



Keio Jean Monnet COE Research Centre for EU Studies
The 4th International Symposium, 26 June 2010, Keio University

Intel Decision and the EU's New Standards for Behaviours by Dominant Firms

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1 Problematic trends



- The Commission of the European Union on 21 September 2009 published the non-confidential version of its 13 May 2009 Decision.



- According to the Decision, Intel Corporation committed an infringement of Article 102 TFEU (former Article 82 EC) by implementing strategies aimed foreclosing competitors from a Central Processing Unit (CPU) market.



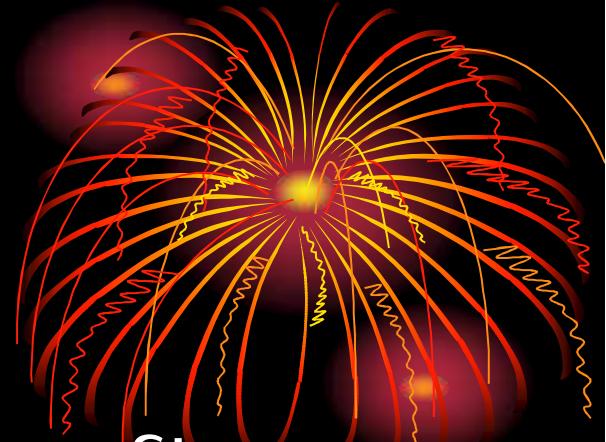
- This study analyses the 517-page Commission Decision, which has drawn tremendous attention from the cross-national high technology companies, in particular those operating in Europe.



- This Decision is of great controversy because, first, the fine of €1.06 billion has been the largest ever imposed on a firm by the Commission.



- Two years prior to the *Intel* Decision, the Court of First Instance in September 2007 adopted the decision of *Microsoft v. the Commission*.
- This judgment confirmed the fine of over €497 million imposed by the Commission.



- Since Intel and Microsoft are U.S. companies, the *Intel Decision* and the *Microsoft* case have rendered many entrepreneurs doubt that whether the European Union has enforced competition rules in a discriminatory manner.

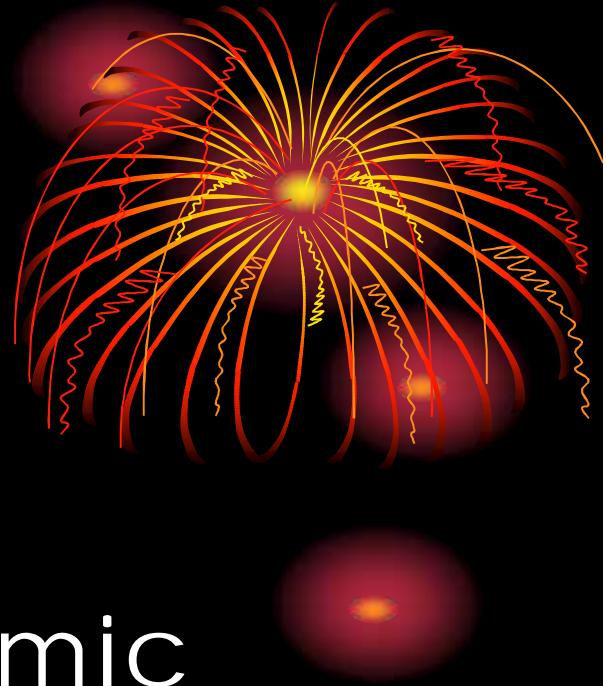


- Also, these astonishing figures have made competition law an area of EU law that probably has strongest and most direct impact on multinational enterprises.



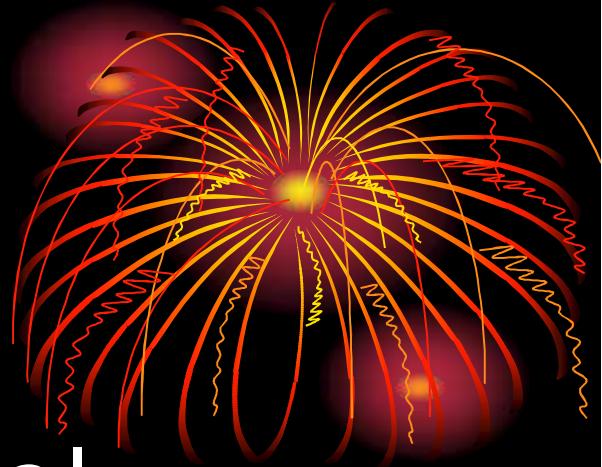
- Second, the Commission held the Intel rebates scheme constituted an abuse of dominant position under Article 102 TFEU, but the distinction between pro-competitive discounting and exclusionary rebates system is vague.

- Third, “as efficient competitor” test, a revolutionary economic approach employed by the Commission in the field of EU competition law, gives cause for concern.





- A major concern is that the enterprises operating on the technology markets in Europe are not at all familiar with the approach, information of which was not available in the TFEU nor in EU legislation.

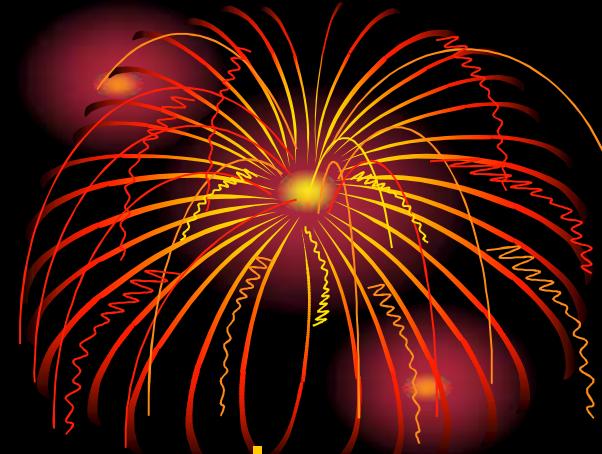


- On 22 July 2009, Intel initiated court proceedings against the Commission before the General Court, seeking an annulment of the Commission Decision.



- This study aims to focus the main issues regarding the *Intel* Decision, particularly the myths relating to as efficient competitor test.

Facts



- Advanced Micro Devices, Inc. (“AMD”) made complaints to the Commission, alleging that Intel had violated Article 102 TFEU (former 82 EC), which prohibits abuses of dominant market positions.

Relevant market(s)



- In the *Intel* Decision, there could be one relevant market of x86 CPUs for all computers, namely desktop, laptop, and server computers.

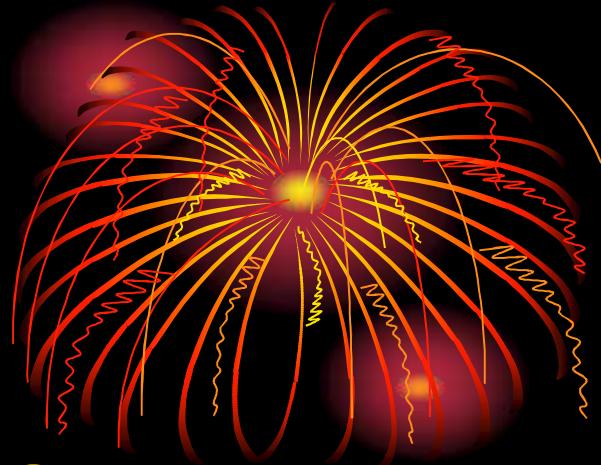


- Or there could be three relevant markets of (1) x86 CPUs for desktop computers; (2) x86 CPUs for laptop computers; and (3) x86 CPUs for server computers.

Market power

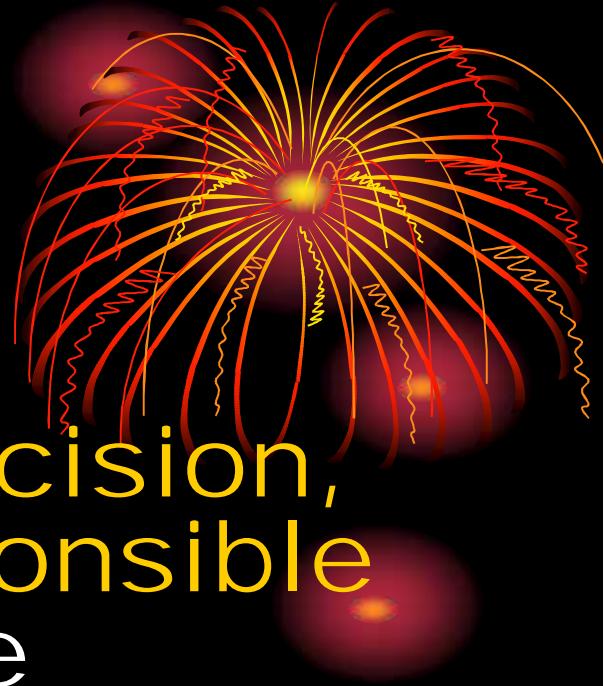


- As to the market power of Intel in the relevant market(s), Intel consistently held very high market shares in an overall x86 CPU market and in any of the sub-markets.



- The Commission also identified certain barriers to entry and expansion **in** the relevant market(s).

Abusive conducts



- According to the Decision, Intel should be responsible two kinds of abusive conduct.



- The first is the implementation of a rebates scheme by Intel and the other is the “naked restrictions” imposed by Intel on three OEMs, including HP, Acer, and Lenovo.

The Commission's views on the rebates scheme



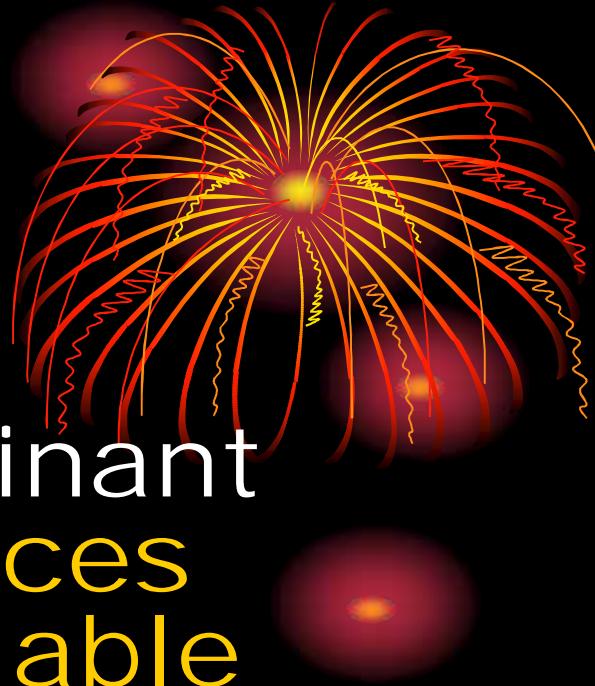
- As regards the rebates scheme, the reasoning behind the Decision is simple and clear:
- Intel is a dominant firm on the markets of x86 CPUs and this CPU producer abused its dominant position by operating an exclusionary rebates scheme.



- The application of an efficient competitor test indicates that the effective prices of Intel products were below Average Avoidable Costs (“AAC”), therefore an efficient competitor might not be able to compete with Intel.

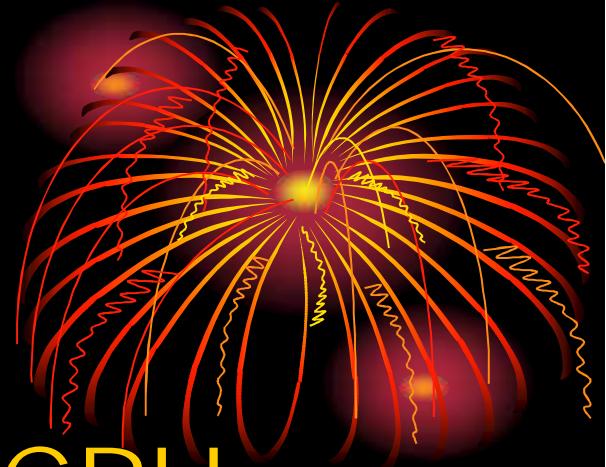
An example

- Suppose that a dominant CPU producer produces 1,000 CPUs at a variable cost of €700 each with no fixed costs.

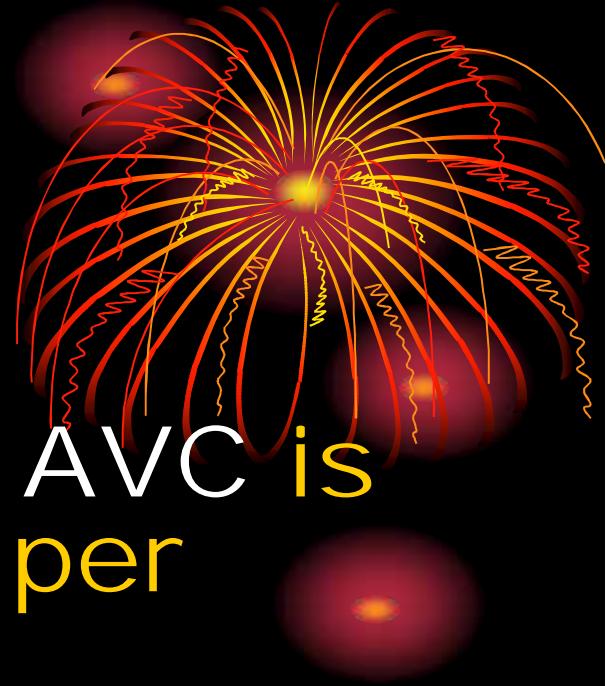




- Then the dominant firm produces additional 800 CPUs at a variable cost of €850 each to compete with the major competitor.



- Since the dominant CPU producer would have sold 1,000 CPUs without making an attempt to compete with the rival firm, the potentially foreclosing increment is 800 CPUs.



- The dominant firm's AVC is approximately €767 per CPU.
(1,000 CPUs at €700 each + 800 CPUs at €850 each)
divided by 1,800 units.



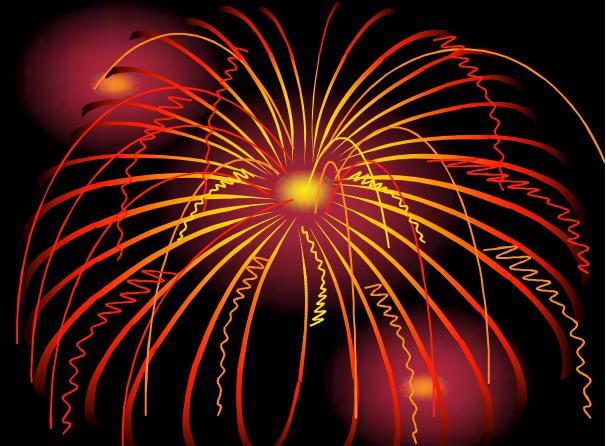
- The dominant firm's AAC is €850 per CPU.
(800 CPUs at €850 each)
divided by 800 units.



- The standard price of an x86 CPU produced by the dominant firm is €1 ,000.



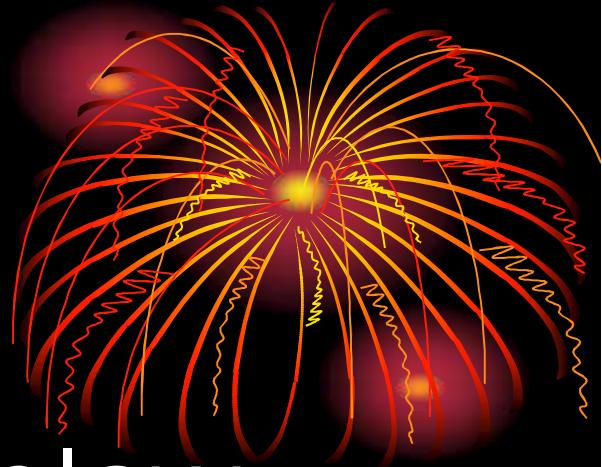
- This firm implements a rebates scheme.
- Some OEMs receive a 20 percent discount on the condition that they purchase CPUs from the dominant firm exclusively or almost exclusively.



- The discounted price **is** €800.
- To sell its CPUs to these OEMs, a hypothetical as efficient competitor must sell a CPU at a price of less than €800, which may be €780.



- The rationale: Even if the major competitor is as efficient as the dominant firm, it must set its price at a level that can compensate the loss of the rebate.
- Otherwise the OEMs would never be interested in purchasing the CPUs produced by the competitor.

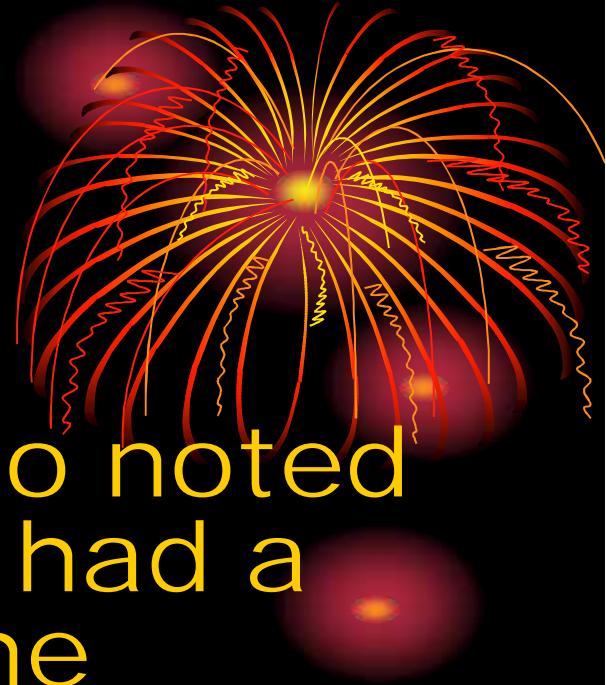


- Since €800 is well below the AAC, namely €850, the rebates scheme as a result potentially causes anticompetitive foreclosure.

The Commission's views on the naked restrictions



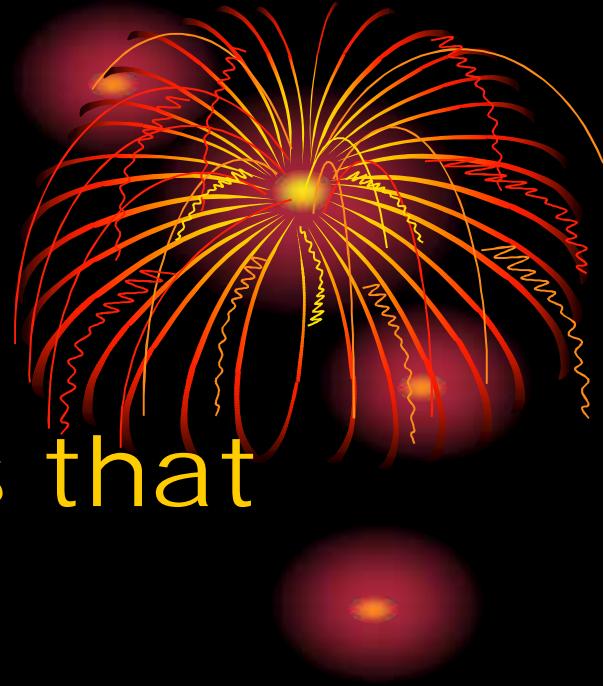
- As regards the naked restrictions, Intel paid the OEMs to restrict the commercialisation of planned AMD-based products.



- The Commission also noted the conduct of Intel had a material effect on the decision-making of OEMs in that they restricted their commercialisation of the AMD-based computers.

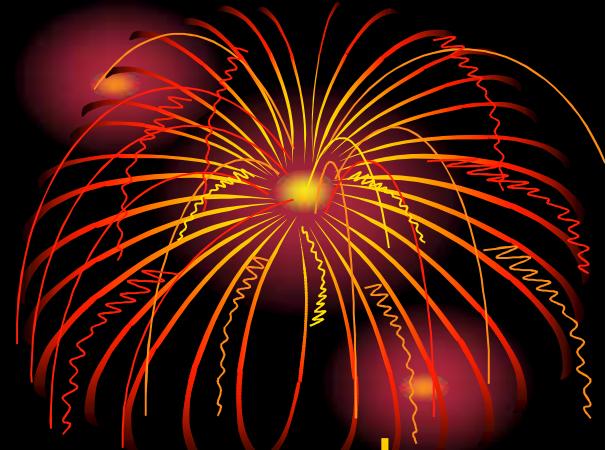
Critical analysis

- This study indicates that the *Intel* Decision is significantly flawed.

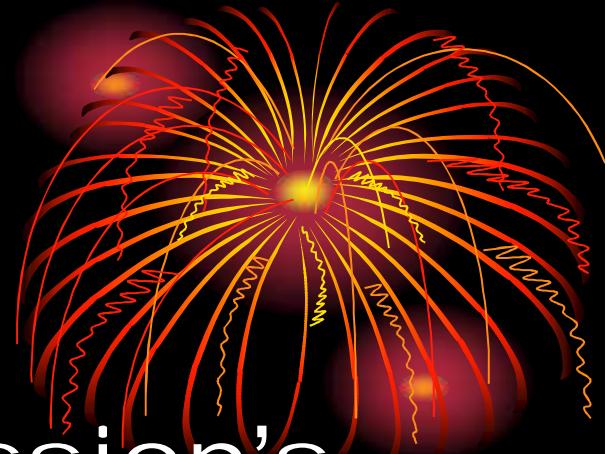




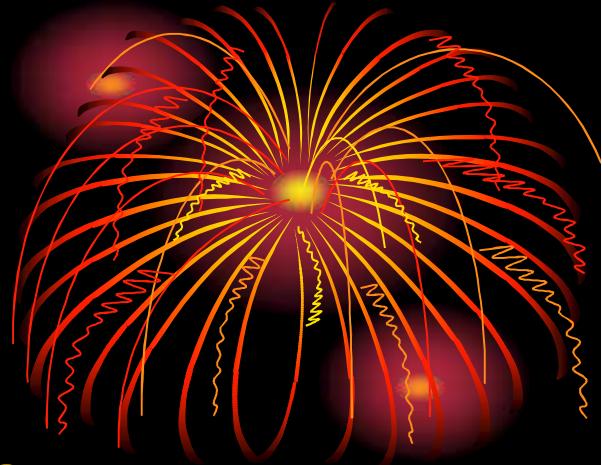
- First of all, in the present case, the Commission did not take into serious account the dynamics of the relevant markets.



- The Commission was correct only to the extent that Intel held large market shares of the relevant markets, but the market power evaluation by the Commission was flawed mainly because Intel was not able freely to exercise the market power.



- Second, the Commission's explanations for the theory of as efficient competitor test do not help the public have a full understanding of how the Commission performed this test.



- On the one hand, the Commission does not provide an example illustrating how the test was performed.



- On the other hand, the crucial figures concerning the rebates scheme were unavailable owing to confidentiality concerns.



- The myth of how the test was applied by the Commission would presumably create chilling effects on numerous firms in various European markets, particularly those holding dominant positions.



- Third, this study argues that the rebates system in question was a scheme made under the influences exercised by Intel, AMD, and the OEMs.



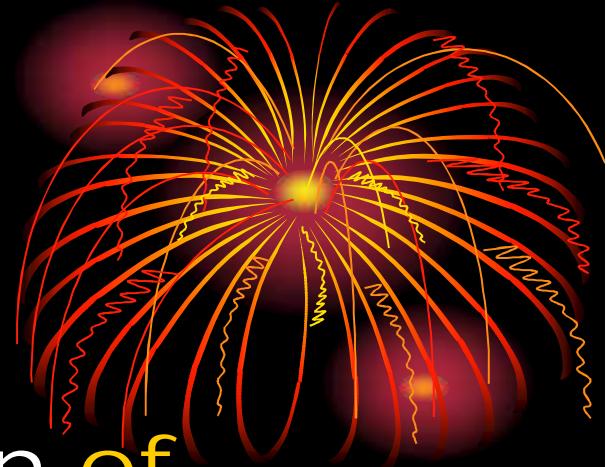
- It is worth noting that Intel and the OEMs made every effort to alter the level of rebates with a view to reduced their costs on the relevant market(s).



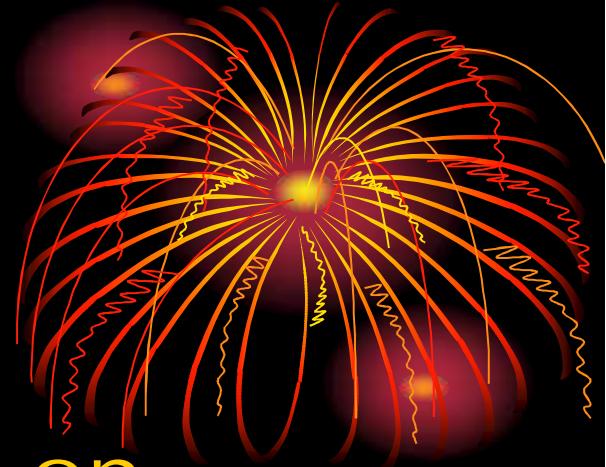
- Fourth, in February 2009, the Commission published “Guidance on the Commission’s enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings”.

As to whether this Guidance Paper applies to this case:

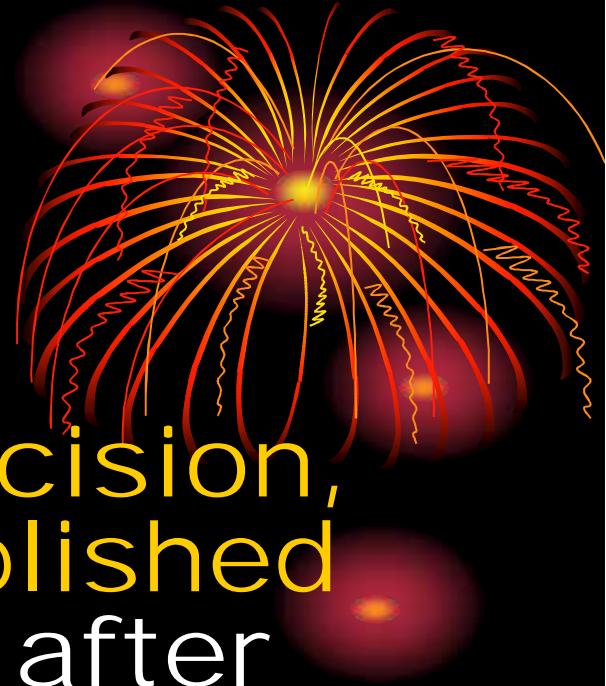
- the Commission noted that:
“[t]he Commission considers that the guidance paper does not apply to this case. The Commission nevertheless takes the view that this Decision is in line with the orientations set out in the guidance paper”.



- Given the huge portion of economic analysis based on as efficient competitor test in the Decision, it is obvious that the Commission applied the Guidance Paper, in particular as efficient competitor test set out in the document, to the *Intel* case.



- The Court should focus on whether it was possible for Intel to realise that the test would be applied to assess the rebates scheme at issue, which could eventually led to the conclusion that the implementation of the scheme constituted an abuse of dominant position.



- According to the Decision, the Commission published the Guidance Paper after Intel implemented the rebates scheme.

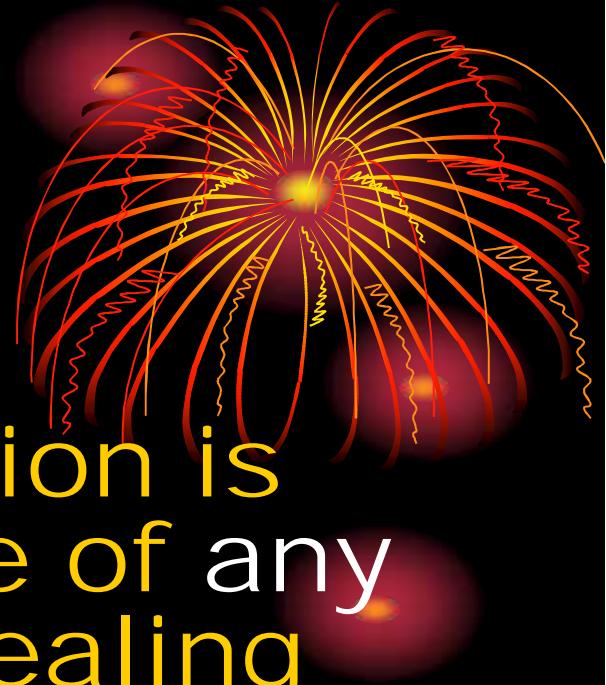
The principle of legal certainty



- This principle requires in particular that rules involving negative consequences for individuals should be clear and precise and their application predictable for those subject to them.



- As it was impossible for Intel to get access to the unpublished document, the *Intel* Decision should be annulled for that the application of as efficient competitor test violated the principle of legal certainty.



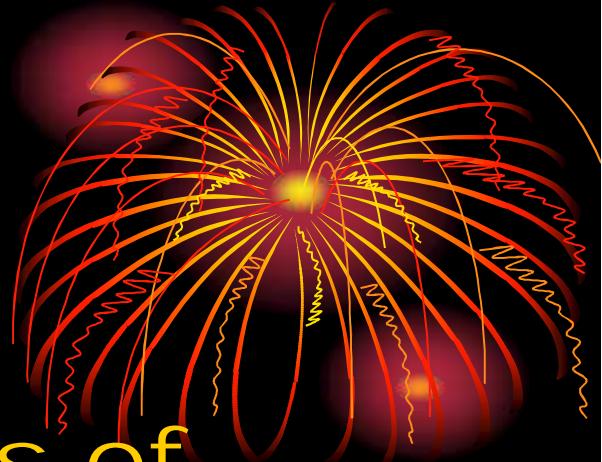
- Where the Commission is entitled to make use of any economic tools in dealing with an Article 102 TFEU case, such enforcement may jeopardise the very core of the competition law system.



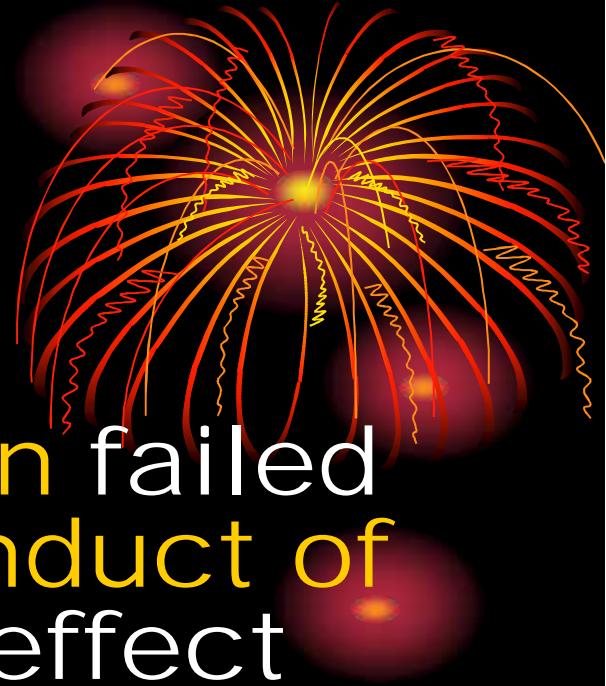
- This study argues that as efficient competitor test can be applied if it is in the future incorporated into relevant Treaty provisions or legislation in the Union.



- Intel is under no legal obligation to perform the test to assess its own rebates scheme, as there is so far no such legal requirement under EU competition law.



- As regards the issues of naked restrictions, the Commission failed to present sufficient evidence to support its view that Intel paid the OEMs to restrict the commercialisation of planned AMD-based products.

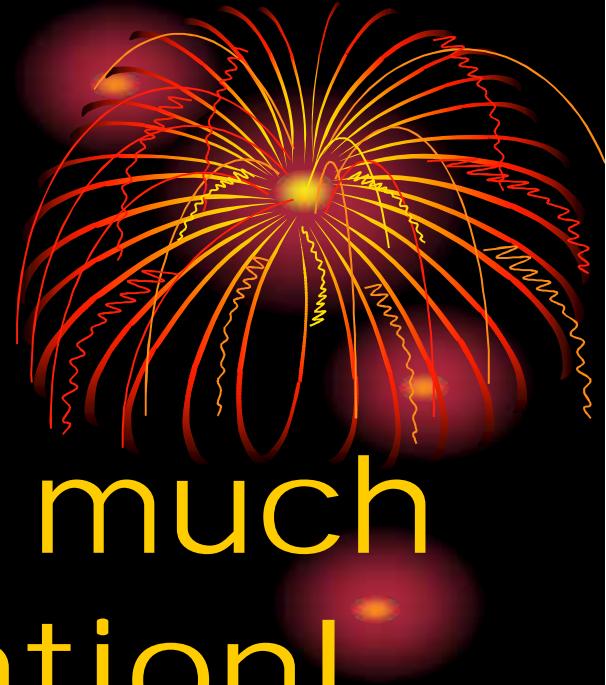


- Also, the Commission failed to prove that the conduct of Intel had a material effect on the decision-making of OEMs in that they restricted the commercialisation of AMD-based computers.

Conclusion



- This study indicates that the *Intel* Decision should be annulled by the General Court since it is significantly flawed.



Thank you very much
for your attention!

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