



EUROPEAN COMMISSION
Neelie Kroes

Member of the Commission

Brussels,

**MEMORANDUM FROM MRS KROES TO THE COMMISSION
CONCERNING A**

DRAFT COMMISSION DECISION

relating to a proceeding under Article 82 of the EC Treaty

(Case COMP/C-3/37.990 – Intel

(Only the English version is authentic.)

I. INTRODUCTION

The purpose of the attached draft Decision is to find that Intel infringed Article 82 of the EC Treaty and to impose a fine for that violation. From October 2002 to December 2007, Intel abused its dominant position through a variety of practices.

II. CASE DESCRIPTION

1. Procedure

Following a formal complaint from AMD (Advanced Micro Devices) on 18 October 2000 under Article 3 of Regulation 17/62 which was further supplemented with new facts and allegations in particular in November 2003, and another complaint from AMD on 17 July 2006 (the latter to the German National Competition Authority), the Commission undertook a range of investigative measures, including surprise inspections on the sites of Original Equipment Manufacturers (OEMs), Intel and PC retailers in Europe in 2005 and 2008. The Commission issued two Statements of Objections, on 26 July 2007 and 17 July 2008.

2. Legal assessment

2.1 The relevant market and dominance

The case concerns the worldwide market for x86 Central Processing Units (CPUs), often referred to as a computer's "brain". The Commission has found Intel to be dominant as during the period covered by the draft Decision (1997-2007), Intel consistently held market shares in excess of or around 70% in an overall x86 CPU market as well as any sub-markets (desktops, notebooks and servers). Today, all Intel's competitors, except AMD, have exited the market or are left with an insignificant share.

2.2 Abusive conduct

Intel has engaged in two types of anticompetitive conduct which the draft Decision finds to constitute abuses of a dominant position.

First, it has awarded major OEMs fidelity rebates, i.e. rebates conditioned on them purchasing all or almost all their supplies from Intel (Dell: 100%; HP: at least 95% in the business desktop segment; NEC: at least 80% in the desktop and notebook segments; Lenovo: 100% in the notebook segment). Intel has also awarded MSH, a major European PC retailer, payments conditioned on it selling exclusively Intel-based PCs. Thus, Intel's practices have been applied cumulatively at two levels of the distribution chain (OEMs and MSH).

The rebates fulfil the conditions of relevant case-law to be qualified as fidelity rebates which constitute an abuse of a dominant position. They had the effect of restricting the OEMs' freedom to choose their source of CPU supply and preventing Intel's competitors from supplying their needs. In addition, the draft Decision conducts an economic analysis which shows that the rebates were capable of foreclosing a competitor which would have been as efficient as Intel, albeit not dominant.

As regards the second type of anticompetitive conduct, naked restrictions, Intel has awarded major OEMs (HP, Acer, Lenovo) payments conditioned on them postponing or cancelling the launch of their AMD-based products and/or restricting their distribution. The payments directly harmed competition because products that had been planned to be released were constrained from reaching the market.

2.3 Effects of Intel's conduct

As a result of Intel's practices, end-customers had a reduced choice and were artificially prevented from choosing non Intel-based computers on the merits. AMD and its investors were deprived of a return on their R&D investments which would have been proportionate to the success of their inventions.

2.4 Conclusion on abuse

The draft Decision concludes that each of the Intel conducts vis-à-vis individual OEMs and MSH constitutes an abuse of dominant position under Article 82 EC. The individual abuses are also part of a single strategy aimed at foreclosing AMD, which constitutes a single infringement of Article 82 EC running from October 2002 to December 2007.

3. Termination of the conduct and fines

The draft Decision requires Intel to bring the infringement to an end and to refrain from repeating any act or conduct having the same or equivalent object or effect.

The draft Decision concludes that a fine should be imposed on Intel. The fine must be determined in light of the gravity and duration of the infringement and in line with the Commission Guidelines on the method of setting fines.¹

III. PROPOSALS

It is therefore proposed that the Commission should by oral procedure:

- take note of the Opinions of the Advisory Committee on Restrictive Practices and Dominant Positions of 28 April and 8 May 2009;
- take note of the Final Report of the Hearing Officer in this case;
- adopt, in the authentic language, English, the attached Decision finding that Intel has infringed Article 82 of the EC Treaty and fining it;
- decide to notify the Decision, together with the Hearing Officer's final report, to Intel;
- decide that a summary of the Decision, together with the Opinions of the Advisory Committee and the Final Report of the Hearing Officer, be published (minus any business secrets and other confidential information) in the Union's official languages in the Official Journal of the European Union;
- decide to make the Decision (minus any business secrets and other confidential information) also accessible on the Internet.

¹ Guidelines on the method of setting fines imposed pursuant to Article 23 (2)(a) of Regulation No 1/2003, OJ C 210/2 of 1 September 2006.

Annexes:

Draft Decision

Advisory Committee opinion(s) on the draft Decision

Hearing Officer's final report