launch of the Athlon 64 CPU was discussed and that Intel noted that the industry infrastructure was not yet ready. It should also be pointed out that, just before the passage cited in paragraph 1291 above, Mr A1 stated that, at the time of the discussion with Mr I5, Acer had not yet had confirmation of Intel's marketing funds for the following quarter. In that context, Mr A1 stated: 'And I also mention[ed] about that ... during the meeting with the — with [Mr I5] we expect we can close the — the marketing dollar discussion but no discussion or no conclusion on that, no discussion, it — it was the — the situation'.

1294 According to Mr A1's statement, Acer thus sought to discuss marketing funds for the following quarter and to reach a conclusion on them at that meeting. If, in such a situation, Mr I5, instead of discussing those funds, discussed the launch by Acer of an Athlon 64 CPU-based computer and stated that the industry infrastructure was not yet ready, that could suffice to transmit the message that Intel was requesting it to postpone the launch and that there was a link between the level of future rebates and the postponement of the launch. In that context, the Court points out that, at that point in time, Acer had already understood that Intel had requested it to postpone the launch, as is apparent from Acer's emails to Intel cited in paragraphs 1237 and 1240 above. If, in such a situation, Intel's [confidential] intervened personally, that in itself could have sufficed to make Acer understand the importance which Intel attributed to that subject, even if the [confidential] did not make an express request to postpone the launch of the product, but merely explained that the industry was not yet ready for such a product.

1295 It must thus be concluded that the probative value of Mr C2's email of 9 September 2003 is not weakened by Mr A1's witness statement, but that is without prejudice to the limited probative value of such an email, as pointed out in paragraphs 1262 to 1264 above.

1296 Second, the applicant points out that Mr A1 testified, when questioned by the lawyer representing AMD regarding his discussions with Intel about the launch by Acer of models equipped with Athlon 64 CPUs, as follows: '[I]t was not requesting, it's always suggesting. We have better technologies, that's the — the — we can offer that's better technology products, and the 64-bit that's not ready ...' According to Intel, that witness statement is wholly incompatible with the Commission's conclusion that Intel 'indicated to Acer' that its rebates would be reduced if it did not postpone the launch. Moreover, the applicant submits that it is apparent from Mr A1's witness statement that no threats were ever communicated by Intel to Acer and that no one from Intel ever said to him that Acer would lose marketing funds if it launched a computer equipped with an AMD CPU.

1297 In that regard, the Court points out that Mr A1 actually stated that Intel did not expressly demand that Acer postpone the launch of an Athlon 64 CPU-based computer. However, it results clearly from his witness statement that he had understood that the level of future rebates was contingent upon Acer's compliance with the 'suggestions' made by Intel. As pointed out by the Commission, Mr A1 confirmed that he 'personally had [the] concern' that Acer could lose its marketing funds from Intel if it launched the planned products equipped with AMD CPUs.

1298 Furthermore, it should be noted that Mr A1 wrote the two emails cited in paragraphs 1237 and 1240 above, in which he mentioned a request from Intel. It would have made no sense for Mr A1 to mention an Intel request in an email sent to the latter if he had not understood that Intel's communications amounted to a request to postpone the launch of an Athlon 64 CPU-based computer. It results from Mr A1's witness statement that he was questioned in relation to an email, apparently the one cited in paragraph 1240 above, in which he stated: 'I am sure Intel could perceive Acer's sincerity to respond to Intel's request, and let's quickly conclude [fourth quarter] business plan'. Mr A1 stated the following in response to a question regarding that email: 'Again, the request is not a — a request for not the shipping. I explain, that's, that's — there is a summary of demo-ing their technology superiority. And that's the — the why you need to do it, say we can support you better. So I put this as a — but because of delaying of the marketing dollars approval, so I put as a request, as a shorthand here, yeah'.

1299 Mr A1 thus confirmed that, in the end, Intel's communications were 'shorthand', to use Mr A1's term, for a request, even though such a request was not made explicitly. Moreover, it must be found that Mr A1 did not state that the use of the term 'request' in his email was inaccurate. It also results from that statement that Mr A1 had understood that there was of a link between the delay in approving Intel's marketing funds for the following quarter and the planned launch of an Athlon 64 CPU-based computer.

1300 Furthermore, Mr A1 responded, 'That is our perception, yeah' to the following question: 'In — in other words, no one from Intel had said to you, in precise words, if you launch a K8 you're not going to get marketing dollars, right? But — but your perception was that if you went ahead and launched the K8 you were going to lose them; is that what you're telling us?'

1301 Mr A1 thus confirmed that there was no explicit threat made by Intel to stop future payments of marketing funds if Acer launched an Athlon 64 CPU-based computer. By contrast, it is apparent from his witness statement that he had understood that Acer would lose marketing funds if it proceeded with the planned launch.

1302 His witness statement could thus, at best, show that Intel did not indicate expressly to Acer that its rebates would be reduced if it did not postpone the launch. However, that witness statement cannot demonstrate the absence of an implicit indication.

1303 In that regard, the Court points out that it is not necessary that a threat to reduce rebates be made expressly, but that it is sufficient that the undertaking in a dominant position makes it clear to its customer that the level of future rebates is contingent upon the postponement of the launch of the computer at issue. That alone is sufficient to provide a customer with an incentive which is not based on competition by merit to postpone the launch of a product incorporating a competitor's CPU.

1304 It results from all of the foregoing that, in reality, contrary to what the applicant submits, Mr A1's witness statement, taken as a whole, does not constitute exculpatory evidence.

3) The argument that it results from Mr A2's statement that postponement of the launch was not linked to payments

1305 The applicant also submits that it results from Mr A2's statement under Article 19 of Regulation No 1/2003, which was cited in part in the contested decision (see paragraph 1270 above), that the postponement of the launch was not linked to Intel payments.

1306 The Court points out that Mr A2's statement is not clear in that respect. It is true that Mr A2 stated that '[t]here was no fund involved in exchange of postponing the launch'.

1307 However, Mr A2 also stated the following in response to another question:

'I think it was more a situation where Intel asked Acer a "favor" and promised some additional support for growth.'

1308 As pointed out by the Commission, those two assertions appear to be contradictory in so far as concerns the question whether the postponement was linked to Intel payments.

1309 The Court points out that it is possible that Mr A2 intended to say, in stating that '[t]here was no fund involved in exchange of postponing the launch', that there was not explicit communication from Intel that a certain rebate or sum of money would be paid directly 'in exchange' for a postponement of

the launch. However, it results from the quote in paragraph 1307 above that it was Mr A2's perception that there was a link between the 'favour' which Intel requested of Acer and future rebates or payments promised by Intel.

1310 In any event, Mr A2's statement cannot serve either to show that the postponement of the launch was linked to Intel payments, or that such was not the case, since that statement is unclear in relation to that issue.

#### 4) The arguments based on the statements of two Acer executives

1311 The applicant relies on statements made on 3 January 2008 by Mr A4, who at that time was Acer's [*confidential*], and by Mr A3, who succeeded the latter, regarding the outcome of a meeting of 25 August 2003 between Acer's senior management and Mr I5 of Intel. It results from those statements that 'neither [Mr I5] nor anyone else from Intel requested explicitly that Acer cancel or postpone its launch of AMD's Athlon 64 products'. Moreover, Mr A4 and Mr A3 also both denied that Mr I5 or any other Intel employee at the meeting made any threats or offered any financial inducements to coerce Acer into delaying its launch of Athlon 64 CPU-based computers.

1312 In that respect, the Commission rightly stated, in recital 440 of the contested decision, that the circumstances under which those statements were obtained are unclear and the legal context surrounding the way in which they were obtained was unknown, with the result that it was impossible to know the legal consequences which possible false information in those statements might have had. Therefore, those statements have limited probative value.

1313 Furthermore, in the statement referred to by the applicant, Mr A4 merely stated that nobody at Intel requested 'explicitly' that Acer cancel or postpone the launch of its products equipped with an Athlon 64 CPU. Such a statement does not rule out the possibility that a request was made implicitly.

1314 It is true that the two Acer executives stated that 'no specific topic on penalty or incentive for delaying and/or cancelling [the] launch of [the] Athlon 64-bit [CPU] was discussed'. However, the fact that no 'specific topic' on penalties or incentives was discussed at that meeting does not necessarily rule out that Intel was able to make it clear to Acer in a more subtle manner that the level of future rebates was contingent upon the postponement of the launch of the computer at issue (see paragraph 1294 above).

1315 In any event, the Court points out that those statements cover only the content of a single meeting which took place on 25 August 2003 (see, to that effect, recitals 438 and 439 of the contested decision). They are thus not capable of calling into question the evidence on which the Commission relied in the contested decision and from which it results that Intel requested that the launch of Athlon 64 CPU-based notebooks be postponed and that Intel made it clear to Acer that the level of future rebates was contingent upon that postponement (see paragraphs 1235 to 1272 above). The findings made in the contested decision are not dependent on what was said by Mr I5 or by other Intel executives at the meeting of 25 August 2003.

1316 Contrary to what the applicant asserts, it does not result from the contested decision that the meeting of 25 August 2003 was a 'key meeting'. It is true that the Commission emphasises in recital 427 of the contested decision that Mr I5 intervened personally. In that regard, it should be noted that the fact that Intel's [*confidential*] intervened personally was such as to make Acer understand the importance which Intel accorded to the issue raised (see paragraph 1294 above), even if Mr I5 did not explicitly make any requests or threats. The two statements at issue confirm that, at that meeting, Mr I5 expressed doubts as to whether the industry was ready for 64-bit technology. Even if Mr I5 limited himself, at that meeting, to making such statements, those statements must be considered in the light of the fact that, by that stage, Acer had already understood that Intel was requesting it to postpone the launch of the product concerned (see paragraph 1294 above).

#### 5) The argument that the negotiations concerning the ECAP rebates were not unusually delayed

1317 The applicant also submits that it results from Mr A3's statement of 3 January 2008 and documentary evidence that the rebate negotiations at issue were not unusually delayed.

1318 In that regard, the Court points out, first of all, that the delay in confirming the ECAP rebates was referred to in both Acer's Article 18 response, cited in paragraph 1274 above, and in Mr A1's witness statement made on 12 June 2009 during the proceedings before the Delaware court. In the contested decision, the Commission did not rely on that passage of Acer's Article 18 response and it was not able to rely on Mr A1's witness statement, which was given after the contested decision. It follows that the Commission did not rely on that evidence as incriminating evidence.

1319 The applicant, for its part, relied on evidence taken, first, from the passage cited in paragraph 1274 above of Acer's Article 18 response and, second, on Mr A1's witness statement, as exculpatory evidence (see paragraphs 1273 and 1283 above). In order to refute those arguments it is sufficient to

place the evidence relied on by the applicant in its context and to consider, as a whole, both the response to question 43 of Acer's Article 18 response and Mr A1's witness statement. It must be found that, in reality, Acer's response to question 43 and Mr A1's witness statement confirm that there was an abuse, since they confirm that Acer understood that the level of future rebates was contingent upon postponement of the launch.

1320 In any event, Acer's statements and those of Mr A1, according to which there was a delay in the confirmation of the ECAP rebates, are not refuted by the evidence relied on by the applicant.

1321 In so far as concerns the document which was produced in Annex A.205 to the application, the Court points out the following. The applicant provided two versions of a document entitled '[Fourth Quarter] 2003 Acer Engagement Plan' dated 8 and 19 September 2003 respectively, and dated documents entitled 'Acer Meet-Comp Response' for various quarters. The Court points out that the applicant stated, in point 181 of the reply, that it results from those documents that the approval of the rebates for the fourth quarter of 2003 occurred within the normal time-frame for such approvals, but without providing a detailed explanation concerning the documents produced in Annex A.205. It results, however, from point 436 of the applicant's response to the Statement of Objections of 2007 that the date 8 September 2003 corresponds to the date on which Intel made its first offer of ECAP rebates and that the date 19 September 2003 corresponds to the date of the definitive agreement between Intel and Acer. Moreover, it is apparent from points 436 and 437 of the response to the Statement of Objections of 2007 that the dates mentioned on the various documents entitled 'Meet-Comp Response' correspond, in one case, to the date on which Intel made its first offer of ECAP rebates and, in the other cases, to the dates on which the final agreement was concluded between Intel and Acer for the following quarter.

1322 The documents produced in Annex A.205 to the application could thus, at the most, show, for two quarters, the dates on which Intel made its first offer of ECAP rebates and, for other quarters, the dates on which the final agreement between Intel and Acer was concluded and, finally, that the dates 8 and 19 September 2003 were not unusually late.

1323 However, that does not rule out the fact that, initially, Intel did not respond to Acer's requests, as has been pointed out in the passage of Acer's Article 18 response cited in paragraph 1274 above. The fact that Intel made its first rebate proposal on 8 September 2003 is wholly compatible with Acer's statement that, once Acer had announced that it would postpone the launch of Athlon 64 CPU-based computers, Intel began to respond to Acer's requests regarding ECAP rebates for the following quarter and pursuant to which the matter was then settled rather quickly. Since Acer communicated its decision to Intel on 5 September 2003 (see paragraph 1256 above), Intel's offer, which was made three days later, is perfectly in line with what Acer stated about how the negotiations unfolded.

1324 In order to refute Acer's Article 18 response, which constitutes reliable evidence, and to show that negotiations unfolded in a normal manner, Intel would have had to state not only the dates on which it made its first offer or on which the parties agreed on rebates, but also the dates on which it was contacted for the first time by Acer during the quarters in question and, where necessary, the dates on which Acer inquired as to the current state of affairs. Only those dates would have enabled it to be established whether Intel reacted within a normal time-frame to Acer's requests.

1325 In so far as concerns Mr A3's statement, the Court points out that that statement is not very precise, since he merely states that '[he did] not believe that the [fourth quarter of] 2003 and/or [the first quarter of] 2004 quarterly meet-comp agreement negotiations between Acer and Intel were unusually delayed'. He does not indicate what knowledge he had of those negotiations and the facts on which that assertion is based. Acer's chief negotiator with Intel was Mr A1 who, moreover, confirmed in his witness statement before the Delaware court that Acer 'continue[d] not [to] receiv[e] the marketing dollars confirmed for [the] next quarter'.

1326 In any event, it should be pointed out that Mr A3's statement is of limited probative value (see paragraph 1312 above), and cannot call into question Acer's Article 18 response which, for its part, constitutes highly reliable evidence.

1327 At the hearing, the applicant added that Mr A2 had also stated, in the statement made under Article 19 of Regulation No 1/2003 (see paragraph 1270 above), that there had been no discussions out of the ordinary regarding rebates.

1328 In that regard, it should be pointed out that Mr A2 was asked whether Acer had received the Intel funds prior to the launch in the usual manner. That question thus concerned the payment of rebates and not the negotiations concerning the rebates for the following quarter. Mr A2 responded: 'Yes, our volume bonus quarter by quarter came more or less as usual. There are always discussions with Intel but nothing out of the ordinary at that time.' That response thus concerned the receipt of payments due from Intel and not the negotiations relating to rebates for the following quarter.

1329 The applicant also pointed out, at the hearing, that Mr A2 stated that, from his perspective, there was nothing strange regarding the MDFs and rebates.

1330 In that respect, the Court points out that Mr A2 was asked whether the recent launch of a series of AMD CPU-based notebooks had had any impact on the MDFs and rebates and that he responded that there was nothing strange from his perspective. However, the Commission did not find in the contested decision that rebates were reduced following the launch of computers equipped with AMD CPUs. Given that Acer had postponed the launch of Athlon 64 CPU-based computers, there was no reason for Intel to reduce rebates.

1331 It results from the foregoing that Mr A2's statement is also not capable of calling into question Acer's Article 18 response, pursuant to which there was a delay in the negotiations of the ECAP rebates for the following quarter.

#### 6) The argument that Intel's conduct forms part of normal competition

1332 The applicant also submits that its conduct forms part of normal competition. In that regard, Intel submits that Mr A2 pointed out in his statement under Article 19 of Regulation No 1/2003 that other Acer suppliers commonly requested it to postpone launching platforms with rivals' products. He also stated that such requests '[become] an issue' only 'if they try to blackmail you'. He did not place Intel's conduct in the 'blackmail' category, but in that of 'ordinary business behaviour'. According to the applicant, it is perfectly legitimate for any supplier to urge a customer to choose its products over a competitor's products; such requests are part of normal competition.

1333 In that regard, the Commission rightly points out that an undertaking in a dominant position has a special responsibility.

1334 It is true that it is legitimate for a supplier, even a dominant one, to try to convince a customer to choose its products rather than those of a competitor. However, the present case does not involve a mere proposal from Intel to Acer that the latter opt for Intel products over those of a competitor. The conduct at issue in the present case consisted in a request to Acer to postpone the launch of a product equipped with a specific CPU of a competitor and making it clear to Acer that the level of future rebates was contingent upon that postponement. As pointed out by the Commission, financial incentives granted by a dominant undertaking to prevent the commercialisation of competing products lie outside the scope of 'normal competition'.

1335 In so far as concerns the applicant's argument that Mr A2 did not place Intel's conduct in the 'blackmail' category but in that of ordinary business behaviour, suffice it to note that his opinion on competition law is of no relevance.

#### 7) Whether there were other reasons for the postponement of the launch

1336 The applicant submits that there were other reasons for the postponement of the launch of its Athlon 64 CPU-based notebook, in particular serious technical issues with the product design, concerns about whether the market was ready for the product and a worldwide shortage of that CPU.

1337 In that respect, the Commission rightly points out that it is of no importance whether other factors contributed to the postponement of the launch at issue. It was sufficient for the Commission to show that the applicant granted payments subject to the condition that Acer postpone the launch of an Athlon 64 CPU-based notebook. Possible grounds other than those payments, which could also have contributed to Acer's decision to postpone the launch of the product have no bearing on the unlawfulness of that practice.

1338 According to the applicant, the Commission's speculation that Acer was so fearful of losing rebates from Intel that it postponed the launch of an AMD CPU-based notebook for only four months is entirely inconsistent with the fact that Acer publicly announced — before the actual launch, when it purportedly was fearful of Intel — that it would introduce that notebook equipped with an AMD CPU within a few months.

1339 As the applicant has pointed out and as can be seen from Annex A.199 to the application, Acer publicly announced in September 2003 that it would launch Athlon 64 CPU-based computers in Europe in the first quarter of 2004 and gave the reason that there was a short supply of Athlon 64 CPUs available for the fourth quarter of 2003. The Court points out that that announcement was fully in line with the commitment which Acer had undertaken towards Intel, namely not to launch computers equipped with Athlon 64 CPUs in 2003. The fact that Acer feared losing rebates if it launched an Athlon 64 CPU-based notebook on the launch date initially scheduled is by no means incompatible with the fact that, after committing to postponing the launch, Acer publicly announced the launch for the new scheduled date.

1340 In so far as concerns the fact that Acer stated that the reason behind the postponement of the launch was a shortage of Athlon 64 CPUs, suffice it to note that it is natural for an undertaking not to announce publicly all of the reasons which led it to take a business decision.

#### 8) The duration of the postponement of the launch

1341 During the written procedure, the applicant submitted that the postponement was for only four months and that the Commission did not explain what Intel had to gain from such a trivial postponement.

1342 At the hearing, the applicant submitted that the duration of the postponement was actually less than four months. In that regard, it stated that Mr A2 submitted, in the declaration which he made under Article 19 of Regulation No 1/2003, that the launch was scheduled for October/November 2003 and that Acer started shipments at the end of December 2003. Acer confirmed the shipping date in its Article 18 response.

1343 When asked whether this line of argument constituted a new plea for the purposes of Article 48(2) of the Rules of Procedure, the applicant submitted that the plea which it raised was based on the fact that the postponement was only short and it sought merely to add accuracy to its argument that the duration of the postponement was very short and to 'add colour' to it. The Commission contended that it constituted a new plea which was inadmissible.

1344 In the present case, it is not necessary to give judgment on the admissibility of that argument, since it must be rejected in any event on its merits, as will be explained below.

#### 8.1) The scheduled date for the launch

1345 The Court points out that the Commission explicitly mentioned, in recital 417 of the contested decision, the fact that Mr A2 and Acer had submitted in a statement made under Article 19 of Regulation No 1/2003 and in Acer's Article 18 response, respectively, that the launch of the Acer notebook equipped with the Athlon 64 CPU was scheduled for October or November 2003. The Commission stated that it resulted, however, from contemporaneous documents that Acer had envisaged carrying out the launch on 23 September 2003, referring, in footnote 508 of the contested decision (footnote 501 of the public version thereof), to the documents cited in paragraphs 1240 and 1242 above.

1346 Those contemporaneous documents mention explicitly 23 September 2003 as the scheduled launch date for the computers at issue.

1347 It must be considered that Acer's email to Intel of 26 August 2003, cited in paragraph 1240 above, constitutes highly reliable evidence of the date of the scheduled launch, since it does not appear that Acer had any interest in communicating too early a date for the launch, especially in the light of the fact that the launch of Athlon 64 CPU-based computers was a delicate issue, which had already been the subject of discussions between Intel and Acer (see paragraphs 1236 to 1239 above). The wording 'Intel shows tremendous concerns on Acer's move on K8 launch on [23 September 2003]' shows that it was a date which had also been discussed earlier by Acer and Intel. Intel's internal email of 27 August 2003, cited in paragraph 1242 above, confirms that Intel considered that date to be correct.

1348 It should also be pointed out that, in spite of the inherent reliability of a statement of an undertaking made under Article 18 of Regulation No 1/2003, it is possible that contemporaneous documents are more reliable, in terms of determining a precise date, than a statement made several years after that date. Moreover, in the present case, the statements of Acer and Mr A2 are less precise than the contemporaneous documents in that they do not specify any exact date, but merely provide a period, namely October and November 2003.

1349 At the hearing, the applicant merely relied on Mr A2's and Acer's statements. It did not take a position on the fact that the contemporaneous documents cited by the Commission indicate the date of 23 September 2003 as the scheduled launch date and thus did not present any arguments as to why those documents may have provided an incorrect date.

1350 Furthermore, the applicant itself stated, in paragraph 173 of the reply, that the postponement was for only four months. Given that the Commission explicitly stated, in recital 417 of the contested decision, that Mr A2 and Acer had indicated that the launch was scheduled for October or November 2003, but that it relied on the date resulting from the contemporaneous documents, that fact was evident for Intel from the written stage of the proceedings. None the less, the applicant implicitly accepted the scheduled launch date relied on by the Commission in stating that the postponement 'was for only four months'.

1351 Irrespective of the question whether the argument raised by the applicant at the hearing is admissible, the applicant should have adopted a position at least on the contemporaneous documents



to which the Commission referred, in recital 417 and in footnote 508 of the contested decision (footnote 501 of the public version thereof), and explained why it considered that the date indicated therein, and which it did not dispute during the written procedure, could possibly have been incorrect.

1352 The Court must therefore reject the applicant's argument that the Commission relied on an inaccurate date in relation to the scheduled launch.

#### 8.2) The end date of the postponement

1353 The applicant stated, at the hearing, that it relied initially on Acer's press release to which the Commission had referred, in recital 431 of the contested decision, and which stated that the launch date of its Athlon 64 CPU-based notebook was 4 February 2004 in Western Europe, but that it was apparent from Acer's and Mr A2's statements that shipping had already begun at the end of December 2003.

1354 In that regard, it should be pointed out that the Commission stated, in footnote 528 of the contested decision (footnote 521 of the public version thereof), that the fact that Acer had launched the product in February 2004 did not alter its conclusion that Intel had requested Acer to postpone the launch until January 2004 and that, for that reason, it had determined January 2004 to be the end of the period of Intel's abusive conduct vis-à-vis Acer.

1355 The fact that Acer agreed to postpone until January 2004 at Intel's request results from Mr A2's statement cited in paragraph 1270 above. It is confirmed by Intel's internal email of 5 September 2003, cited in paragraph 1247 above, pursuant to which Mr A1 stated that 'Acer decide[d] to drop AMD K8 throughout 2003 around the world'. The Commission thus showed to the requisite legal standard that the postponement of the launch to which Acer agreed, at Intel's request, was until January 2004.

1356 Even supposing that Acer did not fully comply with its commitment, by commencing shipment of Athlon 64 CPU-based notebooks at the end of December 2003, instead of in January 2004, that fact does not call into question the existence and duration of the abuse. The Commission showed to the requisite legal standard that, at Intel's request, Acer agreed to postpone the launch of Athlon 64 CPU-based notebooks until January 2004 and that Intel had made it clear to it that the level of future rebates was contingent upon that postponement. Had Acer not fully complied with its commitment by commencing shipment at the end of December 2003, this could at most result in actual effects of the abuse being excluded from the end of December 2003. However, the finding of an abuse does not depend on the finding of actual effects (see paragraph 212 above).

1357 It results from the foregoing that the Court must reject the applicant's argument seeking to challenge the duration of the postponement of Acer's launch of an Athlon 64 CPU-based computer.

1358 In so far as concerns the argument raised by Intel in points 173 and 174 of the reply, pursuant to which the Commission failed to explain what Intel had to gain from a postponement as trivial as four months, the Court points out that a postponement of four months cannot be regarded as trivial, especially in a sector such as the one at issue in which the pace of innovation is rapid (see, in that regard, recital 140 of the contested decision and paragraph 195 above).

#### 9) The evolution of market shares

1359 The applicant submits that the rebates granted by Intel to Acer remained steady or increased even when AMD's market share at Acer increased.

1360 In that regard, the Commission rightly points out, first, that the contested decision does not establish that Intel granted Acer rebates contingent upon the level of its market share at Acer and, second, that the evolution of that market share is thus not relevant to the evaluation of the findings in the contested decision. Since Acer acquiesced to Intel's request to postpone the launch of Athlon 64 CPU-based notebooks, there was no reason for Intel to reduce the rebates granted to Acer.

#### c) Analysis of the capability of the rebates to restrict competition according to the circumstances of the case

1361 It should be noted that, in order to find that the naked restrictions at issue in the present case were unlawful, the Commission is not required to analyse the capability of those practices to restrict competition according to the circumstances of the case at hand (see paragraph 209 above).

1362 For the sake of completeness, the Court also points out that, in the contested decision, the Commission established that the naked restrictions vis-à-vis Acer were capable of restricting competition also on the basis of an analysis of the circumstances of the case at hand.

1363 In that regard, it should be noted generally that the fact that the conditional rebates granted by the applicant to Acer were part of an overall strategy aimed at foreclosing AMD's access to the most important sales channels and the fact that that strategy included two types of infringement which

complemented and strengthened one another render the applicant's conduct capable of restricting competition (see paragraphs 181, 184 and 213 above).

1364 Moreover, the conditional rebates and payments were an important element for OEMs to consider on account of the strong competition on the OEM market and their low operating margins (see paragraph 179 above). Furthermore, the fact that those rebates and payments were actually taken into account in the commercial decisions of those benefiting from them also constitutes a factor which suggests that those payments are capable of restricting competition (see paragraphs 180 and 212 above).

1365 In so far as concerns, more specifically, the rebates granted to Acer, the following should be noted.

1366 As pointed out by the Commission, in recital 434 of the contested decision, relying on Acer's Article 18 response, the ECAP rebates were of great importance for Acer. Moreover, it results from the email cited in paragraph 1245 above that Intel was aware of that importance.

1367 Furthermore, the Court points out that, as noted by the Commission in recital 429 of the contested decision, Mr A2 asserted, in his declaration under Article 19 of Regulation No 1/2003, that Intel's request was the main reason behind Acer's decision to postpone the launch of an Athlon 64 CPU-based notebook (see paragraph 1270 above).

1368 Finally, the applicant itself stated, in point 480 of the application, setting out various reasons for Acer's decision to postpone the launch at issue, that Acer harboured concerns whether it might lose some of its rebates from Intel.

1369 It follows that the fear of losing Intel rebates was a factor which was taken into consideration by Acer in its decision to postpone the launch of an Athlon 64 CPU-based notebook.

1370 Those circumstances confirm that the naked restriction vis-à-vis Acer was capable of restricting competition.

#### d) Conclusion

1371 It results from all of the foregoing that the Court must reject the arguments raised by the applicant against the findings in the contested decision relating to Acer.

#### 6. MSH

1372 According to Article 1(e) of the contested decision, Intel granted payments to MSH between October 2002 and December 2007 at a level that was conditional on MSH selling only computers incorporating Intel x86 CPUs.

1373 In that regard, the Commission states, in essence, at recitals 620 to 678 of the contested decision, that, from 1997 until at least 12 February 2008, a series of contribution agreements between Intel and MSH had been concluded on the unwritten condition that MSH would sell only Intel-based computers. The Commission specifies at recitals 587, 588 and 615 to 617 of that decision that the applicant never showed any particular interest in MSH's compliance with MSH's commitments, which were provided for expressly in those agreements, relating to promotional activities. According to that decision, that is due to the fact that the payments under those agreements were not in practice conditional on the performance by MSH of any promotional activities, but on MSH's compliance with the unwritten condition that it sell only Intel-based computers.

1374 At recitals 679 to 688 of the contested decision, the Commission concludes, in essence, that it was understood by the applicant and MSH that from the beginning of their relationship, the exclusivity agreement was to be kept secret. Indeed, according to that decision, the contribution agreements concluded between the applicant and MSH either circumscribed the exclusivity requirement by understating it by means of a 'best efforts' clause, or stated the contrary by referring to an express 'non-exclusivity' clause.

1375 At recitals 689 to 699 of the contested decision, the Commission states, in essence, that it was understood by Intel and MSH that non-compliance with MSH's exclusivity commitment would lead at least to a substantial and disproportionate reduction of Intel's payments under the contribution agreements. According to that decision, there was however some uncertainty as regards the amount of payments that would be lost since the applicant never expressly spoke out on the financial consequences of non-compliance with the commitments made and MSH avoided testing the issue with Intel in practice.

1376 The contested decision then makes reference to three specific incidents in order to highlight the risk of a reaction by the applicant and its unwillingness to consider any exception to MSH's exclusivity commitment (see recital 619 of that decision).

1377 At recitals 700 to 705 of the contested decision, the Commission states, in essence, that, after it found MSH advertising an AMD-based 'Fujitsu' PC at the end of 1998, the applicant decided to withhold a substantial part of the agreed funding in order to send a warning to MSH concerning the consequences to which it would expose itself in the event of a breach of its exclusivity obligation.

1378 At recitals 706 to 711 of the contested decision, the Commission states, in essence, that, in 2002, MSH tried to negotiate an exception from its exclusivity agreement with the applicant with regard to certain AMD-based 'Vaio' PCs offered by Sony. According to that decision, those efforts turned out to be unsuccessful on account of Intel's insistence on full compliance with the exclusivity.

1379 Recitals 712 to 725 of the contested decision describe the difficulties encountered by MSH Italy when acceding to the contribution agreements in 2003/2004. According to that decision, the applicant's European headquarters refused to allow MSH Italy to sell off its existing stock of AMD-based PCs. Also according to that decision, it was only with Intel Italy's local management that MSH Italy was able to reach a 'gentlemen's agreement' under which it was permitted to sell off its remaining stocks of non-Intel-based computers.

1380 Lastly, at recitals 996 to 1000 of the contested decision, the Commission finds, in essence, that the applicant's conditional payments had the effect that MSH stayed 100% loyal to the applicant after 1997.

#### a) Preliminary observations

1381 The Court observes that it is apparent from the contested decision that, during the administrative procedure, Intel relied on an extract from a statement by Mr M1, [*confidential*] of MSH, which was annexed to MSH's response of 5 May 2008 to a request for information from the Commission under Article 18 of Regulation No 1/2003 ('MSH's Article 18 response'). Intel maintained that Mr M1 had stated that, on account of the non-exclusivity clause contained in the written agreement, MSH was able to 'inform Intel at any time that we would also sell [AMD-based computers] in the future' and thus that 'a binding exclusivity arrangement for the future did not exist' (see recital 752 of the contested decision).

1382 At recital 754 of the contested decision, the Commission found, in essence, that that extract from the testimony of Mr M1 does not disprove the Commission's conclusion. Indeed, the Commission does not claim that MSH's arrangements with Intel banned MSH from selling non-Intel-based computers. The Commission's conclusion is rather that the unwritten exclusivity clause conditioned the allocation of a disproportionate part of Intel's payments on MSH selling only Intel-based computers. In other words, MSH was free to start selling AMD-based PCs at any time, but this would have led to a loss of a disproportionate fraction of Intel payments.

1383 In the application, the applicant refers to recital 754 of the contested decision in asserting that the Commission 'concedes that the agreements did not impose exclusivity obligations upon MSH or legally restrict MSH from marketing AMD-based computers'.

1384 In the defence, the Commission counters by saying that it demonstrated that the contribution agreements contained an unwritten exclusivity clause. The Commission states that the unwritten nature of the exclusivity requirement meant that Intel could not enforce it at law, but as was explained at recital 754 of the contested decision, abandoning Intel exclusivity was de facto impossible for MSH by reason of the conditional payments from Intel. The Commission contends that it also demonstrated that Intel gave MSH to understand that non-compliance with the exclusivity requirement would lead at least to a substantial and disproportionate reduction of its payments under the contribution agreements. The Commission is of the view that those elements each alone suffice to prove the unlawfulness of Intel's payments to MSH.

1385 In its reply, the applicant submits that the defence departs impermissibly from the findings of the contested decision in claiming that the unwritten exclusivity clause alone suffices to prove an abuse. No such claim of an abuse predicated solely on the alleged unwritten exclusivity clause appears in the contested decision, which instead relies entirely on the theory that Intel's payments were conditional in that a switch to AMD would lead to a disproportionate reduction.

1386 In the rejoinder, the Commission reaffirms that it suffices as proof of the unlawfulness of Intel's payments to demonstrate that Intel's funding agreements between Intel and MSH contained an unwritten exclusivity clause or that Intel gave MSH to understand that non-compliance with the exclusivity requirement would lead at least to a substantial and disproportionate reduction of its payments under the contribution agreements.

1387 It is therefore common ground between the parties that the abuse theory relied on in the contested decision is not based on the claim that the contribution agreements imposed formal exclusivity obligations on MSH or prevented it in law from marketing AMD-based computers. In so far as the parties disagree however on the circumstances that the Commission must prove in order to

establish the unlawfulness of the payments at issue, the Court finds that it is sufficient to establish that those payments constituted, at least in part, consideration for exclusivity (see paragraph 171 above). To that end, the Commission may demonstrate either that the payments under the contribution agreements were subject to an unwritten exclusivity condition or that Intel gave MSH to understand that a switch to AMD would lead to a disproportionate reduction of those payments. Those various circumlocutions of what the Commission must demonstrate in order to establish the unlawfulness of the payments under the contribution agreements have the same meaning. In accordance with the terminology used in the contested decision, the 'disproportionate' loss of payments refers plainly and simply to the part of those payments which is granted in consideration for exclusivity (see paragraph 452 above). The use of the term 'disproportionate loss' of the payments means simply that the payments under the contribution agreements were subject to an unwritten exclusivity condition.

1388 It is therefore necessary to analyse whether the Commission proved to the requisite legal standard that the payments under the contribution agreements were, at least in part, conditional upon exclusivity.

b) Assessment of the evidence presented in the contested decision of the conditionality of the payments under the contribution agreements

1389 Assessment of the evidence presented in the contested decision of the conditionality of the payments under the contribution agreements.

1) MSH's Article 18 response

1390 In the contested decision, the Commission relies on several extracts from MSH's Article 18 response. Those extracts contain inter alia a general description of the conditionality of the payments under the contribution agreements and relate to two of the three specific incidents set out at recitals 1376 to 1379 above, namely, first, MSH's failure to negotiate an exception from its exclusivity agreement with the applicant with regard to certain AMD-based 'Vaio' PCs offered by Sony (see paragraph 1378 above) and, second, the difficulties encountered by MSH Italy when acceding to the contribution agreements (see paragraph 1379 above). Moreover, the contested decision also refers inter alia to the statements of Mr M1 and Mr M2, [*confidential*] of MSH, which were annexed to MSH's Article 18 response.

1391 It is therefore necessary to present the content of those items of evidence and examine their probative value.

1.1) The general description of the conditionality of the contribution agreements

1392 At recital 620 of the contested decision, having noted that the contribution agreements did not contain an express exclusivity clause, the Commission cites the following passage of MSH's Article 18 response:

'Nevertheless, MSH management members involved in the negotiation and implementation of the Intel relationship knew that the partnership with Intel was based on the implicit requirement that MSH would sell exclusively, or at least essentially exclusively, computers equipped with Intel CPUs.'

1393 At recital 621 of the contested decision, the Commission relies on the following passage of MSH's Article 18 response in order to demonstrate that the unwritten exclusivity requirement was considered an integral part of the written contribution agreements throughout the parties' entire contractual relationship:

'In fact, it had been clear during the negotiations of the first agreement concluded in 1997 between Intel and [MSH] that, despite the fact that the agreement only provided for an obligation of [MSH] to use [its] "best efforts" to purchase Intel-equipped computers, Intel expected that [MSH] would exclusively, or at least essentially exclusively, deal in Intel-equipped computers. This had been openly discussed during the negotiations between Intel and [MSH] in California. Intel's understanding that the relationship was meant to be essentially exclusive did not change in 2002, when the best efforts clause contained in the initial agreements was deleted and an express no-exclusivity clause was included in the agreements. It was clear to MSH that despite the non-exclusivity clause the exclusive nature of the relationship remained, for Intel, an essential element of the relationship between Intel and MSH. In fact, [Mr M2] recalls that Intel representatives made it clear to him that the changes in the wording of the agreement had been requested by Intel's legal department, but that in reality the relationship was to continue as before, including the requirement that MSH sell essentially only Intel-based computers.'

1394 At recital 623 of the contested decision, the Commission found that the applicant never permitted any significant exception to the exclusivity agreement. In support of that finding, the Commission cites the following passage of MSH's Article 18 response:

'It was clear to all involved, in the framework of such discussions, that MSH did not have the option to buy AMD [CPUs] to target a sub-segment in which it was weak, but that some price concession on the part of Intel was requested to address such weakness.'

1395 At recital 616 of the contested decision, the Commission cites, inter alia, the following passage of MSH's Article 18 response in order to demonstrate that payments under the contribution agreements were not in practice conditional on the performance by MSH of any promotional activities, but on MSH's compliance with the unwritten condition that it sell only Intel-based computers:

'MSH considered the amounts paid under the agreements were at least in part a reflection of the special and exclusive relationship it had with Intel ...'

1396 At recital 691 of the contested decision, the Commission cites the following passage of MSH's Article 18 response in order to demonstrate that it was understood by Intel and MSH that non-compliance with MSH's exclusivity commitment would lead at least to a substantial and disproportionate reduction of Intel's payments under the contribution agreements:

'In particular, [AMD's offers in the past were not sufficient to] terminate the relationship with Intel. It was clear to MSH in this regard that the sale of AMD-equipped computers would result at least in a reduction of the amount of Intel's contribution payments per Intel CPU under the contribution agreements (and thus in a reduction of the total payments received from Intel, even if the total volume of Intel-CPUs sold by MSH would have remained the same as in previous periods), although MSH never actually tested the issue with Intel.'

1397 The applicant contests in a general manner that the level of the payments under the contribution agreements was subject to an exclusivity condition. It claims that those payments were calculated solely on the basis of the units of Intel-based computers sold by MSH. With respect in particular to MSH's Article 18 response, the applicant submits that the Commission misinterpreted it. MSH's Article 18 response is ambiguous because different CPUs had different payment levels, and thus, depending on the product mix shifted to AMD, the average per-unit payment could decline without any reduction in the per-unit payment for any Intel CPU.

1398 However, the Court finds that MSH's Article 18 response constitutes an unequivocal statement that the payments under the contribution agreements were not only calculated on MSH's sales of Intel-based computers, but constituted, at least in part, consideration for exclusivity. It is apparent from the passages mentioned in paragraphs 1392 to 1396 above of MSH's Article 18 response that the contribution agreements under which the payments at issue were granted were concluded on the implicit condition that MSH sell exclusively, or at least essentially exclusively, Intel-based computers. It is also apparent from those passages that MSH considered that the amounts paid under those agreements were at least in part a reflection of the special and exclusive relationship it had with Intel and that the sale of AMD-equipped computers would result in a reduction of the total payments received under those agreements, even if the total volume of Intel-CPUs sold by MSH would have remained the same as in previous periods. In the light of those statements, the line of argument by which the applicant attempts to demonstrate that MSH's Article 18 response is ambiguous must be regarded as artificial and implausible.

#### 1.2) The incident concerning the AMD-based 'Vaio' PCs

1399 As regards MSH's failure to negotiate an exception to its exclusivity agreement with the applicant with regard to certain AMD-based 'Vaio' PCs offered by Sony (see paragraph 1378 above), the contested decision is based inter alia on the following passage of MSH's Article 18 response (see recital 707 of that decision):

'... MSH turned to Intel requesting whether it could exceptionally sell AMD equipped Vaio notebooks ... Intel responded that if MSH [did] so, Intel would no longer pay any contributions for any Sony Vaio notebooks, i.e., also not for those Vaio notebooks sold by MSH that were actually equipped with Intel CPUs. As this would have meant a substantial financial loss for MSH, it decided not to deal in AMD equipped Vaios at all.'

1400 It should be noted that that passage of MSH's Article 18 response is based on the statements of two MSH executives — Mr M1 and Mr M2 — which were annexed to MSH's Article 18 response (see paragraphs 1410 to 1419 below).

1401 The applicant contests the reliability of Mr M2's statement and submits that that statement is the only specific item of evidence on which the contested decision bases its findings in this regard. However, the applicant does not advance any specific evidence to detract from the reliability of Mr M2's statement. Given that that statement is supported by Mr M1's statement and that MSH endorsed the statements of those executives in its Article 18 response, it is permissible to conclude that the Commission established the abovementioned circumstances concerning the discussions on the AMD-based 'Vaio' PCs offered by Sony to the requisite legal standard.

1402 It must be stated that that incident concerning the AMD-based 'Vaio' PCs demonstrates unequivocally that the payments under the contribution agreements were not only calculated on MSH's sales of Intel-based computers, but constituted, at least in part, consideration for exclusivity. It should be recalled that the applicant informed MSH that it would no longer pay any contributions for any Sony 'Vaio' notebooks, and thus also not for those Vaio notebooks sold by MSH that were actually equipped with Intel CPUs, if MSH sold AMD-based 'Vaio' computers.

### 1.3) The discussions on MSH Italy's accession to the contribution agreements

1403 With respect to the discussions between the applicant and MSH Italy on its accession to the contribution agreements, the contested decision cites inter alia the following passage of MSH's Article 18 response (see recital 714 of that decision):

'[MSH] Italy generally sold a relatively significant proportion of AMD-equipped computers (e.g. in 2003, the proportion was roughly 40-50%) ... As it was clear that [MSH] Italy could only come under the coverage of the central contribution agreement if MSH sold (essentially) exclusively Intel-equipped computers, the extension of the agreement to Italy was negotiated in light of [MSH] Italy's existing AMD business. More specifically, [MSH] Italy's management tried to obtain an exception from the exclusivity requirement under which it would be permitted, at least for a transition period, to continue selling a certain maximum percentage of AMD-equipped computers. [MSH] Italy first asked to be able to sell up to 20% AMD-equipped computers, and subsequently would have been willing to reduce that percentage to 10%. However, Intel rejected this request and insisted that [MSH] Italy could only come under the central agreement if it were to switch entirely to Intel-equipped computers. In the negotiations, Intel's main representative, [Mr I16], even refused [MSH] Italy the possibility to sell down its existing stocks of AMD-equipped computers and insisted that the central contribution agreement agreed with MSH could only become applicable to [MSH] Italy once only Intel-equipped computers were sold.'

1404 In order to contest the veracity of that extract from MSH's Article 18 response, the applicant relies on two written statements by two of its executives. Those executives deny that Intel refused to allow MSH Italy to sell off its stocks and stated that MSH Italy had rather requested financial support to help it sell stocks of AMD-based computers, but that Intel refused to provide such support.

1405 However, the Court notes that the statement in MSH's Article 18 response that the applicant refused to allow MSH Italy to sell off its stocks is based on the statements of two MSH executives, namely those of Mr M3 and Mr M4, which were also annexed to MSH's Article 18 response. MSH endorsed those statements in its Article 18 response. That response has high probative value owing to the fact that, according to Article 23(1)(a) of Regulation No 1/2003, incorrect information given in response to a Commission request for information under Article 18 of that regulation is punishable by fines.

1406 By contrast, the statements by executives of the applicant that MSH Italy had requested financial support from Intel in order to help sell off its stocks of AMD-based computers seem implausible. Moreover, the circumstances in which those statements were obtained are not clearly apparent and the legal basis of those statements is unknown. It is therefore impossible to know what legal consequences any false information contained in those statements might have. Accordingly, those statements have limited probative value.

1407 In the light of the foregoing considerations, the Court finds that MSH's Article 18 response and the statements of Mr M3 and Mr M4 are more credible than the statements of the two Intel executives. Consequently, it is permissible to conclude that the Commission has established the circumstances mentioned in paragraph 1379 above concerning the discussions between the applicant and MSH Italy on its accession to the contribution agreements to the requisite legal standard.

1408 The Court observes that Intel's refusal to allow MSH Italy to sell off existing stocks of AMD-based computers and the manner in which Intel insisted that the central contribution agreement could only become applicable to MSH Italy once only Intel-based computers were sold demonstrates unequivocally that the payments under the contribution agreements were not only calculated on MSH's sales of Intel-based computers, but constituted, at least in part, consideration for exclusivity.

1409 That conclusion is, moreover, confirmed by quantitative findings made at recitals 724 and 725 of the contested decision that the applicant does not contest. The Commission demonstrates in those recitals that, according to estimates provided by Intel to the Commission during the administrative procedure, the rate of Intel payments per CPU unit doubled as soon as MSH Italy acceded to the central exclusivity agreement and stopped selling AMD-based computers. This means that, according to Intel's own estimates, its payments to MSH Italy increased disproportionately in relation to the increase in purchases after MSH Italy acceded to the central contribution agreements.

### 1.4) The statements of Mr M1 and Mr M2, MSH executives

1410 It should be noted that, at recital 689 of the contested decision, the Commission found, first, that it was understood by Intel and MSH that non-compliance with MSH's exclusivity commitment would lead at least to a substantial and disproportionate reduction of Intel's payments under the contribution agreements. Next, the Commission cited Mr M1's statement in order to support the finding that there was however some uncertainty as regards the amount of payments that would be lost since the applicant never expressly spoke out on the financial consequences of non-compliance with the exclusivity commitment and MSH avoided testing the issue with Intel in practice.

1411 Moreover, it should be recalled that at recital 621 of the contested decision, the Commission cited extracts from MSH's Article 18 response (see paragraph 1393 above). In that regard, in footnote 863 of the contested decision (footnote 855 of the public version thereof), the Commission referred to Mr M2's statement. The statements of Mr M1 and Mr M2 were annexed to MSH's Article 18 response.

1412 The applicant submits that Mr M1 stated that, on account of the non-exclusivity clause contained in the written agreement, MSH was able to 'inform Intel at any time that we would also sell [AMD-based computers] in the future' and thus that 'a binding exclusivity arrangement for the future did not exist' (see also paragraph 1381 above). In addition, the applicant submits that the statements of Mr M1 and Mr M2 contain no reference to the likelihood of a disproportionate reduction in Intel payments as a consequence of introducing AMD-based computers. Mr M1's statement notes only that: '[W]e assumed that there would be implications for the Contribution Agreement if we were to start selling AMD [CPUs] and that, in particular, Contribution Payments would be reduced.' Mr M2's statement does not refer to any potential reduction in rebates from Intel.

i) Mr M1's statement

1413 With respect to Mr M1's statement, the Court finds that, as the Commission demonstrated at recital 754 of the contested decision, the argument that the Commission stated that, on account of the non-exclusivity clause contained in the written agreement, MSH was able to 'inform Intel at any time that we would also sell [AMD-based computers] in the future' and thus that 'a binding exclusivity arrangement for the future did not exist' is not relevant (see paragraph 1382 above). The conduct of the applicant complained of in the contested decision does not relate to MSH being prevented from starting to sell AMD CPUs, but rather to the fact that MSH would have lost the payments granted in consideration for an unwritten exclusivity condition if it had done so. The passage of Mr M1's statement relied on by the applicant does not therefore contradict the conclusions of the contested decision, according to which the payments under the contribution agreements constituted, at least in part, consideration for exclusivity.

1414 As regards the assertion that Mr M1's statement mentions only that: '[W]e assumed that there would be implications for the Contribution Agreement if we were to start selling AMD [CPUs] and that, in particular, Contribution Payments would be reduced', it is necessary to place the passage cited by the applicant in its context. It is apparent from the statement that Mr M1 stated as follows:

'[W]e assumed that there would be implications for the Contribution Agreement if we were to start selling AMD [CPUs] and that, in particular, Contribution Payments would be reduced ... From time to time we speculated internally about the extent of such consequences, but we always avoided testing this with Intel ... In addition, it was impossible to get any explanation from Intel as to what the consequences of non-exclusivity would be. From my dealings with Intel, I had the impression that statements (and conversations) on this topic were deliberately avoided. But I usually spoke to higher-ranking employees. However, I know from my colleagues' reports that Intel employees at a lower level of the chain seemed to be less reluctant and were more frank (e.g. [Mr I16] to [Mr M3] although I only know this from hearsay).'

1415 That statement confirms the findings of the contested decision set out in paragraphs 1375 and 1410 above. It confirms that it was understood by Intel and MSH that non-compliance with MSH's exclusivity commitment would lead at least to a substantial and disproportionate reduction of Intel's payments under the contribution agreements, but that there was however some uncertainty as regards the amount of payments that would be lost since the applicant never expressly spoke out on the financial consequences of non-compliance with the commitments made and MSH avoided testing the issue with Intel in practice. The statement must therefore be understood as meaning that the payments under the contribution agreements constituted, at least in part, consideration for an unwritten exclusivity condition.

1416 Mr M1 did not state that the cause of a reduction of the contribution amounts would have been the corresponding reduction of Intel-based computers sales. He stated rather that it was the sale of AMD CPUs which would have brought about a reduction of those amounts. In addition, he referred to the 'consequences of non-exclusivity'. In the absence of a plausible explanation by the applicant, that choice of words must be understood as meaning that the decisive factor for reducing the contribution

amounts would have been the breach of the exclusivity condition by the mere introduction of AMD-based computers, and not the reduction of sales of Intel-based computers.

1417 It is true that it is also apparent from Mr M1's statement that MSH was unable to quantify exactly the loss of payments that it would have suffered if AMD-based computers had been introduced. However, that is not capable of calling in question the conclusion that Mr M1 understood that the payments under the contribution agreements constituted, at least in part, consideration for the unwritten exclusivity condition. That is a fortiori the case given that it is apparent from Mr M1's statement that the uncertainty surrounding the exact level of the payments which would have been lost if MSH had introduced AMD-based computers was due, at least in part, to the fact that the applicant deliberately avoided that topic.

1418 Moreover, it should be noted that other parts of Mr M1's statement refer to MSH's failure to negotiate an exception from its exclusivity agreement with the applicant for certain AMD-based 'Vaio' PCs offered by Sony and to the applicant's discussions with MSH Italy on its accession to the contribution agreements. It was found in paragraphs 1402 and 1408 above that those incidents confirm that the payments under the contribution agreements were not exclusively calculated on MSH's sales of Intel-based computers, but that those payments constituted, at least in part, consideration for exclusivity. In the light of the fact that Mr M1's statement refers to those two incidents, his statement must be understood in the same manner.

#### ii) Mr M2's statement

1419 With respect to Mr M2's statement, it should be noted that he repeatedly confirms the exclusive nature of the contribution agreements. Moreover, Mr M2's statement refers to MSH's failure to negotiate an exception to its exclusivity agreement with the applicant for certain AMD-based 'Vaio' PCs offered by Sony and to the applicant's discussions with MSH Italy on its accession to the contribution agreements. Contrary to the applicant's claim, Mr M2's statement confirms therefore MSH's Article 18 response, in so far as it is apparent from that response that the payments under the contribution agreements constituted, at least in part, consideration for exclusivity and that those payments were not exclusively calculated on MSH's sales.

#### 1.5) Conclusion

1420 In the light of the foregoing considerations, the Court considers that MSH's Article 18 response includes an unequivocal statement that the payments under the contribution agreements constituted, at least in part, consideration for exclusivity. In that regard, it should also be observed that that response has high probative value (see paragraph 1405 above).

#### 2) The evidence supporting MSH's Article 18 response

1421 In the contested decision, in order to demonstrate that the level of the payments under the contribution agreements was conditional upon exclusivity, the Commission relies also on the fact that the applicant decided to withhold a substantial part of those payments after it found MSH advertising an AMD-based 'Fujitsu' PC at the end of 1998 (see paragraph 1377 above). In addition, the Commission relies on various other documents.

1422 It is therefore appropriate to present the content and examine the probative value of that evidence.

#### 2.1) The withholding of payments in 1998

1423 As regards the withholding of the contribution payments in 1998, the contested decision is based on a chain of internal Intel emails. According to recitals 701 and 702 of that decision an Intel employee wrote: 'I have just stopped a payment due to be made today of [USD] 2.64 [million] to [MSH] as we have just found them advertising a Fujitsu AMD K6-2 processor based PC. ... [A]s a kind of "warning" it should be a signal for them that we stopped our payments.' A few days later, the same person asked: '[H]ow open can we be in telling them WHY Intel delayed the payment?'

1424 The applicant claims, in essence, that that item of evidence shows that MSH was selling AMD-based PCs in 1999, and that it thus rebuts the claim that an unwritten exclusivity clause was in effect from 1997. Moreover, the document expresses concern not about MSH's sales of AMD-based PCs but about advertising activities. This concern is understandable in light of a marketing agreement then in effect that provided that, with Intel funding, MSH should 'primarily focus on the promotion of leading edge Intel products as they are introduced'.

1425 However, the Court notes that the fact that the applicant withheld payments due under the contribution agreement, on account of the fact that MSH was advertising an AMD-based computer, demonstrates that the payments under the contribution agreements were not exclusively calculated on MSH's sales of Intel-based computers, but constituted, at least in part, consideration for exclusivity. Contrary to the applicant's claim, the fact that MSH advertised a certain AMD-based computer does



not call in question the evidence of the conditionality of the payments under the contribution agreements. On the contrary, the applicant's reaction to that advertising cannot reasonably be explained in another way. The fact that, at the time, the contribution agreement contained an express clause obliging MSH to 'primarily focus on the promotion of leading edge Intel products' does not call in question that conclusion. Moreover, the distinction suggested by the applicant between the promotion of AMD-based computers and their sale, is, in the present case, artificial. The evidence examined in paragraphs 1390 to 1420 above demonstrates unequivocally that the exclusivity condition to which the payments under the contribution agreements were subject related essentially to the obligation to sell only Intel-based computers. In its Article 18 response, MSH referred to the implicit requirement that MSH 'would sell' exclusively computers equipped with Intel CPUs (see paragraphs 1392 and 1393 above). The two incidents relating to the AMD-based 'Vaio' PCs and to MSH Italy's accession to the central agreements also concern essentially the sale of AMD-based computers.

## 2.2) The various other documents

### i) The documents in respect of which the applicant does not make any submissions

1426 At recitals 625 to 677 of the contested decision, the Commission relied on numerous MSH and Intel documents in order to demonstrate the conditionality of the payments under the contribution agreements.

1427 In the context of this action, the applicant did not make any submissions on those documents, with the exception of the document cited at recital 629 of the contested decision, which is the same document as that cited at recital 694 of that decision, whose probative value will be examined in paragraphs 1445 and 1448 to 1450 below. However, the Court observes that those documents demonstrate that the payments under the contribution agreements constituted, at least in part, consideration for an exclusivity condition. In that regard, it is appropriate to focus on the following documents.

1428 At recital 627 of the contested decision, the Commission refers to an email of 25 August 1999 sent by MSH's headquarters to the managing directors of the subsidiaries which were concerned by the 1999 contribution agreement, the content of which is essentially as follows:

'... This agreement contains a number of significant terms for [MSH], which however are linked to the condition that all PCs sold by us are based on Intel CPUs, i.e. that during the contract duration no CPUs of other producers may be sold.'

1429 At recital 635 of the contested decision, the Commission cites an email from MSH Netherlands to MSH's headquarters of 11 February 2007:

'Where are we as regards the topic Intel/AMD? What is the line of approach for 2007? If we offer again exclusively Intel, I would like to know how much this will bring us (i.e. MSH Netherlands) precisely in terms of additional money from Intel.'

1430 At recital 644 of the contested decision, the Commission refers to an MSH internal email of 8 August 2001, the content of which is essentially as follows:

'... We have concluded an [exclusivity agreement] with Intel ... good/bad?!? We have received a big sum of money in return — good!'

1431 The Court finds that it follows from the documents mentioned in paragraphs 1428 to 1430 that the payments under the contribution agreements were conditional, at least in part, on exclusivity.

### ii) The documents in respect of which the applicant makes submissions

1432 At recitals 693 to 699 of the contested decision, the Commission relies on various documents which confirm, according to that decision, that non-compliance with MSH's exclusivity commitment would lead at least to a substantial and disproportionate reduction of Intel's payments under the contribution agreements.

1433 The applicant contests the probative value that the Commission ascribed to those documents in the contested decision. In addition, as regards the documents cited at recitals 693 to 696 of that decision, the applicant claims that the Commission infringed its rights of defence by failing to communicate to it all those documents.

The documents cited at recitals 697 to 699 of the contested decision

1434 The document cited at recital 697 of the contested decision consists of an exchange of emails of 13 and 15 September 2004 between MSH's headquarters in Germany and its Austrian subsidiary. The subsidiary wrote as follows: '[Y]ou can see how strong AMD is at PC/Desktop. ... My question: how

about the rest of Europe and are there plans to reconsider the strategy as regards the Intel-contract? The headquarters replied as follows:

'[T]he Intel/AMD question is currently (in fact as every year) being reconsidered. ... For the moment, the tendency seems to me to go towards a continuation of the agreement. Reasons: 1. Despite our Intel [only] strategy we are gaining market share. 2. We would potentially lose a lot of money.'

1435 The applicant claims that that document does not refer to a disproportionate reduction in payments from Intel, and that the loss envisioned could just as easily result from the lower popularity of AMD-based computers. In the applicant's submission, MSH would necessarily have experienced a proportionate reduction in payments from Intel, to the extent that MSH did not receive Intel payments on sales that it shifted from Intel to AMD.

1436 However, it must be stated that the document cited at recital 697 of the contested decision refers to a direct link between the reconsideration of the strategy of selling exclusively Intel-based products and a potential loss of 'a lot of money'. By contrast, the document contains no evidence supporting the applicant's assertion that the reference to a potential loss of 'a lot of money' was used only to describe a loss of payments which is proportionate to the reduction of sales of Intel-based computers. The applicant's explanation that the loss mentioned in the document results from the lower popularity of AMD-based computers is not plausible. It is indeed contradicted by the statement contained in the same document which reads as follows: '[Y]ou can see how strong AMD is at PC/Desktop.'

1437 The document cited at recital 698 of the contested decision contains an email of 17 April 2006 from Mr M2 to MSH Netherlands, replying to the question whether it was 'still an international decision to work exclusively with Intel' as follows:

'I discussed the AMD issue with [an MSH executive] and I told him that, if [MSH Netherlands] is not willing/able to work exclusively with Intel any more, I can exclude [MSH Netherlands] from the contract. I asked him if he thinks that we would sell significantly more, and he denied. Definitely you would lose the money, and AMD is not able to compensate even a part of it. Especially in the current situation (with 100% Intel you are winning a lot of market share!) it seems not very intelligent to stop this partnership now.'

1438 The applicant submits that that document does not bear on whether the terms of the overall contribution agreement would change if MSH shifted a portion of its CPU demand to AMD.

1439 However, it follows unequivocally from the document cited at recital 698 of the contested decision that if MSH Netherlands no longer sold exclusively Intel-based computers, this would have meant that it would be excluded from the contribution agreement concluded with the applicant and would have resulted in the loss of the money granted to MSH Netherlands under that agreement. Moreover, Mr M2 did not say that the Dutch subsidiary would have suffered a loss of payments proportionate to the switch of its sales from Intel-based computers to sales of AMD-based computers. He refers merely to a loss of 'money' if MSH Netherlands stopped 'work[ing] exclusively with Intel'. The applicant puts forward no reasons explaining that choice of words.

1440 The document cited at recital 699 of the contested decision consists of an internal MSH Hungary email of 8 May 2006 concerning the promotion of a specific AMD-based PC. It contains the following statement:

'Do not advertise [AMD-based PC] at all, breaching the contract would cost a lot.'

1441 According to the applicant, that email refers only to advertising. The 'contract' to which it refers is not identified, and could just as plausibly be an agreement between MSH Hungary and an OEM for reimbursement of expenses for the advertisement of Intel-based PCs. The Commission did not attempt to ascertain the meaning of this document and instead assumed that it related to a disproportionate loss of Intel payments, even though the very fact that MSH was selling AMD-based PCs should have led it to question the premiss that the sale of AMD-based systems would have that consequence.

1442 Those arguments are not convincing. First, the distinction suggested by the applicant between the promotion of AMD-based computers and their sale, is, in the present case, artificial. The evidence examined in paragraphs 1390 to 1420 above demonstrates unequivocally that the exclusivity condition to which the payments under the contribution agreements were subject related essentially to the obligation to sell only Intel-based computers (see paragraph 1425 above). Second, the applicant does not put forward any reasons to support its premiss that 'the contract' refers to an agreement between MSH Hungary and an OEM. In the light of the other items of evidence relied on in the contested decision and in the absence of any specific evidence to the contrary in that regard, the Commission was right to conclude that the contract in question was the contribution agreement between MSH and the applicant. Third, the fact that, according to the email, the promotion of an AMD-based computer would have implied a breach of the contribution agreement and that that would have cost MSH dearly

directly contradicts the applicant's assertion that the payments under the contribution agreements were calculated by units of Intel-based computers sold by MSH. By contrast, those circumstances confirm unequivocally that the payments under the contribution agreements constituted, at least in part, consideration for exclusivity.

The documents cited at recitals 693 to 696

1443 At recitals 693 to 696 of the contested decision, the Commission refers to four other MSH documents. In both that decision and the versions of those documents to which the applicant had access during the administrative procedure, certain passages contained in the original versions of those documents have been deleted or replaced by non-confidential summaries on account of requests for confidentiality by MSH.

1444 At recital 693 of the contested decision, the Commission sets out the content of an internal MSH email of 26 September 2002 as follows:

'[O]n the basis of the present offers from AMD we prepared two scenarios. These show that we have a risk of approx. [USD] [deleted] to [deleted] million. In addition we have an additional risk resulting from the INTEL Inside agreement, which I estimate [at] approx. [USD] [deleted] million.'

1445 At recital 694 of the contested decision, the Commission cites extracts from the minutes of MSH's management meeting of 8 October 2002 as follows: '[An MSH executive favours using AMD CPUs as this might fit with MSH's marketing strategy.] Even large brands such as Sony are switching to AMD. ... [An MSH executive] has asked to verify whether as a test a partial exit in only one Intel-exclusive [region] would be possible. ... A general termination of the Intel agreement is rejected for profit reasons.'

1446 At recital 695 of the contested decision, the Commission sets out the content of an email of 1 November 2003 as follows:

'As for Intel, there is in principle nothing new to say with regard to last year. Apparently we are right with our strategy since we are gaining market share although we don't market AMD CPUs. The economic risk in the event of a strategy change is as in the previous year approximately USD [deleted] million.'

1447 At recital 696 of the contested decision, the Commission sets out the content of an exchange of emails of 15 and 16 January 2004 as follows: '[An MSH executive] has met [Mr C2] of AMD — responsible for the international business — at a tradeshow in Las Vegas. He has passed on the message of the AMD guy of USD [deleted] per quarter if AMD does business with Media-Saturn.' Another MSH executive reacted as follows: '... [T]hat is in total EUR [deleted] more than we achieved with Intel in 2003...excl. Intel Inside. This fits the picture we currently have of Intel...for more efforts we receive increasingly less money.'

– The probative value of the documents cited at recitals 693 to 696 of the contested decision

1448 The applicant submits that the document cited at recital 694 of the contested decision (see paragraph 1445 above) says nothing about the impact on Intel's payments of a shift of a portion of MSH's requirements to AMD, and that the reference to 'profit reasons' could more easily refer to MSH's margins on Intel-based computers than to a loss of payments.

1449 That line of argument is not convincing. That document compares a 'partial exit in only one Intel-exclusive [region]' to a 'general termination of the Intel agreement [which] is rejected for profit reasons'. Thus, the minutes of the meeting indicate that a general termination of the exclusivity agreement is rejected for profit reasons. The email therefore refers to a link between the exclusivity and profit reasons and directly refutes the applicant's assertion that the payments under the contribution agreements were calculated by units of Intel-based computers sold by MSH.

1450 Moreover, the Commission is right to note that that document also contains the following statement: 'The so far unsuccessful attempts to negotiate with Intel an exemption for the distribution of specific brand products with AMD processors (e.g. SONY) are being continued.' In the light of that statement, the interpretation suggested by the applicant, according to which the reference to 'profit reasons' refers to MSH's margins on Intel-based computers, and not to the loss of payments, is not plausible. The fact that MSH wished to continue its attempts to negotiate an exemption from the exclusivity condition for certain AMD-based computers demonstrates that MSH had an interest in selling AMD-based computers, so that its decision not to terminate in general the agreement with the applicant cannot be imputed solely to MSH's margins on Intel-based computers.

1451 The applicant claims that the documents cited at recitals 693, 695 and 696 of the contested decision do not support the Commission's conclusions.

1452 As regards, first, the document cited at recital 696 of the contested decision (see paragraph 1447 above), the Court observes that that document does not support the Commission's position that the payments under the contribution agreements constituted, at least in part, consideration for exclusivity. That document demonstrates only that an MSH executive took the view that a certain offer by AMD at the beginning of 2004 was higher than what MSH achieved with Intel in 2003. However, nor does that document confirm the applicant's assertion that the payments under the contribution agreements were calculated by units of Intel-based computers sold by MSH. It must be held that that document has no probative value whatsoever as regards the existence of a link between the payments under the contribution agreements and the unwritten exclusivity condition.

1453 As regards, second, the documents cited at recitals 693 and 695 of the contested decision (see paragraphs 1444 and 1446 above), it must be stated that the fact that those documents refer to a 'risk' is an indication, albeit a relatively weak one, of the fact that the applicant's payments were not only calculated on the basis of MSH's sales of Intel-based computers. Had MSH simply projected that there would be a proportionate loss of payments if it sourced from AMD, it would not have been necessary to use the term 'risk' in those documents, but would have been a matter of straightforward calculation of the loss of payments on the number of Intel-equipped computers whose sales were replaced by AMD-equipped computers.

– The alleged infringement of the rights of the defence

1454 The applicant moreover submits that it is unable to plead to the documents cited at recitals 693 to 696 of the contested decision and reserves all of its rights in respect thereof. Settled case-law bars the Commission from relying on documents not put to a defendant during the administrative procedure. In the present case, the Commission materially relied upon the amount of the 'risk' assessed by MSH in the documents cited at recitals 693 and 695, while failing to disclose that information to Intel, which is a serious infringement of its rights of defence.

1455 The Court observes that the applicant claims only that the Commission incorrectly relies on information to which it did not have access. It therefore submits merely that the Commission wrongly used that information as inculpatory evidence. The applicant does not however submit that it could have used the confidential information as exculpatory evidence.

1456 It should be recalled that, according to case-law, the right of access to the file in competition cases is intended to enable the addressees of statements of objections to acquaint themselves with the evidence in the Commission's file so that, on the basis of that evidence, they can express their views effectively on the conclusions reached by the Commission in its statement of objections (see *Atlantic Container Line and Others v Commission*, paragraph 359 above, paragraph 334 and the case-law cited).

1457 It is also apparent from the case-law that the right of access to the file must be balanced against the interests of third parties who may have an interest in the protection of their business secrets and who may be exposed to the risk of retaliatory measures for their cooperation with the Commission's investigation. Consequently, in so far as a third party may have an interest in confidential treatment and provided that the undertaking concerned by an investigation may however comment effectively on the conclusions reached by the Commission in its statement of objections, the Commission cannot be criticised for having given access only to non-confidential summaries of documents used by the Commission as evidence or for having failed to disclose the identity of its informers (see, to that effect, Case T-221/95 *Endemol v Commission* [1999] ECR II-1299, paragraphs 67 and 70 to 72, and *Michelin II*, paragraph 75 above, paragraphs 124 and 125 and the case-law cited).

1458 With regard to inculpatory evidence, observance of the rights of the defence requires that the undertaking concerned must have been able to express its views effectively on the evidence used by the Commission to support its allegation of infringement (see *Atlantic Container Line and Others v Commission*, paragraph 359 above, paragraph 337 and the case-law cited). To that end, it may not be necessary that the undertaking concerned is put in a position to have access to a document used by the Commission as inculpatory evidence in its entirety. Where a third party has an interest in confidential treatment, the Commission may replace certain passages of a document containing inculpatory evidence by non-confidential summaries or may delete them, on condition that it does not rely on the passages that it treats as confidential and that the context of the passages on which it relies remains sufficiently comprehensible to enable the undertaking concerned to make effective use of its rights of defence.

1459 The Court finds that, in the present case, the Commission gave the applicant access to the relevant passages of the documents in question on which it relied in the contested decision. It did not rely on passages which were not disclosed to the applicant but confined itself rather to using the non-confidential versions of those documents as inculpatory evidence. As regards, first, the documents cited at recitals 693 and 695 of the contested decision (see paragraphs 1444 and 1446 above),

contrary to the applicant's claim, that decision is not based on the quantum of the risk referred to in those documents. According to the Commission's convincing explanation, that decision is only based on the tenor of those documents in referring in an abstract manner to the 'risk' of the loss of Intel payments. As regards, second, the documents cited at recitals 694 and 696 of that decision (see paragraphs 1445 to 1447 above), the applicant does not even claim that the Commission relied on the confidential parts of those documents. Nothing indicates that that was the case. Consequently, it is necessary to reject the applicant's argument that the Commission wrongly relied on the confidential information of the documents cited at recitals 693 to 696 of the contested decision by failing to communicate that information to the applicant.

1460 For the rest, the Court notes that the versions of those documents to which the applicant had access were sufficiently comprehensible to enable the applicant make effective use of its rights of defence. In the light of MSH's interest in confidential treatment, the Commission was therefore entitled to rely on those versions as inculpatory evidence. Consequently, it must be concluded that the Commission did not infringe the applicant's rights of defence.

1461 In any event, according to the case-law, if the Commission is found to have relied in the contested decision on documents that were not communicated to the applicant, those documents should be excluded as evidence. In that case it is necessary therefore to check whether the complaint made in the final decision is sufficiently made out by the other inculpatory evidence relied on to which the applicant did have access (see *Atlantic Container Line and Others v Commission*, paragraph 359 above, paragraph 338 and the case-law cited).

1462 Even on the assumption that the Commission ought not to have relied on the non-confidential versions of the documents cited at recitals 693 to 696 of the contested decision, the Court finds that the other inculpatory evidence relied on in that decision, to which the applicant did have access, establishes to the requisite legal standard that the payments under the contribution agreements constituted, at least in part, consideration for exclusivity. Consequently, even on the assumption that the documents cited at recitals 693 to 696 of that decision must be excluded as evidence, it is not necessary to annul that decision.

### 2.3) Conclusion

1463 Accordingly, it is permissible to conclude that MSH's Article 18 response and the evidence which supports that response demonstrate to the requisite legal standard that the payments under the contribution agreements were, at least in part, conditional upon exclusivity.

#### c) The applicant's other arguments

1464 The other arguments put forward by the applicant are not capable of calling in question that conclusion.

##### 1) The documents aimed at rebutting the evidence of conditionality

1465 The applicant relies on various documents which it claims rebut the evidence of the conditionality of the payments under the contribution agreements.

##### 1.1) Ms I17's email

1466 In order to rebut the evidence of the fact that the payments under the contribution agreements were, at least in part, conditional upon exclusivity, the applicant relies on an email of 9 October 2000, written by Ms I17, the [confidential] of Intel, the content of which is set out below.

1467 In response to a suggestion from MSH that it was considering a shift of 10 or 20% of its purchases to AMD, Ms I17 stated that '[a] non-100% approach would be acceptable' and that '[p]romo should be defined in such a way that we get a fair share of high-end (P4P), mid-end (P3P) and low-end (ICP)'.

1468 That passage must be placed in its context (see also recital 761 of the contested decision). The Commission observes that that email reflects the negotiations of the contribution agreement for 2001. During those negotiations, Mr M2 of MSH submitted a 'wish list' including inter alia an '80/20 or 90/10 [market segment share] option'. Faced with that wish of MSH to be able to sell freely in respect of a 10 or 20% share of the market, Ms I17 stated as follows:

'A non-100% approach would be acceptable. What we need to ensure is they don't cherry pick from our and AMD's product line. Promo should be defined in such a way that we get a fair share of high-end (P4P), mid-end (P3P) and low-end (ICP).'

1469 However, as the Commission rightly found, at recital 761 of the contested decision, it is implausible that the flexibility implied by the wording of Ms I17's email as regards the option for MSH to have freedom in respect of 10 or 20% of its sales was maintained in the further course of the negotiations. In that regard, the Commission was entitled to rely on the manner in which the applicant

subsequently insisted on full compliance with the exclusivity during the discussions with MSH on the possibility of selling AMD-based 'Vaio' PCs offered by Sony (see paragraph 1378 above) and during the discussions with MSH Italy on its accession to the contribution agreements (see paragraph 1379 above). The firmness with which the applicant insisted on compliance with the exclusivity condition during those incidents demonstrates to the requisite legal standard that the applicant did not allow any significant exception to that condition.

1470 Accordingly, Ms I17's email is not capable of rebutting the probative value of the evidence relied on in the contested decision.

#### 1.2) Mr I18's email

1471 The applicant claims that, in an email of 10 November 2000, Intel's main negotiator, Mr I18, noted as follows after a meeting with Mr M2 of MSH:

'We did agree that we will not define a % of [market segment share] as that is not possible to measure and does not help at all.'

1472 The Commission observes, without being contradicted on that point by the applicant, that that email also reflects the negotiations of the contribution agreement for 2001. The probative value of that email must therefore also be assessed in the light of MSH's request to be able to have freedom in respect of 10 or 20% of its sales (see paragraph 1468 above).

1473 The Court finds that, in the light of MSH's request to be able to have freedom in respect of 10 or 20% of its sales, the passage relied on by the applicant according to which '[w]e did agree that we will not define a % of [market segment share] as that is not possible to measure and does not help at all' is not necessarily at odds with the existence of an unwritten exclusivity condition. That passage may also mean that MSH did not succeed in getting its request granted during the negotiations or that MSH and Intel ultimately did not go ahead with an option allowing MSH to have freedom in respect of 10 or 20% of its sales, because such an option would have been too difficult to apply, and therefore the relationship between the two parties was, in principle, to continue being exclusive. The passage of the email of Mr I18 on which the applicant relies must therefore be regarded as ambiguous. That passage is not therefore capable of rebutting the probative value of the evidence relied on in the contested decision. Moreover, it should be recalled that the firmness with which the applicant insisted on compliance with the exclusivity condition during the discussions with MSH on the possibility of selling AMD-based 'Vaio' PCs offered by Sony and during the discussions with MSH Italy on its accession to the contribution agreements demonstrates to the requisite legal standard that the applicant did not allow any significant exception to that condition (see paragraph 1469 above).

1474 Accordingly, Mr I18's email is not capable of rebutting the probative value of the evidence relied on in the contested decision.

#### 1.3) The documents from November 2000

1475 The applicant refers to two other documents from November 2000 which indicate, in its submission, that Intel was aware of its competitive exposure at MSH and responded by offering more attractive products and discounts.

1476 That line of argument cannot succeed. The mere fact that the applicant was aware of its competitive exposure and that it responded by offering more attractive products and payments does not preclude the applicant's having conditioned the grant of those more attractive payments on MSH selling exclusively Intel-based computers. Consequently, the applicant's argument is not capable of calling in question the evidence relied on in the contested decision. It is not therefore necessary to examine in more detail the content of the two documents on which the applicant relies.

#### 1.4) The spreadsheets

1477 In support of its argument that the payments under the contribution agreements were only calculated by units of Intel-based computers sold by MSH, the applicant relies on two documents containing 'spreadsheets' drawn up by MSH. According to the applicant, those spreadsheets analyse the value of the expected payments under two scenarios — one in which MSH would sell only Intel-based computers and another in which approximately one third of MSH's computers were AMD-based. MSH's projections of payments from Intel per CPU unit are identical in both scenarios, which demonstrates, according to the applicant, that MSH had taken the view that shifting approximately one third of its overall requirements to AMD would result in only a proportionate reduction in payments from Intel, with no reduction in per-unit contributions.

1478 The Court notes that, at recitals 772 and 773 of the contested decision, the Commission acknowledges that those spreadsheets give information on the proportionate payments from Intel that would subsist if MSH switched to AMD, which were calculated on the basis of the units of Intel-based computers that MSH would continue to sell in that case. However, according to that decision, the

spreadsheets merely apply the written rule contained in the contribution agreement. The spreadsheets do not however specify whether MSH would have continued to receive those payments or not. They cannot therefore be used as proof that the applicant would have continued paying the amount indicated. According to the findings of the contested decision, it is possible that the spreadsheets in fact served the purpose of enabling MSH to calculate the payments which would have been at risk in view of the unwritten exclusivity condition. Since that latter interpretation and Intel's interpretation can both be inferred from the spreadsheets, those sheets have no probative value. However, in the light of other evidence referring to a risk of financial loss, the interpretation of the spreadsheets that they constitute a tool to quantify the risk of loss of payments in the event of a breach of exclusivity is more plausible.

1479 In the context of this action, the applicant contests the assessment of the probative value of the spreadsheets carried out by the Commission. In its submission, the spreadsheets were designed to evaluate an AMD offer by quantifying the total amount of payments that MSH expected to receive if it used only Intel CPUs and if it shifted one third of its requirements to AMD respectively. The spreadsheets indicate that AMD's offer to MSH for the notebook segment was lower than Intel's offer. The applicant submits that its interpretation of the spreadsheets is confirmed by an internal memorandum from Mr M2, which demonstrates, in its submission, that, in 2004, MSH rejected an AMD offer solely because Intel's offer was better.

1480 However, the Court finds that it is not necessary, in the present case, to adjudicate on whether the Commission's interpretation of the spreadsheets, according to which they constitute a tool to quantify the risk of loss of payments in the event of a breach of exclusivity is more plausible than the applicant's interpretation that the spreadsheets demonstrate that MSH took the view that shifting approximately one-third of its overall requirements to AMD would result in only a proportionate reduction in payments from Intel, with no reduction in per-unit contributions.

1481 The Court notes that the spreadsheets do not specify whether MSH would have continued to receive those payments or not. They cannot therefore be used as proof that the applicant would have continued paying the amount indicated if MSH switched to AMD. Moreover, it should be recalled that there was uncertainty at MSH on the exact amount of the loss of payment if it switched to AMD (see paragraph 1415 above) and that Mr M1 stated that MSH speculated internally about the extent of that loss (see paragraph 1414 above). That is, moreover, confirmed by the documents cited at recitals 693 and 695 of the contested decision, which demonstrate that MSH prepared scenarios in order to evaluate the 'risk' of a switch to AMD. In the light of those circumstances, it is at least possible that MSH used the spreadsheets to calculate the payments that were formally due under the contribution agreements, but which were at risk in view of the unwritten exclusivity condition.

1482 That conclusion is not called in question by the applicant's assertion that the spreadsheets were designed to evaluate an AMD offer. It cannot be ruled out that the spreadsheets allowed MSH to determine at the same time, on the one hand, the minimum funding AMD had to grant it if MSH wanted to achieve the same level of funding as before and, on the other hand, the amount of funding that was potentially at risk in view of what MSH could expect by way of a response from Intel.

1483 Since the Commission's interpretation and the applicant's interpretation can both be inferred equally from the spreadsheets, those sheets have no probative value. In any event, the Court notes that those sheets are just one of several projections by MSH regarding the consequences of selling AMD-based computers. Even if they were capable of confirming the applicant's theory that the payments under the contribution agreements were calculated by units of Intel-based computers sold by MSH, that theory would nevertheless be contradicted by all the evidence set out at recitals 1389 to 1463 above. Consequently, the spreadsheets are not capable of calling in question the probative value of the items of evidence relied on in the contested decision which demonstrate unequivocally that the payments under the contribution agreements were, at least in part, conditional upon exclusivity.

#### 1.5) Conclusion

1484 Accordingly, the various documents on which the applicant relies do not call in question the evidence of the conditionality of the payments under the contribution agreements.

#### 2) The argument alleging that Intel's contribution agreements with MSH served legitimate objectives and were not shams

1485 The applicant disputes the assertion, made at recitals 588 to 616 of the contested decision, that Intel entered into agreements with MSH to disguise exclusivity payments as reimbursements for marketing expenditure, and that Intel never showed any particular interest in MSH's compliance with these obligations.

1486 In support of its argument, the applicant claims, first, that it has entered into similar marketing cooperation agreements with many other retailers throughout Europe, which are not conditioned on any implicit exclusivity requirement. Intel's use of similar agreements with many retailers that stock AMD processors indicates that Intel's agreement with MSH was a normal contract and not a sham or 'disguise'.

1487 That argument is not convincing. The anti-competitive nature of the applicant's practices vis-à-vis MSH is not refuted by the nature of the relationships between the applicant and other retailers.

1488 Furthermore, the applicant submits that it monitored MSH's promotional activities, at least until the 2002 agreement. Subsequently, it no longer had any reason to monitor those promotional activities, since the right to payments was subject to sales. In essence, Intel therefore pursued only legitimate commercial interests and did not commit any fraud whatsoever.

1489 However, it must be stated that, in the contested decision, the Commission refuted, to the requisite legal standard, the applicant's argument that its payments to MSH under the contribution agreements were only calculated by units of Intel-based computers sold by MSH, by demonstrating that those payments constituted, at least in part, consideration for the unwritten exclusivity condition included in the contribution agreements. Where it is implemented by an undertaking in a dominant position, that exclusive-sale incentive does not constitute a legitimate commercial interest. Even on the assumption that, in addition to that unlawful incentive, the contribution agreements pursued in part legitimate commercial interests and that the applicant succeeded in demonstrating that, before the 2002 agreement, it monitored MSH's promotional activities, that would not rebut the evidence of the fact that, between October 2002 and December 2007, the payments under the contribution agreements constituted, at least in part, consideration for exclusivity.

1490 Moreover, it should be noted that at recital 679 the contested decision states, in essence, that the applicant's legal department had requested the insertion of an express non-exclusivity clause in the contribution agreements in order to conceal the fact that the amount of the funding granted by the applicant to MSH was dependant de facto on compliance with an exclusivity condition. In support of that finding, the contested decision cites, in footnote 921 of that decision (footnote 913 in the public version thereof), MSH's Article 18 response, in which it stated as follows:

'It was clear to MSH that despite the non-exclusivity clause the exclusive nature of the relationship remained, for Intel, an essential element of the relationship between Intel and MSH. In fact, [Mr M2] recalls that Intel representatives made it clear to him that the changes in the wording of the agreement had been requested by Intel's legal department, but that in reality the relationship was to continue as before, including the requirement that MSH sell essentially only Intel-based computers' (see paragraph 1393 above).

1491 The fact that the applicant's legal department requested the insertion of an express non-exclusivity clause is, moreover, confirmed by Mr M1's statement as follows:

'I talked about this provision with [Mr M2] who told me that Intel had indicated to him that the clause was requested by the legal department but that this change should not actually affect the cooperation — and the understanding that only Intel-based PCs should be sold.'

1492 In the light of the fact that a non-exclusivity clause was inserted in the contribution agreements which were however subject to an unwritten exclusivity condition, it is clear that those agreements stipulated the opposite of what was actually agreed. This confirms to the requisite legal standard that the applicant entered into the agreements at issue with MSH at least also to disguise exclusivity payments as reimbursements for marketing expenditure.

3) The argument alleging that the Commission failed to prove that the applicant threatened MSH with a disproportionate reduction of the payments

1493 The applicant submits that the contested decision fails to identify any evidence from Intel to MSH in which any loss of payments — still less a 'disproportionate reduction' thereof — is threatened. The absence of any such communication indicates that Intel did not have a strategy of using such threats to ensure MSH's loyalty. Further, the defence wrongly asserts that the question whether Intel would actually have disproportionately reduced its payments and whether MSH believed in the threat is irrelevant. Lastly, the applicant submits, in essence, that, at recitals 689, 789(1) and 999 of the contested decision, the Commission wrongly based its finding of infringement on MSH's alleged impression regarding a disproportionate loss of payments. Such an approach is contrary to the principle of legal certainty.

1494 First, the applicant's argument that it did not communicate to MSH that the level of the payments under the contribution agreements was conditional upon exclusivity is not convincing. The evidence on which the Commission relied in the contested decision demonstrates to the requisite legal standard not only that the fact that the applicant granted payments to MSH the level of which was subject to an



unwritten exclusivity condition did not constitute purely internal or unreasonable speculation by MSH, but that the conditionality of the payments was an integral part of the contribution agreements concluded between the applicant and MSH (see *inter alia* paragraph 1393 above). That conclusion, which goes beyond evidence of a unilateral communication, is sufficient to prove the infringement at issue in the contested decision. On the other hand, the Commission was not required to demonstrate, in addition, that the applicant threatened MSH with a disproportionate loss of payments. That threat is inherent in the existence of an unwritten exclusivity condition, regardless of whether or not it has been communicated expressly (see paragraphs 778 and 999 above).

1495 Second, it should be recalled that the capability of the applicant's practices *vis-à-vis* MSH to be anti-competitive is based on the fact that they were capable of giving MSH an incentive to sell exclusively Intel-based computers. The existence of such an incentive does not depend on whether the payments under the contribution agreements would actually have been reduced if the requirement of exclusivity on which it was conditional was not satisfied. Such an incentive does not depend either on whether MSH actually believed in a corresponding threat. It is sufficient, in that regard, that the applicant gave the impression that the payments under the contribution agreements would have been reduced if AMD-based computers were introduced, so that MSH might have expected this (see paragraph 527 above). Consequently, it is necessary to reject the applicant's assertions that the finding of an abuse required proof that the applicant would actually have reduced its payments disproportionately in the event of breach of the exclusivity condition and that MSH actually believed in a corresponding threat.

1496 In any event, the Court observes that the items of evidence relied on in the contested decision demonstrate to the requisite legal standard that it was understood by the applicant and MSH that non-compliance with MSH's exclusivity commitment would lead at least to a substantial and disproportionate reduction of Intel's payments under the contribution agreements (see paragraphs 1375 and 1396 to 1398 above). This implies that MSH actually believed in a corresponding threat.

1497 Third, the Commission cannot be criticised for having found, at recitals 789(1), 999 and 689 of the contested decision, that 'MSH feared that non-compliance with its exclusivity commitment would lead to a disproportionate loss of Intel's payments under the funding agreements', that 'it was clear to MSH that a change in its supplier strategy would lead at least to a substantial and disproportionate reduction of total payments from Intel' and that 'it was understood by Intel and MSH that non-compliance with MSH's exclusivity commitment would lead at least to a substantial and disproportionate reduction of Intel's payments under the funding agreements'. In so far as those findings refer directly to or involve impressions of MSH, it should be borne in mind that the principle of legal certainty does not preclude the Commission from relying on the impressions of a retailer in order to establish evidence of the dominant undertaking's own conduct (see paragraphs 519 to 525 and 1083 to 1087 above).

4) The argument alleging that the Commission wrongly failed to evaluate the consideration for exclusivity

1498 The applicant claims, in essence, that the Commission failed to demonstrate that the portion of the payments under the contribution agreements which was conditional upon exclusivity was 'substantial'. Furthermore, nowhere has the Commission even attempted to quantify what it means by 'disproportionate' or at what level of loss of payments MSH would rationally be compelled to assume that it was not feasible to switch to AMD. The Commission wrongly failed to demonstrate the creation of such a strong and powerful incentive that MSH was in fact prevented from selling AMD-based computers by the fear of losing payments.

1499 In that regard, it must be stated at the outset that, for reasons corresponding to those set out in paragraphs 140 to 166 above, the application of an AEC test is not necessary to establish the illegality of the applicant's practices *vis-à-vis* MSH. Such a test can also not provide a reliable means by which the dominant undertaking may rule out any infringement. Whilst it is true that the application of an AEC test required exact quantification of the financial advantage which was conditional upon exclusivity, the fact remains that such a quantitative analysis was not essential in order to characterise as abusive the applicant's practices *vis-à-vis* MSH.

1500 Moreover, it should be noted that the anti-competitive nature of the practices at issue in the contested decision does not depend on the precise amount of the portion of the payments under the contribution agreements which was conditional upon exclusivity. Rather it depends on the exclusivity which was granted in consideration for those payments (see paragraph 108 above).

1501 In the present case, the Commission stated, at recital 614 of the contested decision, that, during the period at issue in the contested decision, the total payments granted by the applicant to MSH under the contribution agreements were between approximately USD 19 and 44 million per year. The

applicant does not contest those figures. In addition, the Commission proved to the requisite legal standard that at least a portion of those payments depended on an unwritten exclusivity condition.

1502 Those findings are sufficient for the conclusion to be reached that the applicant's practices vis-à-vis MSH were capable of giving MSH an incentive to sell exclusively Intel-based computers. Since it is established that at least a portion of the payments under the contribution agreements was provided in consideration for the unwritten exclusivity condition, it is permissible to conclude that those payments were capable of giving MSH an incentive to sell exclusively Intel-based computers. In those circumstances, the Commission is not required to identify more precisely the exact portion of those payments which was provided in consideration for exclusivity (see paragraphs 109 and 538 above). That conclusion applies a fortiori given that, as the Commission correctly found at recital 689 of the contested decision, the uncertainty at MSH surrounding the exact level of the payments which would have been lost if MSH had introduced AMD-based computers was due, at least in part, to the fact that the applicant had deliberately avoided that topic (see paragraphs 1414 and 1417 above).

d) Analysis of the capability of the payments under the contribution agreements to restrict competition according to the circumstances of the case

1503 It should be noted that, in order to find that the applicant's practice of making the level of the payments under the contribution agreements conditional upon exclusivity was unlawful, the Commission is not required to analyse the capability of that practice to restrict competition according to the circumstances of the case at hand (see paragraph 169 above).

1504 For the sake of completeness, the Court points out that, in the contested decision, the Commission established that the payments to MSH under the contribution agreements were capable of restricting competition also on the basis of an analysis of the circumstances of the case at hand.

1505 In that regard, it should be noted generally that the fact that the conditional payments granted by the applicant to MSH were part of an overall strategy aimed at foreclosing AMD's access to the most important sales channels and the fact that that strategy included two types of infringement which complemented and strengthened one another render the applicant's conduct capable of restricting competition (see paragraphs 181, 184 and 213 above).

1506 Moreover, it should be recalled that the fact that the applicant's conditional rebates and payments were granted to certain particularly important beneficiaries also constitutes a factor which suggests that those payments are capable of restricting competition (see paragraph 182 above).

1507 The Court notes that MSH was particularly strategically important so far as concerned the retail of consumer computers equipped with x86 CPUs in Europe.

1508 In that regard, the Commission stated, at recital 580 of the contested decision, that MSH was the largest PC retailer in Europe. In addition, it found, at recitals 1600 to 1602 of that decision, that MSH had, at the time of the infringement, a considerable influence on the supply of OEMs' products in Europe and on the decision of OEMs to equip their consumer computers in Europe with CPUs produced by the applicant or by AMD. According to that decision, the applicant itself took the view that since MSH had a strong influence on the configuration of computers manufactured by the OEMs, it was 'key for Intel to have a close relationship' with MSH.

1509 The applicant does not contest those findings. However, at the hearing, it contested MSH's strategic importance by claiming that that importance must be assessed at the worldwide level, given that the market at issue in the contested decision is the worldwide market for x86 CPUs. However, at the worldwide level, MSH accounted for at most only 1% of sales of computers on the retail market.

1510 However, it must be stated that the Commission did not infer MSH's particular strategic importance solely from that undertaking's sales figures of computers or market shares. The Commission also relied on MSH's considerable influence on the supply of OEMs' products in Europe and on the decision of OEMs to equip their consumer computers in Europe with CPUs produced by the applicant or by AMD.

1511 Even on the assumption that MSH was strategically important only for the retail of consumer computers equipped with x86 CPUs in Europe, and not at the worldwide level, nothing precludes that from being taken into consideration as one of numerous factors capable of falling within the scope of an analysis of the capability of a practice to restrict competition according to the circumstances of the case. Thus, the Court notes that the applicant's practices vis-à-vis MSH were capable of making it more difficult for AMD to gain access to a particularly important retailer in Europe.

1512 Moreover, it should be recalled that the fact that the conditional rebates and payments at issue were actually taken into account in the commercial decisions of those benefiting from them also constitutes a factor which suggests that those rebates and payments are capable of restricting competition (see paragraphs 180 and 212 above).

1513 In that regard, the Court finds that the payments granted to MSH under the contribution agreements had an impact on MSH's commercial choice to sell exclusively Intel-based computers during the period at issue in the contested decision.

1514 It should be noted that, at recital 691 of the contested decision, the Commission cites an extract from MSH's Article 18 response which reads as follows:

'Against the background of MSH's existing arrangements with Intel and the likely impact that dealings with AMD would have had thereon, MSH has to date always considered that the commercial offers made by AMD would not have been attractive enough to MSH from a commercial point of view.'

1515 Moreover, it should be recalled that MSH refrained from selling AMD-based 'Vaio' PCs on account of the consequences that that sale would have had for the applicant's payments (see paragraphs 1399 to 1402 above).

1516 Furthermore, three other items of evidence relied on in the contested decision confirm particularly clearly that the applicant's practices had an impact on MSH's choice to sell exclusively Intel-based computers.

1517 First, at recital 732 of the contested decision, the Commission sets out an exchange of emails between the headquarters of MSH and its Dutch subsidiary, the content of which may be summarised as follows (see recital 731 of that decision). In October 2007, MSH Netherlands advertised a non-Intel-based computer. Intel immediately complained to MSH. Since MSH had already itself detected that mistake, the delivery of the products to the local shops had been stopped, so none of these PCs was sold.

1518 Second, at recital 654 of the contested decision, the Commission states that, in an email of 8 April 2005, the manager of a local MSH shop in Leipzig (Germany) complained about the lack of competitiveness of Intel-based PCs in certain price ranges and stated as follows:

'I don't want my mail to be understood as an accusation but rather as a cry for help in the sense that we are currently not able to satisfy this market. I know very well about the importance of the Intel agreement. But it really hurts me when our competitors advertise exactly the products and price ranges, for which our hands are tied due to contractual obligations.'

1519 Third, at recital 655 of the contested decision, the Commission states that, in an email of 6 February 2006, MSH replied as follows to the question of a business partner who had asked whether it was true that MSH did not purchase any products equipped with AMD CPUs.

'1. Yes, it is correct that we don't purchase any products with [AMD CPUs]. 2. because we have an agreement with Intel.'

1520 Those items of evidence demonstrate unequivocally that the exclusivity payments under the contribution agreements had an impact on MSH's commercial choice to sell exclusively Intel-based computers during the period at issue in the contested decision. The applicant does not express an opinion on those items of evidence.

1521 It follows that the Commission inferred from precise and consistent evidence that the exclusivity payments under the contribution agreements had an impact on MSH's commercial choice to sell exclusively Intel-based computers. Accordingly, the Court finds that the applicant's practices vis-à-vis MSH were capable of restricting competition.

#### e) Conclusion

1522 It results from all of the foregoing that all of the complaints raised by the applicant in relation to the payments under the contribution agreements must be rejected.

#### *E – The evidence of an overall strategy aimed at foreclosing AMD's access to the most important sales channels*

1523 According to the contested decision, the applicant implemented a long-term comprehensive strategy to foreclose AMD from the strategically most important sales channels. In that decision, the Commission based the existence of that strategy, in essence, on the following:

- the practices at issue in that decision took place during a consistent period between 2002 and 2007 (see recitals 1740 and 1745);
- the practices were carried out in the context of a growing competitive threat from AMD (see recitals 1741 and 149 to 164);
- the practices had a common strand since they were all aimed at or had the effect of foreclosing AMD from the market (see recital 1745);

- the practices allegedly concerned not only a significant number of OEMs worldwide, but also the strategically most important sales channels (see recitals 1745 and 1747)
- the practices complemented each another (see recital 1747);
- two emails dated November 1998 and sent by the [confidential] of the applicant and by its [confidential] (see recital 1747 in conjunction with footnote 2065 [footnote 2056 of the public version]);
- the applicant attempted to conceal the anti-competitive nature of its practices (see recitals 1742 and 1743).

1524 The applicant contests the existence of a comprehensive strategy. This finding is erroneous, as the infringements found 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'. The Commission's position is incompatible with Professor P3's observations, who refuted the existence of a strategy by referring to 'contra-indicators', and in particular the growth in purchases from AMD by the OEMs concerned. The Commission does not provide any evidence of a consistent or coherent plan. The emails from 1998 do not provide any evidence of the existence of a coherent plan to foreclose AMD. Lastly, the applicant contests that it concealed the anti-competitive nature of its practices.

1525 As a preliminary point, it should be noted that proof of the existence of an overall strategy does not necessarily require direct evidence demonstrating the existence of a coherent anti-competitive plan. The Commission may rather demonstrate the existence of such a plan also by a body of evidence.

1526 As regards, next, the evidence on which the Commission relied in the contested decision, the Court notes the following.

1527 First, in so far as the applicant alleges that the practices at issue are of a fragmented nature, it must be stated that the evidence on which the Commission relied in the contested decision establishes the coherence of those practices to the requisite legal standard.

1528 In the first place, the Commission was entitled to rely on the fact that the infringements were consistent over time. The contested decision states in that regard that the practices at issue were concentrated between 2002 and 2005 and that, during the period between September 2003 and January 2004, six individual abuses occurred, namely conditional rebates or payments vis-à-vis Dell, HP, NEC and MSH, and naked restrictions vis-à-vis HP and Acer. Whilst it is true that, for a part of 2006, the contested decision finds only one illegal practice vis-à-vis MSH and for the remainder of 2006 and for 2007 only illegal practices vis-à-vis MSH and Lenovo, that weakening of the overall intensity of the applicant's anti-competitive conduct towards the end of the total period at issue does not call in question the continuity over time between the respective practices. It follows that the applicant's argument that those practices were of a fragmented nature as regards the period in question must be rejected.

1529 In the second place, the Commission correctly relied on the comparable nature and complementarity of the practices at issue in the contested decision. By contrast, the applicant's argument that the fragmented nature of the infringements stems from the differences between the products concerned is unconvincing.

1530 On the one hand, all the practices at issue in the contested decision have a common strand, since they were all capable of foreclosing AMD from the worldwide market for x86 CPUs. Thus, those practices were interconnected, given that they all concerned the same market and the same competitor of the applicant.

1531 Admittedly, the applicant claims that its practices vis-à-vis MSH can be distinguished from its practices vis-à-vis the OEMs, since they concern a retailer of electronic products that does not buy any CPUs from Intel directly and does not receive true rebates from Intel, but only marketing contributions. Moreover, the applicant complains that the Commission has failed to define a relevant product and geographic market in respect of the MSH allegations.

1532 However, the Court finds that those arguments cannot succeed in depriving the practices of the applicant at issue in the contested decision of their comparable nature and of their complementarity.

1533 In that regard, it should be recalled that the applicant's practices vis-à-vis the OEMs and MSH are, in principle, comparable, the only difference being that the exclusivity payment granted to MSH was not designed to prevent the supply of a direct customer of the applicant by a competitor, but rather the sale of competing products by a retailer further down the supply chain. The Court observes that the Commission was not required to define a separate product market or a separate geographic market as regards MSH. The applicant's practices vis-à-vis MSH were capable of restricting competition on the worldwide market for x86 CPUs. By depriving OEMs of a distribution channel for

AMD-based computers, those practices were capable of having repercussions for OEMs' demand for AMD CPUs on the worldwide market for x86 CPUs. Thus, those practices tended to make it more difficult for AMD to gain access to that market (see paragraph 169 above). That market therefore constitutes at least one of the markets concerned by the applicant's conduct vis-à-vis MSH. The fact that the applicant's practice vis-à-vis MSH might also have concerned the market on which MSH operated does not undermine that conclusion. Consequently, it is not necessary to adjudicate on the question whether the market on which MSH operated was defined correctly.

1534 On the other hand, the anti-competitive mechanisms of the practices at issue in the contested decision are complementary. With respect (i) to the complementarity between (a) the exclusivity rebates and payments and (b) the naked restrictions, the Commission correctly states, at recital 1642 of the contested decision, that the scope of those restrictions is more specific than that of the exclusivity rebates and payments. The naked restrictions are shorter in duration and are focused on a specific product or line of products or specific sales channels, whereas the exclusivity agreements are longer in duration and cover at least entire business segments. Thus, within that single strategy, naked restrictions constitute tactical moves to foreclose AMD from well-identified specific products or sales channels, while exclusivity rebates and payments constitute more strategic devices to foreclose AMD from entire segments of OEMs' demand.

1535 With respect (ii) to the complementarity between (a) the exclusivity rebates granted to the OEMs and (b) the exclusivity payments vis-à-vis MSH, the Commission correctly found, at recital 1597 of the contested decision, that those practices were applied to two levels of the distribution chain. Even on the assumption, as the applicant submits, that MSH purchased only a small part of its computers from the OEMs to which the applicant granted exclusivity rebates, that would not call in question the complementarity between (a) the exclusivity rebates granted to the OEMs and (b) the exclusivity payments granted to MSH. By giving MSH an incentive to sell exclusively Intel-based computers, the applicant implemented an additional anti-competitive device which was capable of restricting also the commercial freedom of the OEMs to which it did not grant exclusivity rebates, by depriving them of a sales channel for their AMD-based computers. Thus, the applicant created an additional barrier for AMD's access to the market which was complementary to that created by the exclusivity rebates.

1536 Second, the applicant relies, on the one hand, on the fact that the infringements covered only a limited share of the market as a contra-indicator of the strategic nature of its conduct. At the hearing, the applicant stated in that regard that, for a part of 2006, the contested decision finds only one illegal practice vis-à-vis MSH and, for the remainder of 2006 and for 2007, the existence of illegal practices only vis-à-vis MSH and Lenovo (see paragraph 1528 above). The applicant added that that decision does not find that Lenovo had strategic importance comparable to Dell's and HP's. Sales of notebooks in the European Union which were potentially affected by its practices vis-à-vis Lenovo were negligible. That is also the case in respect of sales of computers potentially affected by its practices vis-à-vis MSH if those sales are considered in relation to worldwide sales. On the other hand, the applicant relies on the fact that the OEMs concerned increased their purchases from AMD during the period at issue and that that increase was greater than the growth in AMD's sales to the remainder of the market as another contra-indicator of the strategic nature of its conduct.

1537 However, on the one hand, in so far as the applicant claims that the infringements covered only a limited share of the market, it should be noted that a practice may be considered strategic even if it covers only a limited share of the market. In the present case, the strategic nature of the applicant's conduct stems from the fact that it attempted to foreclose AMD from the most important sales channels, namely Dell for the period between December 2002 and December 2005 and HP for the period between November 2002 and May 2005 (see paragraph 182 above). Moreover, with respect to 2006 and 2007, the Court finds that the coherence between the individual infringements of which the overall strategy was composed is not interrupted by the fact that the infringements concerning Lenovo and MSH were less significant than the infringements concerning Dell and HP. That conclusion applies a fortiori given that MSH was particularly strategically important so far as concerned the retail of consumer computers equipped with x86 CPUs in Europe (see paragraphs 183 and 1507 to 1511 above). In any event, it should be recalled that the foreclosed part of the market was on average significant (see paragraphs 187 to 194 above).

1538 On the other hand, in so far as the applicant relies on the increase in OEMs' purchases from AMD during the period at issue, it must be stated that that circumstance cannot even demonstrate that the applicant's practices had no effect. In the absence of the applicant's practices, it may legitimately be considered that the increase in OEMs' purchases from AMD might have been greater (see paragraph 186 above).

1539 Third, contrary to the applicant's claim, the two emails from November 1998 also provide evidence of the strategic manner in which the applicant implemented its practices. On 27 November 1998, the [confidential] of Intel wrote as follows: '[T]here is really no question that in the long run, I

would like AMD output spread round the world as a low cost/low value, unbranded brand. The backstreets of Beijing are wonderful.' Similarly, on 20 November 1998, the [confidential] of Intel, wrote: 'Acknowledging that we have to face competition I think it would be better to have them selling their product with limited penetration around the world rather than high penetration in the most visible and trend setting market'. Although it is true that, in themselves, such statements could be regarded as business language which is admittedly aggressive but not suspicious, the fact remains that, in the light of the other evidence mentioned above, the two emails confirm that Intel's aim was to limit AMD's access to the market. Moreover, contrary to the applicant's claim, the mere fact that the two emails are from 1998 and therefore approximately four years before the period at issue in the contested decision does not deprive them of all probative value.

1540 Fourth, in so far as the applicant contests that it concealed the anti-competitive nature of its practices, the Court observes that the Commission mentions in that regard, at recitals 1742 and 1743 of the contested decision, the following:

- an email of Mr I2, [confidential] of Intel, to [confidential] of Lenovo of 18 June 2006, in which he stated as follows: '[Mr L1] [confidential], [f]irst of all, the information in this note is incredibly sensitive and would be embarrassing to me and Intel if it was known. I am asking you as a matter of trust to read it and delete it with no sharing to your team. ... any meet-comp program that we may have had with Dell will get nullified as they introduce competition — this opens vistas of opportunity for Lenovo/Intel that I have only hinted at in the past ...';
- the secret nature of the exclusivity agreement between the applicant and MSH, and how the applicant insisted on this;
- the existence of rebate agreements that contained unwritten anti-competitive clauses as regards HP;
- the applicant's attempts to portray its conduct in a non-suspicious manner through the use of euphemisms.

1541 As regards, in the first place, the email of 18 June 2006, the applicant argues that this email merely reflects a negotiating effort by its [confidential] aimed at persuading Lenovo to give Intel more business. Obviously, it would have been embarrassing to Intel if it had become known to a third party, especially to Dell, that the applicant was using Dell's switch as a negotiating point with another OEM. The Court considers that that argument is not convincing. In the light of the statement that any meet-competition program would get nullified as Dell was introducing competition, the email provides evidence of the fact that the rebates granted by the applicant to Dell were conditioned on exclusivity (see paragraphs 460, 463, 1124 above). In addition, Mr I2's statement that the breach, by Dell, of that condition 'opens vistas of opportunities for Lenovo/Intel ... only hinted at in the past' meant that, following the reduction of the rebates granted to Dell, the applicant would offer Lenovo the preferential status Dell had had (see recital 526 of the contested decision). Consequently, Mr I2's request to [confidential] of Lenovo to delete the email is an indication that he sought to conceal the anti-competitive nature of the applicant's relationships with Dell and Lenovo.

1542 As regards, in the second place, the secret nature of the exclusivity agreement concluded with MSH, it has been demonstrated in more detail in paragraphs 1490 to 1492 above that a non-exclusivity clause was inserted in the exclusivity agreements, so that the contribution agreements stipulated the opposite of what was actually agreed.

1543 As regards, in the third place, the use of unwritten anti-competitive clauses vis-à-vis HP, the applicant merely claims that HP was not contractually bound by exclusivity obligations or other unwritten requirements. However, the unwritten conditions of the HPA agreements did not need to be legally binding to be capable of creating an incentive for HP to comply with them (see paragraph 106 above). Given that the contested decision correctly found that the rebates granted under the HPA agreements were subject to several unwritten anti-competitive conditions (see paragraphs 666 to 873 below), the unwritten nature of the clauses is also indicative of the manner in which the applicant attempted to conceal its anti-competitive practices.

1544 As regards, in the fourth place, the applicant's use of euphemisms, it should be noted, first of all, that the Commission concluded, at recital 661 of the contested decision, that the applicant used the acronym 'VOC', which stands for 'vendor of choice', in a series of documents as a euphemism to refer to MSH being bound to Intel by an exclusivity condition. The Commission specifies, at recital 662 of the contested decision, that there was also a 'Sales and Marketing Creation Reference Card', drawn up by Intel's Legal Department. In that document, under the heading 'Sensitive language', the term 'vendor of choice' was suggested to replace wording implying potentially inappropriate conduct as regards exclusivity:

'Avoid ALL militaristic, aggressive language ANYWHERE (including internal mail, memos...) e.g. erect barriers, ...exclude from competition ...War ...Battle ...Tie ...Leverage ...dominate ...Top to Bottom

...Squash ...blow away the competition ...be a killer ...bundle ...technology treadmill Use instead: lead the field ...set the specifications ...grow the market segment ...be the vendor of choice ...build upon ...add value.'

1545 Second, recital 1743 of the contested decision mentions a series of emails of 30 April 2004. According to that decision, an Intel Germany executive referred to attempts that had been made by Intel to 'successfully inhibit further Opteron implementation in our key accounts'. An Intel France executive replied to that email as follows: '[P]lease be very careful using expressions like "inhibit further Opteron implementation" which could be misinterpreted as anti-competitive — I think you mean "win with IA vs Opteron" — If you see others use similar expressions please remind them of the current investigations by EU\_FTC / dawn raids etc.' The contested decision specifies that that communication predates the inspections by the Commission.

1546 The applicant admits that it has never denied that 'vendor of choice' may mean that a customer is sole-sourcing or sourcing predominantly from Intel. However, in the applicant's submission, there is nothing in the 'Sales and Marketing Creation Reference Card' that supports the Commission's interpretation that it implies some form of binding commitment. This card is simply a document to educate its business people to avoid using language which may be misinterpreted by competition authorities. As regards the email of 30 April 2004, the applicant states that the email's purpose was also merely to warn against using language that 'could be misinterpreted as anti-competitive', which is a legitimate effort.

1547 However, a distinction must be drawn between a situation in which an undertaking is careful to ensure that its lawful conduct is not misinterpreted by a competition authority and a situation in which an undertaking seeks to ensure that its anti-competitive practices are not detected. It is true that, for an undertaking, it is in principle legitimate to warn its employees against using language that could be misinterpreted by a competition authority. However, such an approach is an indication that an undertaking concealed the anti-competitive nature of its practices where the existence of those practices has been established by means of other evidence.

1548 Lastly, the applicant submits that the Commission only set out specific allegations of concealment as regards MSH, HP, and Lenovo. In that regard, it should be borne in mind that recitals 1742 and 1743 of the contested decision concern the evidence of the overall strategy and that items of evidence set out in paragraph 1539 above are cited in that paragraph as indicia. The Court finds that that evidence demonstrates to the requisite legal standard that the applicant attempted to conceal the anti-competitive nature of its conduct, at least as regards its relationships with Dell, HP, Lenovo and MSH. In order to establish that the applicant implemented an overall strategy aimed at foreclosing AMD from the market, the Commission was not required to demonstrate, in the contested decision, an effort to conceal in relation to each practice implemented, but was entitled to confine itself to setting out the evidence in relation to those four undertakings.

1549 Moreover, the items of evidence set out in the contested decision as indicia at recitals 1742 and 1743 are confirmed by the general finding made at recital 167 of that decision, according to which all Intel's practices had a common strand in that numerous deals between Intel and its customers, sometimes worth hundreds of millions or even billions of USD, were made on the basis of handshake agreements or contained significant provisions which were unwritten. The complaint that the applicant used unwritten anti-competitive clauses is not only directed against the applicant's conduct vis-à-vis Dell, HP, Lenovo and MSH, but extends to the applicant's conduct vis-à-vis all the OEMs and MSH.

1550 It is true that the applicant submits that, in the CPU market, which is characterised by the rapid introduction of new products and significant price declines for existing products, informal agreements are a consequence of industry's pace and the demands of OEMs themselves. However, it must be stated that, although undertakings are free to conclude informally agreements which are consistent with the competition rules, recourse to informal anti-competitive conditions may constitute an indication of an effort to conceal such conditions. In the present case, such an indication stems not only from the informal nature of the agreements concluded between the applicant and the OEMs or MSH in itself, but, at least as regards HP and Lenovo, from the use of unwritten anti-competitive clauses which did not appear in the written contracts, or even, as regards MSH, from written terms which indicated the opposite of what was actually agreed.

1551 On the basis of the considerations set out in paragraphs 1540 to 1550 above, it is permissible to conclude that the Commission demonstrated to the requisite legal standard that the applicant attempted to conceal the anti-competitive nature of its practices. Consequently, it is not necessary to adjudicate also on the admissibility or the merits of the Commission's other arguments as regards whether other evidence exists which strengthens the abovementioned evidence or demonstrates more specifically that the applicant also disclosed its anti-competitive practices regarding Acer and NEC.

1552 On the basis of all the foregoing considerations, the Court therefore finds that the Commission proved to the requisite legal standard that the applicant implemented a long-term comprehensive strategy to foreclose AMD from the strategically most important sales channels.

*III – The heads of claim for annulment or reduction of the fine*

1553 According to Article 2 of the operative part of the contested decision, a fine of EUR 1.06 billion was imposed on the applicant.

1554 Pursuant to point 19 of the 2006 Guidelines, the Commission determined that the basic amount of the fine is related to a proportion of the value of sales, depending on the degree of gravity of the infringement, multiplied by the number of years of infringement (see recital 1778 of the contested decision).

1555 The Commission set at EUR 3 876 827 021 the value of sales to be considered, which represents the value of sales of x86 CPUs invoiced by Intel to undertakings established in the EEA market during the last year of the infringement (see recitals 1773 to 1777 of the contested decision).

1556 As regards the gravity of the infringement, the Commission took into account, in particular, the nature of the infringement, the market share of the parties concerned and the geographic scope of the infringement. The Commission also took into account the fact that Intel had committed a single infringement, that the intensity of that single infringement differed across the years and that most of the individual abuses concerned were concentrated in the period ranging from 2002 to 2005, that the abuses differed in their respective likely anti-competitive impact, and that Intel took measures to conceal the practices established in the contested decision. In consequence, the Commission fixed that proportion at 5% (see recitals 1779 to 1786 of that decision).

1557 Regarding the duration of the infringement, the Commission found that the abuse commenced in October 2002 and continued until at least December 2007. It therefore lasted 5 years and 3 months, which, in accordance with point 24 of the 2006 Guidelines, means the basic amount should be multiplied by 5.5 to take account of that duration (see recitals 1787 and 1788 of the contested decision).

1558 In view of the foregoing, the Commission found that the basic amount of the fine to impose on Intel was to be EUR 1 060 000 000 (see recital 1789 of the contested decision). It found no mitigating or aggravating circumstances (see recitals 1790 to 1801 of that decision).

1559 The applicant, supported by ACT, submits that, in light of the Court's unlimited jurisdiction pursuant to Article 261 TFEU and Article 31 of Regulation No 1/2003, the fine should be annulled or reduced substantially on the following grounds. First, the Commission misapplied the 2006 Guidelines and took irrelevant considerations into account. Second, Intel did not infringe Article 82 EC intentionally or through negligence. Third, the level of the fine is manifestly disproportionate.

*A – The alleged incorrect application of the 2006 Guidelines and the alleged taking into account of irrelevant considerations*

1560 The applicant claims that the calculation of the basic amount of the fine is vitiated by a number of flaws. First, the Commission failed properly to assess the goods or services to which the infringement relates between January and September 2006. The Commission moreover inflated the amount of the fine by using the value of Intel's sales in all EEA Member States in December 2007, whereas 12 Member States joined the EEA during the infringement period. Second, the Commission erroneously took into account concealment as a factor in assessing the gravity of the infringement. Third, the Commission erroneously used its finding of a single infringement as an aggravating factor across the whole time period. Fourth, the contested decision was incorrect in so far as the Commission applied a multiplier of 5.5 for duration to each infringement. Fifth, the Commission applied its guidelines retroactively.

1561 As a preliminary point, it should be noted that, at recitals 1747 and 1748 of the contested decision, the Commission was right to infer the existence of a single and continuous infringement of Article 82 EC, extending from October 2002 to December 2007 and aimed at foreclosing competitors from the market, from evidence of the existence of a comprehensive strategy to foreclose AMD from the strategically most important sales channels (see paragraphs 1523 to 1552 above).

1562 It is apparent from the case-law that the concept of a single and continuous infringement relates to a series of actions which form part of an overall plan because their identical object distorts competition within the common market. For the purposes of characterising various instances of conduct as a single and continuous infringement, it is necessary to establish whether they complement each other inasmuch as each of them is intended to deal with one or more consequences of the normal pattern of competition and, by interacting, contribute to the realisation of the objectives intended within the framework of that overall plan. In that regard, it will be necessary to take into



account any circumstance capable of establishing or casting doubt on that complementary link, such as the period of application, the content (including the methods used) and, correlatively, the objective of the various actions in question (*AstraZeneca*, paragraph 64 above, paragraph 892).

1563 The Court observes that the findings of the contested decision relating to the existence of an overall strategy fulfil those requirements. Consequently, the Commission was entitled to infer from those findings that the applicant committed a single and continuous infringement. In that regard, the Court draws attention in particular to the consistency over time of the infringements at issue in the contested decision and their comparability and complementarity. The individual practices alleged against the applicant pursued an identical object since they were all aimed at foreclosing AMD from the worldwide market for x86 CPUs. In that regard, they were complementary in so far as those practices were applied to two levels of the distribution chain and in so far as the naked restrictions constituted tactical moves to foreclose AMD from well-identified specific products or sales channels, while exclusivity rebates and payments constituted more strategic devices to foreclose AMD from entire segments of OEMs' demand. Moreover, it should be recalled, in particular, that the coherence between the individual infringements is not interrupted by the fact that the infringements concerning Lenovo and MSH were less significant than the infringements concerning Dell and HP (see paragraphs 1525 to 1537 above).

1564 According to the case-law, the Commission was therefore entitled to impose a single fine. In that regard, the Commission was not required to state specifically in the grounds of the contested decision how it took into account each of the components of the abuse for the purposes of setting the fine (see, to that effect, Case T-83/91 *Tetra Pak v Commission* [1994] ECR II-755, paragraph 236, and *Michelin II*, paragraph 75 above, paragraph 265).

1565 It is in the light of the foregoing considerations that it is necessary to verify the applicant's arguments relating to the alleged incorrect application of the 2006 Guidelines.

1. The argument alleging erroneous assessment of the products to which the infringement relates between January and September 2006 and that the Commission ignored the fact that 12 Member States formed part of the EEA only during a part of the infringement period

1566 First, the applicant submits that the fine was unlawful because the 5% per annum figure was applied to too large a turnover figure between January and September 2006. The Commission failed to define a relevant product and geographic market in respect of the MSH allegations. Given that the alleged abuse in respect of MSH is the only infringement with a potential connection to the EEA from January 2006 until at least September 2006, the Commission erred in applying turnover in respect of the whole of the x86 CPU market in the EEA to an allegation which does not relate to that market. The Commission committed a manifest error of assessment in failing to take into account the limited geographic scope of the alleged infringement during this period in calculating the fine. MSH was not active in many Member States within the EEA and retail markets are likely to be no more than national in scope.

1567 Second, the applicant complains that the Commission inflated the fine by finding, at recital 1784 of the contested decision, that 'the whole EEA was covered by the unlawful conduct', and by using the value of Intel's sales in all EEA Member States in December 2007, that is to say when the infringement period ended. However, 12 Member States joined the EEA during the infringement period and had not previously been subject to the Commission's jurisdiction. Had the Decision imposed a separate fine for each infringement, it would have had to exclude the value of Intel's sales in those states or apply a lower multiplier.

1568 Those arguments are not convincing.

1569 First, in accordance with point 13 of the 2006 Guidelines, in determining the basic amount of the fine to be imposed, the Commission will take the value of the undertaking's sales of goods or services to which the infringement directly or indirectly relates in the relevant geographic area within the EEA. That wording covers sales in the relevant market (Case T-211/08 *Putters International v Commission* [2011] ECR II-3729, paragraph 59). Also according to point 13, the Commission will normally take the sales made by the undertaking during the last full business year of its participation in the infringement.

1570 Second, it follows from point 22 of the 2006 Guidelines that the geographic scope of the infringement is one of the factors that may be taken into consideration in order to determine the gravity of the infringement and therefore to decide whether the proportion of the value of sales to be considered should be at the lower end or at the higher end of the scale of 30% laid down in point 21 of the 2006 Guidelines.

1571 Although it is therefore true that both point 13 and point 21 of the 2006 Guidelines refer to the geographic scope of an infringement, the Court finds — as will be explained below — that, in the present case, the Commission did not infringe either point 13 of the 2006 Guidelines or point 21

thereof by failing to take into consideration both the geographic scope of the market on which MSH operated and the fact that 12 Member States formed part of the EEA only during part of the infringement period.

a) The existence of an infringement of point 13 of the 2006 Guidelines

1572 It is apparent from recitals 792 to 836 of the contested decision that the Commission concluded that the relevant market was the worldwide market for x86 CPUs. According to recital 1773 of that decision, the amount of EUR 3 876 827 021, on which the Commission relied as the value of sales to be taken into consideration, represents the value of sales of x86 CPUs invoiced by Intel to companies located in the EEA during the last year of the infringement. That value does not take account either of the alleged narrower geographic scope of the market on which MSH operated or of the fact that 12 Member States formed part of the EEA only during a part of the infringement period.

1573 However, the Court finds that, by failing to take into consideration both the geographic scope of the market on which MSH operated and the enlargement of the European Union during the infringement period, the Commission did not apply point 13 of the 2006 Guidelines incorrectly.

1574 In that regard, it should be recalled that, in the present case, the Commission was entitled to impose a single fine and that it was not required to state specifically how it took into account each of the components of the abuse for the purposes of setting the fine (see paragraph 1564 above).

1575 First, it should be noted that, in accordance with point 13 of the 2006 Guidelines, the year which is normally relevant for determining the value of sales is the last full business year of the participation in the infringement, namely, in the present case, 2007. The applicant does not claim that the Commission ought to have departed from that rule and chosen another year as reference year. However, for the whole of 2007, the Commission established the existence of an abuse not only in relation to MSH, but also in relation to Lenovo. As regards the applicant's conduct vis-à-vis Lenovo in 2007, the applicant does not contest that the relevant market was the worldwide market for x86 CPUs. Given that at least one of the abusive practices committed by the applicant in 2007 related therefore to the worldwide market for x86 CPUs, the Commission did not apply its guidelines incorrectly in so far as it set the value of sales by reference solely to the market for x86 CPUs, and not to the allegedly more limited consumer computer market on which MSH operated.

1576 In any event, it should be recalled that the Commission was not required to define a separate product market or a separate geographic market as regards MSH and that the applicant's practices vis-à-vis MSH were capable of restricting competition on the worldwide market for x86 CPUs (see paragraph 1533 above). Given that the Commission was not required to define a separate geographic market as regards MSH, nor was the Commission required to take account of the limited geographic scope of such a hypothetical market when setting the value of sales, in accordance with point 13 of the 2006 Guidelines.

1577 Second, the Court notes that the 12 Member States which joined the EEA during the infringement period formed part of the EEA during the entirety of 2007. Given that, in accordance with point 13 of the 2006 Guidelines, the relevant year for the calculation of the value of sales is, in the present case, 2007, the Commission was not required to take into consideration, when setting the amount of the value of sales, the fact that those Member States formed part of the EEA only during a part of the infringement period.

b) The existence of an infringement of point 21 of the 2006 Guidelines

1578 The Court notes that, as regards the gravity of the infringement, the Commission found, at recital 1784 of the contested decision, that the applicant's exclusionary strategy against AMD was worldwide in scope. For the purposes of assessing the gravity of the infringement, this means that the whole of the EEA was covered by the infringement.

1579 The Court finds that, by failing in this way to take into consideration the geographic scope of the market on which MSH operated, the Commission did not apply point 13 of the 2006 Guidelines incorrectly.

1580 The mere fact that, for a part of 2006, the contested decision finds only one illegal practice vis-à-vis MSH cannot call in question the conclusion that the applicant's exclusionary strategy against AMD was worldwide in scope. It should be recalled that the Commission was not required to define a separate product market or a separate geographic market as regards MSH and that the applicant's practices vis-à-vis MSH were capable of restricting competition on the worldwide market for x86 CPUs (see paragraph 1533 above). Moreover, since the applicant's practices vis-à-vis MSH were part of a coherent overall strategy, they cannot be considered in isolation. The geographic scope of that strategy was worldwide. Consequently, in the contested decision, the Commission correctly concluded that the whole of the EEA was covered by the infringement.

1581 Moreover, the Court finds that the Commission was also not required to take account of the fact that 12 Member States formed part of the EEA only during a part of the infringement period when, for the purposes of assessing the gravity of the infringement, it considered that the worldwide scope of the exclusionary strategy against AMD meant that the whole of the EEA had been covered by the infringement.

1582 It should be noted that the Commission found merely that the whole of the EEA had been covered by the infringement. Thus, it was referring in a dynamic manner to the States which formed part of the EEA at a given point during the infringement period. The Commission was not required to break down the geographic scope taken into consideration when assessing the gravity of a single infringement in step with the various States which joined the EEA at a given point during the infringement period. The Commission was not required to state specifically how it took into account each of the components of the abuse for the purposes of setting the fine (see paragraph 1564 above).

## 2. The taking into consideration of the concealment of the infringements

1583 It should be noted that, in order to assess the gravity of the infringement, the Commission, at recital 1785 of the contested decision, took account of the fact that the applicant took measures to conceal the practices at issue in that decision.

1584 The applicant claims that the Commission was wrong to take account of the alleged concealment of the infringement, given that it did not succeed in proving that concealment. In addition, the Commission's claims concerning that concealment relate only to MSH, HP and Lenovo and should not therefore be applied globally to all the infringements.

1585 Those arguments cannot succeed.

1586 As a preliminary point, it should be noted that the secret nature of an infringement of the competition rules of the European Union is a factor liable to exacerbate its gravity (see, to that effect, Joined Cases T-259/02 to T-264/02 and T-271/02 *Raiffeisen Zentralbank Österreich and Others v Commission* [2006] ECR II-5169, paragraph 252, and *Imperial Chemical Industries v Commission*, paragraph 139 above, paragraph 446). In the present case, the Commission took into account Intel's attempts to conceal its conduct, among many other factors, when assessing the gravity of the infringement.

1587 It should be recalled that the evidence relied on in the contested decision demonstrates to the requisite legal standard that the applicant attempted to conceal the anti-competitive nature of its conduct, at least as regards its relationships with Dell, HP, Lenovo and MSH (see paragraphs 1540 to 1551 above). Contrary to the applicant's claim, it was sufficient that the Commission set out specific allegations of concealment only as regards those four undertakings in order to take into consideration concealment as one of the factors determining the gravity of the single infringement. The Commission was not required to state specifically how it took into account each of the components of the abuse for the purposes of setting the fine (see paragraph 1564 above).

## 3. The aggravating nature of the finding of a single infringement

1588 It should be noted that, at recital 1747 of the contested decision, in the context of the findings concerning the existence of an overall strategy, the Commission concluded that, taken together, the applicant's individual practices were capable of having or likely to have had an even greater impact on the market. At recital 1785 of that decision, in the context of the findings relating to the gravity of the infringement, the Commission stated that it had taken into account the fact that Intel had committed a single infringement, that the intensity of that single infringement had differed across the years, that most of the individual abuses concerned were concentrated in the period ranging from 2002 to 2005 and that the abuses differed in their respective likely anti-competitive impact.

1589 The applicant claims that the Commission 'presumably' used the finding of a single infringement as an aggravating factor in determining the gravity. The application of a single infringement as a factor increasing the gravity of the infringement is incorrect, because, for certain periods, it cannot be shown that 'such' a 'factor' could increase the gravity of the alleged conduct. For part of 2006, when the only conduct relating to the EEA involved MSH, there can be no basis for attributing greater gravity to Intel's conduct resulting from a single infringement.

1590 Those arguments must be rejected.

1591 It should be recalled that, in the present case, the Commission was entitled to impose a single fine and that it was not required to state specifically how it took into account each of the components of the abuse for the purposes of setting the fine (see paragraph 1564 above). Moreover, the applicant's argument is based on the incorrect premiss that the Commission increased the gravity of the unlawful conduct to be taken into account on account of the existence of a single infringement. That, however, is not the case. The Commission considered that the intensity of the single

infringement differed across the years, that most of the individual abuses concerned were concentrated in the period ranging from 2002 to 2005 and that the abuses differed in their respective likely anti-competitive impact. Those findings take account, to the requisite legal standard, of the fact that, for part of 2006, the infringement involving MSH was the only infringement in relation to the EEA which was established in the contested decision.

#### 4. The application of a multiplier of 5.5 for the duration of the infringement

1592 It should be observed that, regarding the duration of the infringement, the Commission found, at recitals 1787 and 1788 of the contested decision, that the abuse commenced in October 2002 and continued until at least December 2007. It therefore lasted 5 years and 3 months, which, in accordance with point 24 of the 2006 Guidelines, means the basic amount should be multiplied by 5.5 to take account of that duration.

1593 In the applicant's submission, the contested decision is incorrect in so far as the Commission applied a multiplier of 5.5 for duration to each infringement. This approach operated to its detriment, as each of the infringements in relation to the OEMs was of significantly shorter duration than the overall infringement period.

1594 That argument is not convincing.

1595 Contrary to the applicant's claim, the Commission did not apply a multiplier of 5.5 to each of the individual infringements, but to the single infringement. Since the Commission correctly found the existence of a single infringement from October 2002 to December 2007 (see paragraphs 1561 to 1563 above), that approach cannot be criticised.

#### 5. The retroactive application of the 2006 Guidelines

1596 The applicant claims that the Commission infringed the principles of non-retroactivity and the protection of legitimate expectations by applying the 2006 Guidelines retroactively. The replacement of certain guidelines by other guidelines must be distinguished from the first introduction of the guidelines. The first introduction of the guidelines created for the first time a legitimate expectation which until then had not existed, which prevents the application of new guidelines retroactively.

1597 That argument cannot be accepted.

1598 It is apparent from the case-law that neither the principle of legal certainty nor the principle that offences and punishments are to be strictly defined by law, which is enshrined in Article 7(1) of the ECHR, precludes the Commission from deciding to adopt and apply new guidelines on the method of setting fines, even after the infringement has been committed. The interest in effective enforcement of the competition rules justifies that, within the limits laid down in Article 23 of Regulation No 1/2003, an undertaking must take account of the possibility of a modification to the general competition policy of the Commission as regards fines with respect both to the method of calculation and the level of fines (judgment of 2 February 2012 in Case T-83/08 *Denki Kagaku Kogyo and Denka Chemicals v Commission*, not published in the ECR, paragraphs 98 to 127). That finding also holds true with respect to Article 49(1) of the Charter of Fundamental Rights. The Commission was therefore, a fortiori, entitled to apply its 2006 Guidelines to a single infringement which ended only after those guidelines were adopted.

#### *B – The alleged absence of an intentional or negligent infringement of Article 82 EC*

1599 The applicant claims that it did not act negligently. In order to substantiate that assertion, it submits, in essence, that conditional rebates are not always unlawful and that naked restrictions constitute a new category of abuse. It showed that the Commission failed to establish the existence of a strategy to foreclose AMD. The Commission erred in taking the view that Intel took steps to conceal its conduct. The applicant could not have foreseen the results that were reached by the Commission in the application of the AEC test. Those results are based upon internal data from the various OEMs which was neither known nor accessible to Intel.

1600 Those arguments cannot succeed.

1601 It is settled case-law that the condition that the infringement was committed intentionally or negligently is satisfied where the undertaking concerned cannot be unaware of the anti-competitive nature of its conduct, whether or not it was aware that it was infringing the competition rules of the Treaty (*Tetra Pak v Commission*, paragraph 1564 above, paragraph 238, and Case T-271/03 *Deutsche Telekom v Commission* [2008] ECR II-477, paragraph 295). An undertaking is aware of the anti-competitive nature of its conduct where it is aware of the essential facts justifying both the finding of a dominant position on the relevant market and the finding by the Commission of an abuse of that position (see, to that effect, *Michelin I*, paragraph 74 above, paragraph 107, and *Raiffeisen Zentralbank Österreich and Others v Commission*, paragraph 1586 above, paragraphs 207 and 210;

see, also Opinion of Advocate General Mazák in Case C-280/08 P *Deutsche Telekom*, paragraph 98 above, point 39).

1602 As regards, first, the argument that conditional rebates are not always unlawful and that naked restrictions constitute a new category of abuse, it is sufficient to note that such a line of argument is merely intended to show that the applicant was unaware that the conduct complained of in the decision at issue was unlawful in the light of Article 82 EC. That line of argument must therefore be rejected in accordance with the case-law cited in the previous paragraph (see, by analogy, Case C-280/08 P *Deutsche Telekom*, paragraph 98 above, paragraph 127). In any event, the applicant could not have been unaware of the anti-competitive nature of its conduct. The European Union Courts have censured on several occasions the implementation, by an undertaking in a dominant position, of practices consisting in the grant of financial incentives conditional upon exclusivity. In that regard, it is sufficient to refer to *Hoffmann-La Roche*, paragraph 71 above, and to Case C-310/93 P *BPB Industries and British Gypsum*, paragraph 89 above. As regards naked restrictions, it was held in paragraphs 219 and 220 above that the characterisation of such practices as abusive cannot be regarded as novel and that, in any event, the fact that conduct with the same features has not been examined in past decisions does not exonerate an undertaking.

1603 Second, it should be recalled that the evidence relied on in the contested decision demonstrates to the requisite legal standard that the applicant implemented a long-term comprehensive strategy to foreclose AMD from the strategically most important sales channels and that the applicant attempted to conceal the anti-competitive nature of its conduct, at least as regards its relationships with Dell, HP, Lenovo and MSH (see paragraphs 1523 to 1552 above). Consequently, it is permissible to conclude that the applicant committed the infringement established at least negligently.

1604 Third, it is necessary to reject the applicant's argument that it could not have foreseen the results that were reached by the Commission in the application of the AEC test. The Court notes that, in the contested decision, the Commission relied, primarily, on the criteria stemming from the Court's case-law in *Hoffmann-La Roche*, paragraph 71 above, in finding the exclusivity rebates to be unlawful (see paragraphs 69, 72 and 73 above). However, it based its contested decision only for the sake of completeness on the AEC test (see paragraphs 173 and 175 above). The Court recalls that the application of an AEC test is not necessary to establish the illegality of the applicant's practices and that such a test can also not provide a reliable means by which the dominant undertaking may rule out any infringement (see paragraphs 140 to 166 above). Even on the assumption that the applicant could not have foreseen the results that were reached by the Commission in applying that test, that would not call in question the fact that the applicant could not have been unaware of the essential facts justifying the finding by the Commission of an abuse of its dominant position according to the criteria stemming from the case-law in *Hoffmann-La Roche*, paragraph 71 above.

#### *C – The allegedly disproportionate nature of the fine*

1605 The applicant relies, in essence, on three arguments to support its assertion that the level of the fine was disproportionate. The fine was not imposed by an independent authority. The fine is disproportionate in relation to fines imposed in other decisions. The imposition of the highest fine ever imposed is disproportionate in the light of the absence of actual effects of the infringement on the market.

1606 All those arguments must be rejected.

##### 1. The argument alleging the Commission's lack of independence

1607 In the applicant's submission, the Commission is not an independent and impartial tribunal within the meaning of the ECHR. The applicant claims that, since the fine is criminal in nature, in the sense of Article 6 of the ECHR, it was imposed unlawfully and in violation of Intel's right to have the charge against it decided by an independent tribunal.

1608 That argument cannot be accepted.

1609 The right of access to an independent and impartial tribunal, on which the applicant relies, is one of the guarantees enshrined in Article 6(1) of the ECHR. In EU law, the protection afforded by that article is guaranteed by Article 47 of the Charter of Fundamental Rights. It is therefore appropriate to refer only to Article 47 (see, to that effect Case C-386/10 P *Chalkor v Commission* [2011] ECR I-13085, paragraph 51). Article 52(3) of the Charter of Fundamental Rights states that, in so far as the Charter contains rights which correspond to those guaranteed by the ECHR, their meaning and scope are to be the same as those laid down by the ECHR. According to the explanation of that provision, which must be taken into account by the Courts of the European Union in accordance with Article 52(7) of the Charter of Fundamental Rights, the meaning and the scope of the guaranteed rights are to be determined not only by reference to the text of the ECHR, but also, *inter alia*, by reference to the

case-law of the European Court of Human Rights (see, to that effect, Case C-279/09 *DEB* [2010] ECR I-13849, paragraph 35).

1610 It follows from the case-law of the European Court of Human Rights that Article 6(1) of the ECHR does not preclude a 'penalty' from being imposed by an administrative authority in the first instance. For this to be possible, however, decisions taken by administrative authorities which do not themselves satisfy the requirements laid down in Article 6(1) of the ECHR must be subject to subsequent review by a judicial body that has full jurisdiction. The characteristics of a judicial body that has full jurisdiction include the power to quash in all respects, on questions of fact and law, the decision of the body below. The judicial body must in particular have jurisdiction to examine all questions of fact and law relevant to the dispute before it (see judgment of the European Court of Human Rights in *A. Menarini Diagnostics S.R.L. v. Italy*, no. 43509/08, 27 September 2011, § 59).

1611 It may be inferred from that case-law that the fact that the Commission acts as investigator, prosecutor and adjudicator in procedures relating to infringements of the competition rules laid down in Regulation No 1/2003 is not of itself incompatible with Article 47 of the Charter of Fundamental Rights, provided, however, that the undertakings subject to such procedures have a right to appeal the Commission's decision before a body which satisfies the requirements under Article 47 (Opinion of Advocate General Mengozzi in Case C-521/09 P *Elf Aquitaine v Commission* [2011] ECR I-8947, point 31).

1612 In that regard, it is clear from the case-law that the review of legality provided for under Article 263 TFEU, supplemented by the unlimited jurisdiction in respect of the amount of the fine, provided for under Article 31 of Regulation No 1/2003, in accordance with Article 261 TFEU, meets the requirements of the principle of effective judicial protection in Article 47 of the Charter of Fundamental Rights. The review provided for by the Treaties involves review by the Courts of the European Union of both the law and the facts, and means that they have the power to assess the evidence, to annul the contested decision and to alter the amount of a fine (see, to that effect, *Chalkor v Commission*, paragraph 1609 above, paragraph 67).

## 2. The disproportionate nature of the fine in relation to other fines

1613 The applicant claims that the fine imposed upon Intel is also disproportionate compared to other recent cases including the case giving rise to the judgment in Case T-201/04 *Microsoft v Commission* [2007] ECR II-3601.

1614 It is clear from settled case-law that the Commission's practice in previous decisions does not itself serve as a legal framework for the fines imposed in competition matters and that decisions in other cases can give only an indication for the purpose of determining whether there might be discrimination since the facts of those cases, such as markets, products, the undertakings and periods concerned, are not likely to be the same (Case C-167/04 P *JCB Service v Commission* [2006] ECR I-8935, paragraphs 201 and 205, and Case C-76/06 P *Britannia Alloys & Chemicals v Commission* [2007] ECR I-4405, paragraph 60; Case T-192/06 *Caffaro v Commission* [2011] ECR II-3063, paragraph 46).

1615 Nevertheless, observance of the principle of equal treatment, which prevents comparable situations from being treated differently and different situations from being treated in the same way, unless such difference in treatment is objectively justified, is incumbent on the Commission when it imposes a fine on an undertaking for infringement of the competition rules, as it is on any institution in carrying out all its activities. However, previous decisions by the Commission imposing fines can be relevant from the point of view of observance of the principle of equal treatment only where it is demonstrated that the facts of the cases in those other decisions, such as markets, products, the countries, the undertakings and periods concerned, are comparable to those of the present case (Case T-360/09 *E.ON Ruhrgas and E.ON v Commission* [2012] ECR, paragraphs 261 and 262 and the case-law cited).

1616 In the present case, the applicant has failed to demonstrate that the facts of the case in the previous decisions on which it relies are comparable to those of the present case. Consequently, in the light of the case-law cited in paragraph 1615 above, those decisions are not relevant from the point of view of observance of the principle of equal treatment.

1617 With respect, first, to the case giving rise to *Microsoft v Commission*, paragraph 1613 above, the applicant merely notes the difference between that case and the present case, claiming that, in that case, the conduct at issue resulted in multiple and measurable negative effects on competitors, which is not the situation in the present case. However, the applicant does not put forward any argument to demonstrate that the facts of the case which gave rise to *Microsoft v Commission* are comparable to those of the present case. The Court observes that that case concerned inter alia markets and abusive practices different from those at issue in the present case.

1618 Second, the applicant relies on the Commission Decision of 12 November 2008 relating to a proceeding under Article 81 [EC] and Article 53 of the EEA Agreement (Case COMP/39.125 — Car glass), a summary of which was published in the Official Journal of 25 July 2009 (OJ 2009 C 173, p. 13), in support of its argument that the fine imposed on it is considerably larger than the highest ever cartel fine imposed on a recidivist. However, the applicant fails to demonstrate that the facts of the case which gave rise to that decision, which related to a cartel and not to an abuse of a dominant position, are comparable to those of the present case.

1619 Third, as regards the comparison of the fine imposed in the present case with those imposed in the cases which gave rise to *Hoffmann-La Roche*, paragraph 71 above, *Michelin I*, paragraph 74 above, *Michelin II*, paragraph 75 above, and Case T-219/99 *British Airways*, paragraph 186 above, the Court finds that the applicant has also failed to demonstrate that the facts of those cases are comparable to those of the present case. In that regard, first, the Court would point out that *Michelin I*, paragraph 74 above, *Michelin II*, paragraph 75 above, and Case T-219/99 *British Airways*, paragraph 186 above, did not relate to exclusivity rebates, but to rebates falling within the third category (see paragraph 78 above) and that the present case also relates to naked restrictions. Second, it should be stressed that, on the assumption that the types of abuse at issue in the present case are similar, or even identical, to those at issue in the cases which gave rise to *Hoffmann-La Roche*, paragraph 71 above, *Michelin I*, paragraph 74 above, *Michelin II*, paragraph 75 above, and Case T-219/99 *British Airways*, paragraph 186 above, that cannot however suffice to make the present case and those relied on by the applicant comparable for the purposes of the case-law cited in paragraph 1615 above, in the light of the differences between those cases as regards in particular the undertakings, the relevant markets and goods and of the time lapse between those cases and the evolution of the Commission's fining policy.

### 3. The need to demonstrate that the infringement had actual effects

1620 It should be recalled that, in order to determine the gravity of the infringement, the Commission took into account inter alia the nature of the infringement, the market share of the undertakings concerned and the geographic scope of the infringement. As regards in particular the nature of the infringement, the Commission found, at recital 1780 of the contested decision, that the x86 CPU market is of great economic importance. According to that decision, that market generated revenues above USD 30 billion in 2007. This means that any anti-competitive conduct on that market had a considerable impact.

1621 The applicant submits that the level of the fine is based upon the alleged 'considerable impact' on the market, but that no analysis of the actual effects of the alleged abusive conduct on AMD, or the market, has been carried out. The applicant points out that its fine of EUR 1.06 billion is the highest fine ever imposed on a single company for an infringement of the competition rules. It was therefore necessary, in assessing that fine, to consider the actual effects of the infringement and the causal link between those effects and the injury to consumers or competitors, regardless of whether actual effects are relevant to the finding of an abuse. The applicant claims that the evidence demonstrates that, during the relevant period, the market for CPUs was characterised by intense competition between AMD and Intel, which resulted in constantly falling prices and improving product quality, to the benefit of consumers. Moreover, AMD multiplied its market share. Lastly, an OEM's decision to buy the applicant's products was based if not entirely, then at least in part, on business reasons other than the loyalty-inducing effects of the conditional rebates.

1622 Pursuant to Article 23(3) of Regulation No 1/2003, in fixing the amount of the fine, regard is to be had both to the gravity and to the duration of the infringement. It is clear from the case-law that the gravity of infringements of competition law must be assessed in the light of numerous factors, such as, inter alia, the particular circumstances of the case, its context and the dissuasive effect of fines, although no binding or exhaustive list of the criteria to be applied has been drawn up. In consequence, contrary to the applicant's assertion, the actual impact of the infringement on the market is not as a rule, according to the criteria established by the case-law, a factor which must be taken into account, but just one among a number of other factors to be taken into account in evaluating the gravity of the infringement and setting the amount of the fine (see, to that effect and by analogy, Case C-534/07 P *Prym and Prym Consumer v Commission* [2009] ECR I-7415, '*Prym*', paragraphs 54 and 55). In addition, it is clear from the case-law that factors relating to the object of a course of conduct may be more significant for the purposes of setting the amount of the fine than those relating to its effects (*AstraZeneca*, paragraph 64 above, paragraph 902).

1623 Under the Guidelines on the method of setting fines imposed pursuant to Article 15(2) of Regulation No 17 and Article 65(5) of the [CS] Treaty (OJ 1998 C 9, p. 3) ('the 1998 Guidelines'), in assessing the gravity of the infringement, account had to be taken inter alia of 'its actual impact on the market, where this can be measured' (under Section 1.A.). In that regard, it was apparent from the case-law that, at least so far as concerned infringements which could be classified as very serious

infringements solely on account of their nature, the actual impact of the infringement on the market was only an optional factor such as to allow the Commission to increase the starting amount of the fine beyond the minimum likely amount of EUR 20 million (see, to that effect, *Prym*, paragraph 1622 above, paragraph 75). It is true that it was also apparent from the case-law that, where the Commission considered it appropriate for the purposes of calculating the fine to take that optional element — the actual impact of the infringement on the market — into account, it could not just put forward a mere presumption but was required to provide specific, credible and adequate evidence with which to assess what actual influence the infringement may have had on competition in that market (*Prym*, paragraph 1622 above, paragraph 82).

1624 However, in the present case, the determination of the amount of the fine is not based on the 1998 Guidelines, but on the 2006 Guidelines. The Court would point out that, unlike the 1998 Guidelines, the 2006 Guidelines no longer provide for the 'actual impact on the market, where this can be measured' to be taken into account when the gravity of a given infringement is assessed. According to point 22 of the 2006 Guidelines, in order to decide whether the proportion of the value of sales determined by reference to the gravity should be at the lower end or at the higher end of the scale of up to 30%, the Commission will have regard to a number of factors, such as the nature of the infringement, the combined market share of all the undertakings concerned, the geographic scope of the infringement and whether or not the infringement has been implemented.

1625 It is therefore true that, according to the 2006 Guidelines, the Commission is not, as a general rule, obliged to take into consideration the actual impact of the infringement on the market when setting the proportion of the value of sales determined by reference to the gravity. However, the Court would point out that nor do the Guidelines preclude consideration of the actual impact of the infringement on the market in order to increase that proportion. In that regard, if the Commission considers it appropriate to take into account the actual impact of the infringement on the market in order to increase that proportion, the case-law cited in paragraph 1623 above also applies with respect to the 2006 Guidelines, so that the Commission must provide specific, credible and adequate evidence with which to assess what actual influence the infringement may have had on competition in that market. However, the Commission does not necessarily have to take account of the absence of any actual impact as an attenuating factor for the assessment of the gravity pursuant to point 22 of the 2006 Guidelines. It is sufficient that the level set by the Commission of the proportion of the value of sales to be taken into consideration is justified by other factors capable of influencing the determination of gravity.

1626 It is in the light of the foregoing considerations that the applicant's arguments must be assessed.

1627 First, it is necessary to reject the argument that the level of the fine is, in the present case, based upon the alleged 'considerable impact' on the market, but that no analysis of the actual effects of the alleged abusive conduct on AMD, or the market, has been carried out. It must be stated that, in the present case, the Commission did not take into consideration the actual impact of the infringement on the market in order to determine its gravity. Contrary to the applicant's claim, it may not be inferred from the fact that, in the contested decision, the Commission found that 'any anti-competitive behaviour on [the x86 CPU market] has a considerable impact', that the Commission took such an impact into consideration. The Court would point out in that regard that the finding criticised by the applicant was made by the Commission in order to describe the nature of the infringement. Since the 'nature' of an infringement refers to its abstract and general features, the Commission was entitled, in that context, to find that, in the light of the size of the revenues generated on the x86 CPU market, any anti-competitive conduct on that market has a considerable impact. In so doing, the Commission did not take into consideration the actual effects on the market of the practices at issue in the contested decision, but the 'nature' and therefore the capability of those practices to have such effects.

1628 The fact that the Commission did not take into consideration the actual impact of the infringement on the market in order to determine the amount of the fine is also confirmed by the following matters. On the one hand, whilst certain passages of the contested decision which do not refer to the determination of the amount of the fine contain conclusions relating to the actual impact of the applicant's conduct on the OEMs' and MSH's freedom of choice (see recitals 1001 and 1678 of that decision) and on the harm suffered by consumers (see recitals 1597 to 1616 of that decision), the Commission refrained from referring to those conclusions when determining the gravity of the infringement. On the other hand, in the conclusion on gravity, set out at recital 1785 of that decision, the Commission found that the abuses differed in their respective 'likely anti-competitive impact'. The fact that, in the conclusion on gravity, the Commission referred to the 'likely anti-competitive impact' of the individual abuses demonstrates unequivocally that it did not take into consideration the actual impact of the infringement on the market, but only its likely impact.

1629 The Court therefore holds that the Commission did not rely on the actual impact of the infringement in order to increase its gravity.



1630 Second, in so far as the applicant submits that the Commission was wrong not to take into account the absence of actual anti-competitive effects of the infringement and of a causal link between those effects and harm to consumers or competitors as an attenuating factor for the assessment of the gravity, its arguments must also be rejected. The Court finds that, in order to set the proportion of the value of sales determined by reference to the gravity of the infringement at 5%, the Commission was not required to take into consideration the alleged absence of any actual impact of the infringement on the market. In the present case, the other matters on which the Commission relied in the contested decision for the purposes of determining the gravity of the infringement justify the setting of the proportion of the value of sales to be taken into consideration at 5%.

1631 In that regard, it should be noted, as a preliminary point, that the level of 5% set in the contested decision is at the lower end of the scale, which, according to point 21 of the 2006 Guidelines, can go up to 30%.

1632 As regards, next, in the first place, the nature of the infringement, it should be noted that, at recitals 1780 and 1781 of the contested decision, the Commission considered that, besides the applicant, which had 80% market share, the only meaningful competitor on the market was AMD. The Commission also stated that the applicant implemented an overall strategy aimed at anti-competitively foreclosing AMD from the market. Thus, the applicant's abusive practices were aimed at foreclosing the only meaningful competitor or, at least, restricting its access to the market. In the light of the barriers to access to the production of x86 CPUs, it is likely that if AMD had been eliminated or marginalised, there would have been no credible entrant in the market.

1633 As regards, in the second place, the market share of the undertakings concerned, the Commission found, at recital 1783 of the contested decision, that during the entire infringement period the applicant not only held a dominant position in the x86 CPU market in all segments, but that its market share was also much higher than that of its competitors.

1634 As regards, in the third place, the geographic scope of the infringement, the Commission found, at recital 1784 of the contested decision, that the applicant's exclusionary strategy against AMD was worldwide in scope. For the purposes of assessing the gravity of the infringement, this means that the whole of the EEA was covered by the infringement (see paragraphs 1578 to 1582 above).

1635 In the fourth place, it should be recalled that, in the conclusion on the gravity of the infringement, the Commission, at recital 1785 of the contested decision, found inter alia that the applicant engaged in a single infringement the intensity of which differed across the years, that the individual abuses differed in their respective likely anti-competitive impact and that the applicant attempted to conceal the anti-competitive nature of its conduct (see paragraphs 1583 to 1591 above).

1636 Those findings, which are either not contested by the applicant or were established by the Commission to the requisite legal standard, are sufficient to justify setting the proportion of the value of sales at 5%.

1637 Third, as regards the applicant's arguments aimed at substantiating the absence of any actual effects on the market and of a causal link, it should be recalled, for the sake of completeness, that neither the growth in the market shares of AMD nor the decrease in the price of x86 CPUs over the period covered by the contested decision means that the applicant's practices had no effect. In the absence of those practices, it may legitimately be considered that the increase in the competitor's market share and the decrease in the price of x86 CPUs might have been greater (see paragraph 186 above). Similarly, in so far as the applicant relies on business reasons other than the loyalty-inducing effects of the conditional rebates for OEMs' decisions to buy its products, the Court finds that that line of argument is not such as to rule out any influence of the conditional rebates and payments at issue on the OEMs' commercial decisions (see paragraph 597 above).

#### 4. Conclusion

1638 Accordingly, all the arguments by which the applicant seeks to establish that the level of the fine is disproportionate must be rejected.

#### *D – The exercise of unlimited jurisdiction*

1639 At the hearing, the applicant drew attention to four points justifying, in its submission, a reduction of the fine by the Court in the exercise of its unlimited jurisdiction. First, it draws attention to the complexity of the present case and submits that it was very difficult for it to comply with the law. In the present case, the Commission followed the approach of the Article 82 Guidance. That guidance does not prohibit conditional rebates per se, but requires the application of an AEC test. The lack of legal certainty thus generated should be taken into consideration by the Court. Second, the applicant pleads that the administrative procedure lasted nine years, whereas Article 6 of the ECHR and Article 41 of the Charter of Fundamental Rights require criminal cases to be dealt with expeditiously. A substantial part of the delay was caused by the work necessary for the application of the AEC test. Delay is a

factor which the Court can always take into consideration. Third, the Court should take account of the Ombudsman's decision of 14 July 2009 finding that the failure to record the meeting between the Commission and Mr D1 constituted a case of maladministration. Fourth, with respect to the abuse concerning Acer, the Court should take account of the fact that there may have been a delay of only two to four weeks in launching the notebook.

1640 However, none of those arguments is capable of leading to an alteration of the amount of the fine set by the Commission.

1641 First, the applicant may not derive any benefit from the alleged legal uncertainty as regards the illegality of the exclusivity rebates. The Commission and the Court of Justice have censured on several occasions the implementation, by an undertaking in a dominant position, of practices consisting in the grant of financial incentives conditional upon exclusivity (see paragraph 1602 above). Regarding the Article 82 Guidance, it is apparent from recital 916 of the contested decision that the Commission did not apply that guidance in the present case. As was explained above, nor was the Commission required to do so. In addition, the applicant has failed to demonstrate that the Commission caused it to entertain a legitimate expectation as regards the application of the AEC test (see paragraphs 160 to 165 above).

1642 With respect, second, to the duration of the administrative procedure, the applicant's line of argument cannot succeed either.

1643 In that regard, it must be pointed out that the exercise of unlimited jurisdiction does not amount to a review of the Court's own motion, and that proceedings before the Courts of the European Union are *inter partes*. With the exception of pleas involving matters of public policy which the Courts are required to raise of their own motion, such as the failure to state reasons for a contested decision, it is for the applicant to raise pleas in law against that decision and to adduce evidence in support of those pleas (*Chalkor v Commission*, paragraph 1609 above, paragraph 64).

1644 The plea put forward by the applicant, which relates solely to the length of the administrative procedure and not to the length of the procedure before the Court, must be declared inadmissible under Article 48(2) of the Rules of Procedure. That plea, which was not put forward in the application, cannot be regarded as elaborating directly or by implication on a plea already put forward in the application and is not based on matters of law or of fact which came to light in the course of the procedure. Nor is there any need in the circumstances of this case for the Court to examine of its own motion the plea alleging that the procedure before the Commission was unreasonably long (see, by analogy, Case T-18/03 *CD-Contact Data v Commission* [2009] ECR II-1021, paragraph 130).

1645 As regards, third, the failure to record the meeting between the Commission and Mr D1, it was specified above that the Commission remedied the initial omission in the administrative procedure, stemming from the failure to draw up a succinct note and make it available to the applicant, by providing the applicant with the non-confidential version of the note to the file (see paragraph 622 above). Accordingly, it is not necessary to alter the amount of the fine. For the sake of completeness, it should be pointed out that, even if the procedural error had not been regularised, that irregularity would not be such as to result in the Court's altering the amount of the fine.

1646 Fourth, as regards the abuse concerning Acer, the applicant's argument, according to which the delay in launching the notebook concerned was, in fact, less than four months, was rejected in paragraphs 1345 to 1357 above.

1647 Moreover, it must be noted that having regard to the unlimited jurisdiction of the Court in relation to fines for infringement of the competition rules, there is nothing in the complaints, arguments or matters of law and of fact put forward by the applicant in connection with all the pleas examined above from which it might be concluded that the fine that was imposed on it by the contested decision is disproportionate. On the contrary, it must be held that the fine is appropriate to the circumstances of the case. In the context of that assessment, it is necessary *inter alia* to take into account the matters set out in paragraphs 1631 to 1636 above and the fact that the fine is equivalent to 4.15% of Intel's annual turnover, which is well below the 10% ceiling set in Article 23(2) of Regulation No 1/2003.

## **Costs**

1648 Under the first subparagraph of Article 87(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings.

1649 Since the Commission has applied for costs and the applicant has been unsuccessful, the latter must be ordered to bear its own costs and to pay those incurred by the Commission, with the exception of the Commission's costs incurred in connection with the intervention of ACT. Moreover, the applicant must be ordered to pay UFC's costs, in accordance with the form of order sought by UFC.

1650 Since ACT has been unsuccessful, it must be ordered to bear its own costs and pay those incurred by the Commission in connection with its intervention, in accordance with the form of order sought by the Commission.

On those grounds,

THE GENERAL COURT (Seventh Chamber, Extended Composition)

hereby:

**1. Dismisses the action;**

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#### Costs

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1 – This judgment is published in extract form.

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2 – Confidential information omitted. In order to ensure anonymity, the names of persons have been replaced, in the case of persons working for Intel, Dell, HP, NEC, Lenovo, Acer or MSH, by the first letter of the name of the undertaking for which they work followed by a number and, in the case of persons working for AMD, by the capital letter ‘C’ followed by a number. Moreover, the names of three professors have been replaced by P1, P2 and P3.