Evropski varuh človekovih pravic

Odločba v zadevi 1935/2008/FOR - Postopkovne napake v zadevi v zvezi s konkurenco

Odločba
Primer 1935/2008/FOR - **Preiskava uvedena dne** 22/07/2008 - **Odločba z dne** 14/07/2009

Evropski varuh človekovih pravic je 20. julija 2008 prejel pritožbo družbe Intel. V pritožbi so bile navedene domnevne postopkovne napake, ki naj bi jih Komisija storila med protimonopolno preiskavo v družbi Intel v skladu s členom 82 Pogodbe ES.

Po pritožnikovih navedbah Komisija ni sestavila zapisnika sestanka z družbo Dell, ki ga je imela 23. avgusta 2006, kljub dejstvu, da je bil sestanek neposredno povezan s predmetom Komisijine preiskave, ki jo je izvedla v družbi Intel.

Varuh človekovih pravic je v svoji odločbi z dne 14. julija 2009 ugotovil, da je Komisija zbrala informacije v zvezi s predmetom svoje preiskave na sestanku 23. avgusta 2006. Ugotovil je tudi, da ni ustrezno zabeležila tega sestanka in da v njeni dokumentaciji o preiskavi ni bilo zapisnika sestanka. Varuh človekovih pravic je zaključil, da Komisija ni ravnala pravilno. Vendar pa ni prišel do nobene ugotovitve, ali je Komisija kršila Intelove pravice do obrambe.

Poleg tega je pritožnik trdil, da je Komisija spodbudila družbo Dell, da naj z družbo AMD sklene sporazum o izmenjavi informacij. Po pritožnikovih navedbah je bil namen tega sporazuma družbi AMD omogočiti, da pridobi zaupne informacije o Intelu, ki jih je vsebovala preiskovalna dokumentacija Komisije. Trdil je, da je Komisija s takim ravnanjem obšla pravila, kar je omejilo pravico družbe AMD do dostopa do dokumentacije o preiskavi.

V zvezi s to drugo trditvijo je varuh človekovih pravic menil, da ne bi bilo v skladu z načeli dobrega upravljanja, če bi Komisija družbo Dell spodbudila, da naj z družbo AMD sklene sporazum o taki izmenjavi informacij. Vendar pa je ugotovil, da Komisija ni bila odgovorna, da bi preprečila tak sporazum, niti ni imela nobene pristojnosti za to.

Varuh človekovih pravic je ugotovil, da je bila možnost, da družba Dell sklene sporazum o izmenjavi informacij, prvič omenjena med telefonskim razgovorom dne 30. avgusta 2007 med višjimi predstavniki družbe Dell in višjimi predstavniki Komisije. Vendar pa, ker Komisija sočasno ni zabeležila vsebine tega telefonskega klica, razpoložljivi dokazi niso zadostovali, da bi se lahko varuh človekovih pravic odločil, ali je tak sporazum najprej predlagala družba Dell ali Komisija. Zato varuh človekovih pravic ni ugotovil nobene nepravilnosti v zvezi s pritožnikovo drugo trditvijo. Kljub temu pa je priporočal, da se v prihodnosti vodijo ustrezne notranje

zabeležke o vsebini sestankov ali telefonskih klicev s tretjimi osebami glede pomembnih postopkovnih vprašanj.

THE BACKGROUND TO THE COMPLAINT

1. The complainant represents Intel Corporation (hereinafter "Intel"), a company that produces microprocessors.

2. At the time the complaint was submitted to the Ombudsman, the European Commission was investigating Intel as a result of a complaint it had received from AMD, an Intel competitor. The Commission's investigation (Case COMP/37.990) sought to verify whether Intel had contravened Article 82 EC [1] by using anticompetitive practices to exclude competitors from the market for certain central processing units. In the course of its inquiry, the Commission obtained extensive information from Original Equipment Manufacturers (OEMs) who purchased central processing units from Intel and/or AMD. One of these OEMs was Dell.

3. On 13 May 2009, that is, during the course of the Ombudsman's inquiry, the Commission took a decision in which it found that Intel had infringed Article 82 EC.

THE SUBJECT MATTER OF THE INQUIRY

4. The subject-matter of the complaint concerns alleged procedural errors by the Commission committed during its investigations in Case COMP/37.990. The Ombudsman understood the complainant to allege the following:

(i) The Commission failed to take minutes of the meeting with representatives of Dell on 23 August 2006, despite the fact that the meeting was directly concerned with the subject-matter of its investigation of Intel, with the result that the Commission did not make a record of potentially exculpatory evidence.

(ii) The Commission encouraged Dell and AMD to enter into an information exchange arrangement which had the effect of allowing AMD to circumvent the rules which limit the right of AMD to have access to the Commission's investigation file.

5. The Ombudsman understood that the complainant did not seek any other remedy or redress in the context of his proceedings.

THE INQUIRY

6. The complaint was submitted on 10 July 2008. On 22 July 2008, the Ombudsman opened an inquiry in relation to the complainant's first allegation, that is, that the Commission failed to take

minutes of the 23 August 2006 meeting with representatives of Dell, despite the fact that the meeting was directly concerned with the subject-matter of its investigation of Intel. As a result, the Commission did not make a record of potentially exculpatory evidence arising from this meeting. The Ombudsman requested the Commission to submit an opinion by 30 November 2008.

7. In order to clarify fully the issues raised by the complainant in relation to the first allegation and the related claim, the Ombudsman, in his letter opening the inquiry, suggested that the Commission include in its opinion its views in relation to the following specific issues and questions:

" *(i) When drafting its opinion, the Commission should, in particular, bear in mind Paragraph 358 of TACA.* [2] *In this context the Ombudsman notes that Annex VII of the complaint dated 10 July 2008 and Annex I of the additional letter dated 10 July 2008, in conjunction with Annex VI of the complaint dated 10 July 2008, would seem to indicate that the meeting of 23 August 2006 may have dealt with certain issues which the complainant considers to be potentially exculpatory.*

(ii) Was the Commission the author of the document entitled "Indicative list of topics to be discussed with Dell Meeting of 23 August 2006"? [3] *The Ombudsman understands that Annex VII of the complaint appears to be part of a response from Dell to follow-up questions posed by the Commission in relation to issues discussed in the meeting of 23 August 2006. Is this understanding correct?*

(iii) Did the Commission officials present at the meeting draft their own personal notes of the meeting of 23 August 2006?

(iv) In order for notes of a meeting to constitute "statements", pursuant to Article 19 of Regulation 1/2003, they must be signed by the party interviewed. Did the Commission request the Dell representatives to sign any notes prepared by the members of the case team? If not, can the Commission confirm, if it is still possible, on the basis of the notes of the Commission officials present at the meeting, to request Dell to sign minutes of the meeting?"

8. As regards the second allegation, the Ombudsman, in his letter opening the inquiry, noted that the complainant had not provided any evidence to support his allegation that the Commission actively encouraged AMD and Dell to enter into an information exchange agreement. Thus, in his letter of 22 July 2008 opening the inquiry, the Ombudsman informed the complainant that there were insufficient grounds to open an inquiry into the second allegation.

9. On 19 September 2008, the complainant wrote to the Ombudsman. He included in his letter a copy of a letter from Dell's outside counsel dated 18 September 2008, in which Dell's outside counsel states that " *in order to avoid a lengthy debate over confidentiality claims, the Commission suggested to Dell to enter into a non disclosure agreement with AMD's counsels and economists for the sharing of Dell documents used in the [* Statement of Objections *]* ". The letter

also contained copies of correspondence between the Commission and Dell's counsel. In light of this information, the complainant requested the Ombudsman to review his position as regards the second allegation set out in his complaint of 10 July 2008.

10. In light of the further correspondence from the complainant, the Ombudsman decided, on 26 September 2008, to extend his inquiry to cover the complainant's second allegation. In his letter informing the Commission of the extension of the scope of the inquiry, the Ombudsman requested that, in its opinion to the Ombudsman, the Commission specifically comment on the statement of Dell's counsel that the Commission suggested to Dell that it enter into an information exchange agreement with AMD. He also requested the Commission to comment specifically on a letter of the Hearing Officer [4] to the complainant dated 18 October 2007 in which it is stated that the agreement in question was not "notified", in any form, to the case team.

11. On 30 September 2008, the Commission wrote to the Ombudsman informing him that, since his letter of 26 September 2008 had extended the scope of the inquiry, it required an additional period, namely, until 15 January 2009, to submit an opinion to the Ombudsman. On 15 October 2008, the Ombudsman agreed to this request.

12. On 13 October 2008, the complainant wrote to the Ombudsman to inform him of two applications which had been submitted by Intel to the European Court of First Instance on 10 October 2008. On 5 November 2008, the Ombudsman wrote to the Commission in relation to this correspondence.

13. The complainant sent correspondence to the Ombudsman on 30 December 2008, 12 January 2009 and 26 January 2009 in relation to the complaint. The Ombudsman forwarded this correspondence to the Commission for information.

14. The Ombudsman received the Commission's opinion on 20 January 2009 and forwarded it to the complainant for his observations. The complainant sent his observations on 3 February 2009.

15. On 16 February 2009, the Ombudsman requested a further opinion from the Commission. On 20 March 2009, the Commission sent its further opinion to the Ombudsman, which was forwarded to the complainant for observations. The complainant sent further observations on 14 April 2009 and 16 April 2009.

16. In his observations, dated 16 April 2009, the complainant provided the Ombudsman with new evidence. As a result, on 23 April 2009, the Ombudsman requested the Commission to provide him, by 31 May 2009, with any comments it might have in relation to this new evidence, or relevant information in relation thereto. He also requested the Commission to allow his services to inspect internal Commission documents which the Ombudsman had identified as being relevant for the present inquiry.

17. On 28 May 2009, 29 May 2009 and 10 June 2009, the Ombudsman carried out an

inspection of documents at the premises of the Commission. A note concerning this inspection was sent to the complainant and the Commission, for information, on 6 July 2009.

18. On 10 June 2009, the Commission sent the Ombudsman its reply to his letter of 23 April 2009. This further opinion was forwarded to the complainant, who sent further observations on 15 June 2009. An annex to the complainant's further observations of 15 June 2009 was received by the Ombudsman on 29 June 2009.

THE OMBUDSMAN'S ANALYSIS AND CONCLUSIONS

Preliminary remarks

Admissibility of the Complaint

19. On 13 October 2008, the complainant wrote to the Ombudsman to inform him that, on 10 October 2008, Intel had made an application to the Court of First Instance, seeking the annulment of the Commission's decisions: (i) setting a deadline of 17 October 2008 for Intel to respond to the Commission's Supplementary Statement of Objections issued on 16 July 2008; and (ii) refusing Intel's request that the Commission obtain additional documents from AMD, which Intel reasonably believed were exculpatory. Intel also made an application to the President of the Court of First Instance for interim measures to suspend the Commission's procedure in Case COMP/37.990 pending a ruling on the main application. [5] In his letter of 13 October 2008, the complainant informed the Ombudsman that the two applications were unrelated to the matter under investigation in Complaint 1935/2008/FOR. The complainant attached to his letter a copy of two documents, both of which are entitled "Summary of Application".

20. On 5 November 2008, the Ombudsman wrote to the Commission. He noted that Article 1(3) of the Statute of the European Ombudsman states that the Ombudsman may not intervene in cases before courts or question the soundness of a court's ruling. Further, Article 2(7) states that, when, because of legal proceedings, in progress or concluded, concerning the facts which have been put forward, has to declare a complaint inadmissible or terminate consideration of such complaint, the outcome of any inquiries he has carried out up to that point shall be filed definitively. The Ombudsman noted that he had carefully examined the complainant's letter dated 13 October 2008 in order to evaluate whether the subject-matter of the applications before the Court of First Instance was the same as the subject-matter of the allegations in Complaint 1935/2008/FOR. The Ombudsman noted that the first allegation in Complaint 1935/2008/FOR was that the Commission did not take minutes of a meeting with Dell. In contrast, the application to the Court of First Instance concerned a decision by which the Commission refused to agree to a request to procure additional documents from AMD. The Ombudsman thus concluded that, on the basis of the information which had been submitted to him, the first allegation in Complaint 1935/2008/FOR did not concern the subject-matter of the application to the Court of First Instance. As regards the second allegation, the Ombudsman

concluded, on the basis of the information which had been submitted to him, that the applications of 10 October 2008 did not concern the facts which have been put forward by the complainant in Complaint 1935/2008/FOR. In light of the above, the Ombudsman informed the Commission that there were no grounds to close his inquiry in relation to the first or the second allegation in Complaint 1935/2008/FOR.

21. In its opinion forwarded to the Ombudsman on 20 January 2009, the Commission argued that Intel linked both its applications before the Court of First Instance to the complaint before the Ombudsman. The Commission pointed out that Intel had attached Complaint 1935/2008/FOR, and the entire correspondence with the Ombudsman, as annexes to the main application before the Court of First Instance. Amongst other arguments, Intel stated in the main application that the Commission's investigation was " *discriminatory and partial* ". In order to substantiate this claim, Intel made reference to examples of what it considered to be discrimination and partiality in the Commission's investigation. These examples included a specific reference to the two alleged instances of alleged bias on which the Ombudsman has opened his inquiry in Complaint 1935/2008/FOR. Intel included the entire correspondence with the Ombudsman as evidence. On this basis, the Commission argued that all the facts put forward in Complaint 1935/2008/FOR were now pending in legal proceedings before the Court of First Instance. The Commission also stated that when, on 13 October 2008, Intel informed the Ombudsman of the applications to the Court of First Instance, Intel only submitted summaries of these applications. The Commission noted that the summaries made no reference to any of Intel's arguments referred to in Complaint 1935/2008/FOR. The Commission therefore requested that the Ombudsman reconsider the assessment made in his letter of 5 November 2008 by basing himself on the complete facts outlined in the Commission's opinion of 20 January 2009 and declare Complaint 1935/2008/FOR to be inadmissible in its entirety.

22. In his observations dated 3 February 2009, the complainant stated that he did not accept the Commission's arguments. He stated that the subject-matter of Complaint 1935/2008/FOR, and the subject-matter of the proceedings before the Court of First Instance in Cases T-457/08 R and T-457/08, were quite distinct. He stated that, while Intel referred to Complaint 1935/2008/FOR in its written filings to the Court of First Instance in order to apprise the Court of First Instance of the full procedural history of the Commission's investigation of Intel, and also to provide some background against which the decision subject to Intel's application might be assessed, Intel did not appeal the two acts of maladministration that are the subject-matter of Complaint 1935/2008/FOR. He stated that Intel's citation, in its applications, of (a) the Commission's failure to make a complete record of an interview with senior Dell representatives, and (b) its role in providing AMD with access to confidential Dell materials forming part of the Commission's file, as examples of the Commission's bias and lack of objectivity, cannot be construed to mean that these acts were themselves part of the subject-matter of Intel's appeal and request for interim measures. He argued that his viewpoint was confirmed by the fact that the President of the Court, in his Order of 27 January 2009 dismissing Intel's application for interim measures, [6] focused his analysis exclusively on the two decisions that were the subject-matter of the appeal and nowhere referred to the two acts of maladministration that are the subject-matter of Complaint 1935/2008/FOR. Thus, in the complainant's view, the two acts of maladministration, which are the subject-matter of Complaint 1935/2008/FOR, did not form

the subject-matter of the appeal and request for interim measures in Cases T-457/08 and T-457/08 R.

23. The complainant also argued that the Commission's claim that Intel's allegation of maladministration was currently pending before the Court of First Instance was now overtaken by events and rendered moot. In effect, the complainant stated that Intel did not intend to appeal the 27 January 2009 order of the President of the Court of First Instance. Further, on 3 February 2009, Intel formally withdrew its main application in Case T-457/08. Given that the proceedings before the Court of First Instance, invoked by the Commission as allegedly precluding the Ombudsman's investigation of Complaint 1935/2008/FOR, were no longer pending, the Commission's objections in that respect were therefore moot.

24. The Ombudsman notes that, in accordance with Article 195(1) second paragraph of the EC Treaty, the Ombudsman shall not conduct inquiries where the alleged facts are or have been the subject of legal proceedings. Article 1(3) of the Statute of the European Ombudsman also states that the Ombudsman may not intervene in cases before courts or question the soundness of a court's ruling. Further, Article 2(7) of the Statute of the European Ombudsman states that, when the Ombudsman, because of legal proceedings, in progress or concluded concerning the facts which have been put forward, has to declare a complaint inadmissible or terminate consideration of it, the outcome of any inquiries he has carried out up to that point shall be filed definitively.

25. The Ombudsman emphasises the importance he attaches to ensuring that his inquiries do not, in any way, impinge upon the role of the courts. If facts have been established or interpreted in a ruling by a court, the Ombudsman will not revaluate the existence of, or the interpretation of, such facts.

26. The Ombudsman notes that, on 27 January 2009, the President of the Court of First Instance issued an Order in relation to Case T-457/08 R. [7] In his Order, the President of the Court of First Instance concluded that the interim measures application in Case T-457/08 R should be declared inadmissible. Following a careful examination of the Order of the President of the Court of First Instance, the Ombudsman notes that the Order does not establish the existence of alleged facts, or evaluate any facts, which are the subject of the present inquiry. As such, the Ombudsman concludes that the Order of the President of the Court of First Instance does not call into question the admissibility of Complaint 1935/2008/FOR.

27. Further, on 3 February 2009, before the Court of First Instance could take a view on any of the alleged facts or facts brought before it in relation to that application, Intel withdrew its application in Case T-457/08. As such, it is not now necessary for the Ombudsman to take a view as regards whether alleged facts which were brought to the attention of the Court of First Instance in the context of that application are the same as the alleged facts which are the subject-matter of the present inquiry.

28. In light of the above, the Ombudsman considers that the present case is admissible. [8]

Alleged delays by the Commission

29. In his observations dated 3 February 2009, the complainant stated that he was concerned that the Commission was deliberately seeking to delay the Ombudsman's investigation of Complaint 1935/2008/FOR. In sum, he argued that it was difficult to believe that the Commission was not in a position to submit its five-page, non-factual opinion, which was based on a single procedural argument (that the complaint was inadmissible), within the original deadline of 30 November 2008, or, at the least, before the expiry of the extended deadline of 15 January 2009. He noted that Cases T-457/08 R and T-457/08 were filed on 10 October 2008 and were communicated to the Commission on 14 October 2008 (for the interim measures application) and 27 October 2008 (for the main application). Given the very limited nature of its submission dated 20 January 2009, the Commission should have been in a position to provide its submission shortly after it obtained a copy of Intel's main application in Case T-457/08 on 27 October, 2008, but in any event within the original deadline of 30 November 2008.

30. The Ombudsman notes that the original deadline set for providing an opinion to the Ombudsman was 30 November 2008. On 30 September 2008, the Commission wrote to the Ombudsman informing him that, since his letter of 26 September 2008 had extended the scope of the inquiry, the Commission required an additional period, namely, until 15 January 2009, to submit an opinion to the Ombudsman. Given the complexity and sensitivity of the allegations in Complaint 1935/2008/FOR, the Ombudsman agreed to this request.

31. The Ombudsman notes that, since the Commission's request of 30 September 2008 was made prior to the applications to the Court of First Instance on 13 October 2008, it must have been the Commission's intention, when it made the request for an extension, to provide the Ombudsman with an opinion in relation to the *substance* of the allegations in Complaint 1935/2008/FOR.

32. The Ombudsman is of the view that the Commission would comply with its duty to cooperate with the Ombudsman in the conduct of an inquiry, if, in the event that such an extension was not necessary for the purposes of responding to the Ombudsman, it decided not to make use of the extension granted to it.

33. The Commission's opinion of 20 January 2009 was based solely on the issue of admissibility discussed in paragraphs 19 to 28 above. The opinion indeed consisted of only five pages. The Ombudsman cannot, however, exclude the possibility that the Commission did not quickly arrive at the views expressed in its opinion of 20 January 2009. In sum, the Ombudsman cannot exclude the possibility that the Commission was not certain of the soundness of its arguments in relation to the admissibility of the complaint during the period between 27 October 2008 and 15 January 2009, and was therefore also considering responding on the substance of the case by 15 January 2009. This view would be confirmed by the fact that when, on 16 February 2009, the Ombudsman set a very short deadline for the submission of a further opinion by the Commission on the substance of the allegations, the Commission was able to meet this very short deadline. [9] The Commission's ability to meet this deadline would indicate that the Commission had indeed (at least partially) used the period between 27 October 2008

and 15 January 2009 to consider the substance of the allegations made in the present inquiry. Further, the Commission replied promptly to the Ombudsman's request of 23 April 2009 for a second further opinion. Finally, the Ombudsman notes that the Commission responded promptly and flexibly to the Ombudsman's request to carry out an inspection of documents.

34. The Ombudsman does not, therefore, agree with the complainant's statement that the Commission was " *deliberately* " seeking to delay the Ombudsman's investigation of Complaint 1935/2008/FOR.

A. The allegation, and related claim, that the Commission failed to take minutes of the 23 August 2006 meeting with representatives of Dell, despite the fact that the meeting was directly concerned with the subject matter of its investigation of Intel, and, as a result, that the Commission did not make a record of potentially exculpatory evidence

Arguments presented to the Ombudsman

35. The complainant states that, on 23 August 2006, the Commission case team responsible for dealing with Case COMP/37.990 met with senior representatives of Dell to discuss issues relating to Case COMP/37.990. The complainant argues that the Commission failed to record, and include in the case file, a detailed note of the meeting. This, in the complainant's view, constitutes a very serious act of maladministration.

36. The complaint argues that, in the meeting of 23 August 2006, Mr A (a senior executive at Dell) must have informed the Commission of facts which, in the context of Case COMP/37.990, would be exculpatory of Intel. In support of this argument, the complainant, provided the Ombudsman with a copy of a document, which, according to the complainant, is an agenda for the meeting of 23 August 2006 (hereinafter, "the Agenda"). The complainant states that the Agenda was prepared by the Commission's case team. According to the complainant, the Agenda makes it clear that the purpose of the 23 August 2003 meeting was to cover, amongst other issues, the following issues:
- Dell's alleged *de facto* exclusivity with Intel;
- Performance differences between Intel and AMD;
- The Intel discount system introduced at the end of 2001 and the *quid pro quo* , if any, from Dell;
- Mr A 's testimony to the US Federal Trade Commission (hereinafter, the "FTC") concerning Dell's interest in ensuring Intel's performance advantage over AMD;
- Dell's "single sourcing" business model, which led it to source solely from Intel;
- Intel's "ability to retaliate" if Dell should begin sourcing microprocessors from AMD;
- Dell's uncertainties about AMD's "roadmap";
- [**Intel's discounts to Dell since April 2004**].

37. In the complainant's view, it is clear that, if the Agenda were followed, [10] the meeting of

23 August 2006 focused on the key areas of Mr A's FTC testimony. The complainant states that Mr A's FTC testimony exonerates Intel and contradicts the allegations contained in the Statement of Objections [11] concerning Dell's relationship with Intel. In sum, Mr A's sworn testimony to the FTC in 2003 [12] consisted of information relating to the same facts which were being investigated by the Commission in Case COMP/37.990. The complainant states that the Commission was aware of this testimony since, at the latest, 18 July 2006.

38. In the complainant's view, the meeting of 23 August 2006 also covered some new material which was not covered in Mr A's FTC testimony, but which was similarly central to the allegations in the Statement of Objections concerning Dell. For example, the Statement of Objections **[made assertions about the reasons why Dell purchased only from Intel]** . It is clear, in the complainant's view, that the accuracy of this claim was a central subject of the Agenda.

39. In the complainant's view, it is also reasonable to assume that, had evidence provided by Mr A incriminated Intel and supported the Commission's allegations, it would have been relied on by the Commission in the Statement of Objections. Since that was not the case, it also seems reasonable to assume that Mr A's evidence was either neutral or exonerated Intel.

40. The complainant argues that the case team failed to make a detailed note of its interview with a material witness who (a) it knew, or should have known from the documents already in its possession, had provided exculpatory evidence contradicting many of the Commission's key assumptions, which were later incorporated into the Statement of Objections, and (b) with whom it appears to have discussed issues central to the Commission's case.

41. Against this background, the complainant argues, it is clear that the Commission's failure to record and include in the case file a detailed note of Mr A's responses to the case team's questions constitutes a very serious act of maladministration and, indeed, calls into question the integrity of the Commission's entire investigation.

42. The complainant states that, in its correspondence with the complainant, the Commission initially denied the existence of the meeting. [13] It subsequently stated that a meeting had taken place, but that no minutes of that meeting were taken. [14] At a yet later date, it stated that a note for the file relating to that meeting had been created and that the note would now be placed in the official case file. However, the Commission's Hearing Officer then informed Intel that it would not have access to that note, since this was an " *internal document* " and did not constitute agreed " *minutes* " of the meeting. [15]

43. The complainant argues that the creation of written minutes of meetings is good administrative practice, which respects the principle of transparency in administrative proceedings. It also ensures impartiality in the investigatory process. In the complainant's view, the Commission's failure to make a record of the meeting constitutes maladministration.

44. The complainant made reference to Article 24 of the European Code of Good Administrative Behaviour which requires the Commission to " *keep adequate records of their incoming and*

outgoing mail, of the documents they receive, and of the measures they take. " It follows that the duty to keep adequate records must, in the complainant's view, also apply to the interview of a material, exculpatory witness. The case team's failure to do so is, in the complainant's view, also inconsistent with the good administrative practice that is incumbent upon an institution with the extensive powers enjoyed by the Commission.

45. The complainant also argues, in relation to the allegation, that the Commission failed to respect the principle of transparency in administrative proceedings. He states that the case team's denial that it interviewed a key witness, and its initial denial that a written note of the meeting had been produced - later transformed by the Hearing Officer into the statement that " *no interview according to Article 19 of Regulation 1/2003 took place ... nor were any minutes taken during or after the meeting which form part of the file* " - inconsistent with the facts as finally established, and with the need to ensure transparency in administrative proceedings. In the complainant's view, the case team's conduct constitutes a manifest violation of Articles 11 [16] and 12 [17] of the European Code of Good Administrative Behaviour, which require Commission officials to exhibit fair and correct conduct and " *reply as completely and accurately as possible to questions which are asked.* "

46. Also in relation to his allegation, the complainant further argues that the Commission was not impartial during the investigatory process. He notes that the Commission has broad and far-reaching powers under Regulation 1/2003 and argues, in addition, that, in competition cases, the Commission acts as " *the investigator, the jury and the judge* " and is subject to judicial review only after it has adopted a decision. In particular, and in contrast to the system in place in some Member States, such as France, where the investigatory and adjudicative functions are split between two agencies, the Commission has the power both to conduct an investigation of the facts and to adopt a decision establishing that an infringement of the competition rules has occurred. In the complainant's view, the extensive nature of the Commission's powers requires that the Commission exercise particular vigilance against any tendency toward bias, lack of objectivity or overzealous prosecution, when performing its investigative and adjudicative functions. In this respect, in the complainant's view, the case team clearly infringed Articles 7, 8 and 9 of the European Code of Good Administrative Behaviour by 1) attempting to cover up the interview of 23 August 2006; 2) attempting to deny that any written note was produced; 3) failing to make the contents of that interview part of the record; and 4) failing to make a detailed record of the questions asked of Mr A and the answers he provided. [18]

47. In its further opinion to the Ombudsman dated 20 March 2009, the Commission states that members of the case team handling the investigation in Case COMP/37.990 had a meeting on 23 August 2006 with two of Dell's senior executives, Mr A and Mr B, as well as with two of Dell's outside counsel. According to the Commission, the purpose of the meeting was to discuss a number of documents which Dell had recently submitted to the Commission [19] and to prepare the Commission's further investigation of the case.

48. The Commission states that, during the meeting, Dell's representatives discussed a number of questions with the Commission. According to the Commission, Dell subsequently answered

these questions formally in a letter dated 22 September 2006.

49. The Commission also states that, between the meeting of 23 August 2006 and the sending of the first Statement of Objections to Intel on 26 July 2007, Dell made eight additional submissions to the Commission pertaining to the key issues of the investigation. According to the Commission, Intel received full access to all these answers when it was given access to file on 29 July 2007 and has thus been aware of the existence of the meeting since that date. The existence of the meeting was further confirmed by the case team by email of 21 February 2008.

50. As to the actual content of the meeting, the Commission states that no notes or records, other than the note of 29 August 2006, exist in the Commission's file. According to the Commission, the note of 29 August 2006 summarises the impressions of one of the case handlers present at the meeting. It incorporates information from other sources, personal views, and the case handler's views on further investigative strategy. The note was therefore, in the Commission's view, not drafted for the purpose of being countersigned or agreed by any other attendees of the meeting (and indeed it never was countersigned or agreed by any other attendees of the meeting). It was not meant to become, at any point in time, part of the facts (inculpatory or exculpatory) resulting from the investigation. Rather, the note of 29 August 2006 was an *aide memoire* for the case handler for preparing further investigative measures.

51. Moreover, the Commission noted, the purpose of the meeting with Dell was to explore further investigative measures related to Dell. The purpose was not to gather information in the format of countersigned minutes or Article 19 statements.

52. The Commission states that, although it maintains that there was no obligation to send the note of 29 August 2006 to Intel, a non-confidential version of the said note, which excluded confidential information relating to Dell and to the Commission's strategy considerations, was sent to Intel on 19 December 2008.

53. The Commission states that, while, as a result of its access to the file, [20] Intel was aware of the meeting, the Commission did not initially inform Intel of the existence of the note of 29 August 2006, since the case team considered that it was not part of the official case file in Case COMP/37.990. The Hearing Officer overruled that initial position by decision of 7 May 2008, and asked that the note to the file of 29 August 2006 be placed on the official case file in Case COMP/37.990. However, at the same time the Hearing Officer denied Intel access to the note of 29 August 2006 on the grounds that the note was an " *internal document* ", and therefore not accessible to Intel.

54. As regards the fact that Intel submitted a document to the Ombudsman that " *appears* " [21] to be a list of topics to be discussed at the meeting, the Commission took the view that it is not possible, from the document itself, to determine from whom this document originates. The Commission states that it has not been able to locate this document and cannot therefore state with certainty where it originates from. The document in question is most likely a personal note of a case handler that was either sent to Dell by email prior to the meeting or handed over to Dell during the meeting. Such notes normally serve as a preparation for both the case team and

the other parties attending a meeting in order to acquaint themselves with possible subjects that could be discussed at a meeting. However, in the course of a meeting, discussions often depart from the topics outlined in such notes, depending on the limited time available for such meetings and the topics that arise in them.

55. The Commission noted that Intel argues that the Commission's handling of the meeting on 23 August 2006 constitutes an act of maladministration. The Commission understands Intel's argument to be based on three different grounds. Firstly, Intel alleges that the topics discussed at that meeting were exculpatory and that the Commission should therefore have recorded them. In order to substantiate its claim, Intel submits a document that it states " *appears to be an agenda prepared by the case team for the meeting* " and holds that the topics listed in that document were actually discussed at the meeting. Moreover, Intel makes reference to the testimony of Mr A (one of the attendees of the meeting of 23 August 2006) before the FTC on 26 March 2003 and claims that (1) the content of that testimony would be exculpatory for Intel and (2) that Mr A must have made similar statements as in his FTC deposition. Secondly, Intel alleges that the Commission hid the fact that a meeting with Dell representatives took place and that a note on that meeting had been prepared. Finally, Intel infers that, by its handling of the meeting with Dell, the Commission has used its powers for purposes that have no basis in law and are not motivated by public interest, and that the Commission has not been impartial and independent by taking into consideration all the relevant factors and giving each of them its proper weight.

56. In relation to the above, the Commission states that Paragraph 12 of the Notice on Access to File [22] states that:

" *There is no obligation on the Commission departments to draft any minutes of meetings with any person or undertaking. If the Commission chooses to make notes of such meetings, such documents constitute the Commission's own interpretation of what was said at the meetings, for which reason they are classified as internal documents* ".

57. The Commission states that the case law underlying the above paragraph of the Notice is set out in paragraphs 349-359 of the *TACA* judgement. [23] It notes that, in paragraph 351 of *TACA* , the Court of First Instance states that *"there is by contrast no general duty on the part of the Commission to draw up minutes of discussions in meetings or telephone conversations with the complainants which take place in the course of the application of the Treaty's competition rules"* . The Commission goes on to state that the Court of First Instance has further confirmed this finding in the *Group Danone* case. [24]

58. The Commission goes on to add that, in paragraph 358 of *TACA* , to which the Ombudsman has made reference in his letter opening the inquiry, and paragraph 67 of *Group Danone* , the Court held that " *according to the case-law infringements of the rights of the defence must be examined in relation to the specific circumstances of each particular case* ". In both judgments, however, the Court of First Instance goes on to say that:

" *if the Commission intends to use in its decision inculpatory evidence provided orally by another*

party it must make it available to the undertaking concerned so as to enable the latter to comment effectively on the conclusions reached by the Commission on the basis of that evidence. Where necessary, it must create a written document to be placed in the file ".

59. As regards Intel's claims that, at the meeting in question, exculpatory information was passed to the Commission and that there is an obligation to record such information, the Commission states that the content of the meeting partly related to documents that were already on the Commission's case file and partly served the purpose of formulating subsequent information requests that were then answered by Dell by letter of 22 September 2006. As regards Intel's claims that the meeting must have addressed exculpatory information that is not contained on the Commission's file, the Commission notes that, in order to substantiate its claim, Intel refers to Mr A's FTC testimony made more than three years prior to the meeting of 23 August 2006 and to a document that allegedly shows the indicative topics to be discussed at the meeting. The Commission states that none of these documents contains evidence of what actually was discussed at the meeting. Without prejudice to whether any statements made to the FTC by Mr A three years previously are exculpatory, the fact that such statements were made by Mr A to the FTC does not demonstrate that Mr A provided any information which might be exculpatory to the Commission. In fact, according to the Commission, Mr A's statement, made before the FTC, largely relates to a period preceding the practices which the Commission objected to in its Statement of Objections of 26 July 2007. [25] This is further confirmed by the questions raised during the meeting, to which Dell has answered in writing and which largely related to the performance of an AMD product (Hammer) in the course of the year 2002. Equally, the indicative list of topics [26] does not imply that these topics were indeed addressed (partially or fully) at the meeting and, if they were addressed, with what level of detail. Therefore, the Commission's " *preliminary assessment* " is that the meeting did not cover any exculpatory information. [27] In the Commission's view, Intel did not provide evidence which would invalidate this preliminary assessment. The Commission noted that the final determination of what information would be exculpatory or inculpatory can only be made once the Commission has concluded the investigative stage of the procedure.

60. Finally, the Commission emphasised that the relevant case law, which exceptionally establishes an obligation to create a written document for the file with respect to inculpatory evidence, is not applicable in this case because the meeting did not pertain to information that the Commission " *intends to use in [any possible] decision.* " It noted that neither of the two Statements of Objections sent in this case rely on the content of the meeting of 23 August 2006. As regards the question whether the meeting covered exculpatory information, this can only be answered definitively in the future, once the Commission will have in its possession all the information needed to take a decision in the present case. [28]

61. The Commission noted that the fact that a case handler decided to draft a note to the file summarising, *inter alia* , his impressions of the meeting does not make this purely internal document an accessible document which the Commission was obliged to provide to Intel. This was also confirmed by the Hearing Officer and the document was therefore provided to Intel on 19 December 2008 " *as a matter of courtesy only* ".

62. The Commission then addressed the issues raised by the Ombudsman in opening the present inquiry (see Paragraph 7 above). As regards the first issue raised by the Ombudsman, the Commission concludes that it acted in full compliance with the Notice on Access to File and the Court's rulings in *TACA* [29] and *Groupe Danone* [30] , when it did not take minutes of the meeting with Dell representatives on 23 August 2006, since these provisions and judgments did not oblige it, in the context of the present case, to do so.

63. As regards the second issue raised by the Ombudsman, the Commission concludes that it cannot be established who the author of the document " *Indicative list of topics to be discussed* " was, but that most likely this document was submitted by a Commission case handler to Dell prior to or during the meeting. Typically, such notes serve as a way to organise the preparation of meetings and are not necessarily strictly followed during the meeting. Moreover, the Commission confirms that the questions to which Dell has responded in writing (in its written follow-up to the meeting) were " *in all likelihood* " discussed during the meeting of 23 August 2006.

64. As regards the third issue raised by the Ombudsman, the Commission concludes that no minutes of the meeting of 23 August 2006 were taken. The note of 29 August 2006 does not constitute " *minutes* ", since it was not drafted with a view to providing a full summary of the content of the meeting but with an eye to preparing further investigative measures related to Dell. Moreover, it is not possible to determine which content of the note of 29 August 2006 stems from the meeting and which stems from other sources. The note of 29 August 2006 was also not meant to be countersigned by Dell. The investigative measures following that note have triggered voluminous submissions by Dell that were made fully available to Intel.

65. As regards the fourth issue raised by the Ombudsman, the Commission concludes that Dell representatives have not been asked to sign any minutes, since the purpose of the meeting of 23 August 2006 was not to produce an Article 19 statement. Moreover, the note to the file addressed in the same sections above did not have the purpose of constituting minutes of the meeting and is not designed to accurately or fully reflect the contents of the meeting. Consequently, it is not possible at this stage to request Dell to sign minutes of the meeting, since no such minutes exist.

66. The Commission argued that it did not hide the fact that a meeting took place. Intel was made aware of a note to the file relating to the hearing in the course of the second stage of the usual access to file procedure, where decisions on access are first taken by DG COMP and are then subject to review by the Hearing Officer.

67. Based on the facts described above, the Commission submits that the handling of the above meeting was in full compliance with the applicable legal provisions and by no means puts into question the objectivity and even-handedness of the Commission's investigation. It argues that Intel's account of the events is inaccurate and incomplete. In the Commission's view, there are elements to support this conclusion, namely, the note of 29 August 2006 itself.

68. In his observations of 14 April 2009 and 16 April 2009, submitted in response to the

Commission's opinion of 20 March 2009, the complainant stated that the Agenda, which was prepared by the Commission in advance of the 23 August 2006 meeting, outlined key topics. He noted that many of these topics would become the foundation of the Commission's allegations in the Statement of Objections dated 26 July 2007. The complainant stated that, prior to the meeting of 23 August 2006, the Commission reviewed Mr A's 2003 testimony before the FTC. Indeed, as the Agenda indicates, the Commission knew in advance of that meeting that much of Mr A's prior testimony was intimately related to the topics on the Agenda. Moreover, the Commission was fully aware that Mr A was **[a Senior Dell executive]** and that he was **[the Dell executive]** responsible for Dell's relationship with Intel. As a result, it is simply not credible that the Commission did not anticipate that Mr A would provide important evidence during the meeting and, given Mr A's 2003 testimony before the FTC, that this evidence would likely be exculpatory of Intel.

69. The complainant states that, in its comments, the Commission attempts to deflect the obvious conclusion that the interview with Mr A focused on the Commission's key allegations concerning Dell. The Commission tries to dismiss the reliability of the agenda for the meeting, by stating that " *such notes are a way to organize the preparation of meetings and are not necessarily strictly followed during the meeting* ". However, in its opinion to the Ombudsman, the Commission also concedes that " *the questions to which Dell has responded in Annex VII of Intel's complaint were in all likelihood discussed during the meeting of 23 August 2006.* " Further, the note of 29 August 2006 itself unequivocally confirms that the meeting tracked the proposed agenda closely. Thus, for example, the note of 29 August 2006 states plainly that the " *Q&A focused on [Mr A's] deposition to the FTC* " and, in particular, on " *Dell's products strategy* ", " **[Dell's decision to source from Intel and its relation to Intel's discount programme]** " and " **[Intel's response, should Dell change its approach]** ". All these topics are identified in the Agenda.

70. The complainant states that the note of 29 August 2006, and Mr A's consistent testimony before the FTC in 2003, and in AMD's civil suit against Intel in **[redacted]** 2009, unequivocally demonstrate that Mr A must have provided evidence during the meeting that the Commission recognised at the time as being exculpatory of Intel. Indeed, one of the non-redacted portions of the note **[redacted]** clearly supports one of Intel's central defence arguments and is therefore clearly exculpatory.

71. The complainant states that Intel has established that Mr A provided highly exculpatory evidence in his 2003 testimony before the FTC on precisely the same topics covered in the 23 August 2006 meeting. The Commission's submission seeks to dismiss the evidentiary value of Mr A's FTC testimony, which was both highly exculpatory of Intel and which, by the Commission's own admission, constituted the " *focus* " of the 23 August 2006 meeting by arguing that " *Mr A 's statements made before the FTC largely relate to a period preceding the practices to which the Commission has objected in the [Statement of Objections]* ". As regards the Commission's suggestion that Mr A 's responses at the 23 August 2006 meeting might have differed from his FTC testimony, the complainant states that: (i) Mr A 's FTC testimony was given under oath; and (ii) **[redacted]** 2009, Mr A again gave sworn testimony confirming that the key points made in his 2003 FTC testimony, to the effect that Dell did not have an exclusive

relationship with Intel and that Intel did not " *threaten* " or " *punish* " Dell for considering a dual-source strategy, were equally applicable throughout the alleged infringement period.

72. The complainant states that, against this background, it is simply not credible that Mr A would have testified one way under oath in 2003 and 2009, but provided contrary evidence on the very same issues to the Commission in 2006. In particular, the FTC testimony of 2003 leaves no room for doubt that the information Mr A provided to the Commission during the 23 August 2006 meeting undermined the Commission's key allegations concerning Dell and was thus highly exculpatory of Intel.

73. The complainant states that, given that the Agenda and Mr A's FTC testimony were the focus of the meeting, the Commission would have known at the time of the meeting that the evidence provided by Mr A to the FTC was exculpatory of Intel. As a result, the Commission was required either to make a transcript during the meeting or else subsequently to prepare an adequate record of the exculpatory evidence presented. However, the complainant states, the Commission has unambiguously conceded that it failed to make an adequate record. Moreover, the fact that it is even necessary to enter into a discussion of what was said during the meeting of 23 August 2006 is the direct result of the Commission's maladministration. Had the Commission taken a full note, or recorded a transcript of the 23 August 2006 meeting, as good administrative practice requires, there would be no uncertainty as to precisely what Mr A said, and, as a result, no debate over whether Mr A 's statements are relevant to the Commission's allegations and/or exculpatory of Intel.

74. As regards the Commission's legal arguments, the complainant states that the Commission seeks to evade the seriousness of its failure to make a complete record of the meeting of 23 August 2006 by arguing that " *whether the meeting would have covered exculpatory information can only he answered definitively when the Commission will have all the information to take a decision in the present case* ". In other words, the Commission appears to contend that it alone retains the exclusive discretion to decide: (i) whether evidence is, in fact, exculpatory and, therefore should be the subject of a detailed written record; and (ii) when, if ever, it is going to disclose such exculpatory evidence to a defendant in a pending investigation. This cannot possibly be a correct formulation of acceptable administrative procedure. First, if it is only possible to determine whether evidence is exculpatory after the investigation has been concluded, it would never be possible for the Commission to know when it was necessary to prepare a full record of a meeting. Second, if the Commission's approach were accepted, the Commission could, as it has sought to do in this case, conceal the existence of exculpatory evidence from the defendant. In the complainant's view, it is evident that such an interpretation would result in a grave violation of a defendant's rights of defence. The complainant states that it is well-settled case law that " *in adversarial proceedings established by the regulations for the application of Articles 81 EC and 82 EC, it cannot be for the Commission alone to decide which documents are of use for the defence of undertakings in proceedings involving infringement of the competition rules* ". [31] In particular, having regard to the general principle of "equality of arms", it is not acceptable for the Commission to be able to decide on its own whether or not to use documents against the applicant, when the applicant had no access to them and is therefore unable likewise to decide whether or not it would use them in its defence.

75. The complainant states that the Commission seeks to create the impression that it called Intel's attention to the existence of the meeting with Mr A in the documents provided to it as part of its file access. In fact, the complainant states, the reference to the meeting with Mr A appeared in a single Dell document, among the hundreds of thousands of pages of file material provided to Intel. Intel did not become aware that this document contained a reference to a meeting with Mr A until sometime around mid-January 2008, after Intel filed its Reply to the Statement of Objections. The complainant stated that, if anything more is required to assess the credibility of the Commission's view, it is sufficient to recall that, when questioned about the meeting, the Commission initially denied that there had been an interview with Mr A and that any note of that interview had been prepared. In the complainant's view, it is clear from these events that the Commission sought to conceal and suppress exculpatory evidence. Also in the complainant's view, this misconduct (and the failure to make a complete note of the meeting which would have eliminated any debate as to what Mr A said) constitutes a serious act of maladministration.

76. In sum, the complainant states, it is clear, in the light of the case law of the Community Courts, that the Commission's argument that it is for the Commission alone to decide " *definitively* " whether material is exculpatory and whether it needs to be provided to the defendant is untenable and has been rejected by the Community Courts.

77. Lastly, the complainant states that the Commission argues that the case law requiring the Commission to create an adequate record was not applicable to the note of 29 August 2006, " *because the meeting did not pertain to information that the Commission intends to use in [* any possible *] decision'* ". This argument only serves to reveal the Commission's fundamental misunderstanding of the relevant issues. The Commission's admission that it does not intend to use the information of the meeting with Mr A in a final decision underlines the very essence of the complainant's first allegation. Put otherwise, it is precisely because the Commission does not intend to use the exculpatory evidence that Intel's rights of defence have been violated. A defendant must be given access to the exculpatory evidence in order that it may use that evidence in its own defence. The Commission's position would completely undermine Intel's rights of defence, and would effectively preclude Intel, and any other defendant in a competition case, from using existing exculpatory evidence in the Commission's possession. This result is neither acceptable nor consistent with Community law. In sum, the case law unequivocally establishes that, in respect of exculpatory evidence, it is sufficient for the undertaking to show that it would have been able to use the exculpatory documents in its defence, in the sense that, had it been able to rely on them during the administrative procedure, it would have been able to put forward evidence which did not agree with the findings made by the Commission at that stage and would therefore have been able to have some influence on the Commission's assessment in any decision it adopted. The Court's approach to exculpatory documents is also reflected in the case law concerning the Commission's obligation to create an adequate record of meetings, in which exculpatory information has been provided.

78. According to the complainant, the *TACA* judgment (on which the Commission seeks to rely in its opinion to the Ombudsman) confirms and supports Intel's submission that the Commission

was under an obligation to provide an adequate record of the meeting with Mr A. In *TACA* , the defendants' plea alleging the Commission's failure to disclose minutes of a meeting with the complainant was rejected on the basis of the specific facts of the case. In sum, in *TACA* , the defendants were unable to specify the exculpatory evidence sought or adduce the slightest indication that such evidence existed and therefore of its relevance for the purposes of that case. In addition, the defendants' second plea in *TACA* , namely, that the Commission failed to draw up minutes of a meeting with a third party, was equally rejected because the defendants could not identify the exculpatory evidence in question and did not adduce any evidence of its existence and therefore of its usefulness for the purposes of that case. The complainant argued that there can be no doubt that, in contrast to the situation in *TACA* , Intel has sufficiently specified the exculpatory evidence sought and has also sufficiently shown both that such evidence existed and that it is relevant and useful to the Commission's investigation. The complainant therefore submitted that the *TACA* judgment in no way alters the conclusion that the Commission was clearly under an obligation to (i) create an adequate record of the interview with Mr A given the apparent exculpatory nature of the information provided by Mr A during the meeting and (ii) make that record available to Intel.

79. In its second further opinion, submitted to the Ombudsman on 10 June 2009, the Commission argues that, as was underlined in the Commission's opinion of 20 March 2009, the question whether any statements that Mr A may have made on 23 August 2006 could be of exculpatory nature could only be decided with certainty in the light of the Commission's final conclusions on Intel's practices, as expressed in a final decision. Before any such decision is taken, the Commission, on the basis of its preliminary assessment of the case that it is developing on a continuous basis, assesses what information is of relevance for the case. On that basis, the Commission has, at all times, a preliminary view on the exculpatory or inculpatory nature of the information. However, it is only at the moment of the final decision that this view becomes definitive. Consequently, it was not before the draft final decision that the Commission definitively assessed whether any statements that Mr A may have made on 23 August 2006 could be of exculpatory nature. The final Decision [32] in fact extensively addresses Mr A's depositions made in the US, in so far as they relate to the conditions attached to the rebates Intel granted to Dell. Therein, the Commission essentially concludes that Mr A, throughout his testimonies, did not change his position concerning the relevant question of whether Intel's rebates to Dell were conditional. Furthermore, the Commission concludes that none of Mr A's statements made during any of his testimonies contradicts the Commission's findings concerning Intel's abusive behaviour. In view of this, it is not plausible to assume that Mr A would have added anything of relevance to the case at the meeting of 23 August 2006, which was not already on the Commission's file. There is no indication that between March 2003 and February 2009 Mr A would have had a reason to change his position and to provide the Commission with a different version of the facts than the one presented before the FTC and the Delaware Court. There is no basis to assume that the Commission has disregarded additional facts which are of relevance to Intel's defence and which were communicated to it during that meeting.

80. The Commission maintained its legal position, outlined in paragraphs 22 to 30 of its comments to the Ombudsman dated 20 March 2009, and reflected in recitals 39 to 49 of the

Decision of 13 May 2009, to the effect that it had no obligation to record or take notes of the interview with Mr A. However, this question is without relevance to the present case, since Intel is not able to substantiate how the facts allegedly presented by Mr A on 23 August 2006 would have refuted the Commission's findings made in the Decision.

81. In his observations of 15 June 2009 concerning the Commission's further opinion of 10 June 2009, the complainant stated that the Commission largely repeated the arguments set forth in the Commission's previous submission dated 20 March 2009. In particular, the Commission reiterated that it has sole discretion to decide: (i) whether evidence is exculpatory and therefore should be the subject of a detailed written record; and (ii) when, if ever, it is going to disclose such exculpatory evidence to a defendant. According to the Commission, the exculpatory nature of the statements Mr A made during the interview of 23 August 2006 could only be determined " *with certainty in the light of the final conclusions of the Commission on Intel's practices, as expressed in a final decision* " so that " *it was not before the draft final Decision that the Commission definitively assessed whether any statements that Mr A may have made on 23 August 2006 could be of exculpatory nature* ". The complainant states that, as explained in detail in his observations of 14 April 2009, the Commission's position has been rejected by the Community Courts. [33] The complainant again stated the Community Courts' unequivocal finding that a defendant must be able to use and rely on exculpatory material " *during the administrative procedure* " in order to address the Commission's findings " *at that stage* " and with a view to being able " *to have some influence on the Commission's assessment in the final decision* " directly contradicts the Commission's argument that it can withhold potentially exculpatory material until the final decision. The complainant repeated his argument that it is not for the Commission alone to decide which evidence is of use for Intel in its defence. He reiterated his argument that, had the Commission made a (proper) note of the 23 August 2006 meeting, Intel could have relied on that note in its defence.

The Ombudsman's assessment

82. As a preliminary general observation, the Ombudsman notes that the Commission's role as guardian of the Treaty, and specifically its role of ensuring that Articles 81 EC and 82 EC are respected, requires it to endeavour, once it decides to open an investigation into a suspected infringement of Article 81 EC or Article 82 EC, to inform itself sufficiently of all the relevant facts. [34] While the Commission has a reasonable margin of discretion [35] as regards its evaluation of what constitutes a relevant fact, the Commission, when seeking to ascertain relevant facts, should not make a distinction between evidence which may indicate that an undertaking has infringed Article 81 EC or Article 82 EC (inculpatory evidence) and evidence which may indicate that an undertaking has not infringed Article 81 EC or Article 82 EC (exculpatory evidence). In sum, the Commission has a duty to remain independent, objective and impartial [36] when gathering relevant information in the context of the exercise of its investigatory powers pursuant to Article 81 EC and 82 EC.

83. The Commission's powers of investigation in relation to Articles 81 EC and 82 EC are set out in Regulation 1/2003. [37] The entry into force, on 1 May 2004, [38] of Regulation 1/2003 led to/resulted in an enhancement of the Commission's investigatory powers compared to those

provided for in the predecessor of Regulation 1/2003, that is, Regulation 17/62. [39] As regards the taking of statements, Recital 25 of Regulation 1/2003 reads as follows:

"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. 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."

84. Article 19 of Regulation 1/2003 (Power to take statements) constitutes the legal basis empowering the Commission to carry out interviews for the purpose of collecting information relating to the subject-matter of an investigation. Article 19(1) reads as follows:

" *In order to carry out the duties assigned to it by this Regulation, 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.* "

85. In its opinions to the Ombudsman, [40] the Commission argues that it is under no obligation to draft any " *minutes* " of meetings with any person or undertaking (emphasis added by the Ombudsman). It argues that, in accordance with its own Notice on Access to the File, if it, the Commission, *chooses* to make notes of meetings, such documents constitute its own interpretation of what was said at the meetings, for which reason they are classified as internal documents. [41] The Commission states that its view is consistent with the rulings of the Court of First Instance in *TACA* [42] and *Group Danone* . [43] In particular, the Commission maintains that the meeting of 23 August 2006 was not an " *interview* " pursuant to Article 19 of Regulation 1/2003.

86. The Ombudsman notes that, in examining the classification of a legal act, the analysis cannot be restricted to considering the official title of a measure, but must be based on objective factors which are amenable to judicial review. Those factors include, in particular, the aim and content of the measure. [44] Since the choice of form cannot alter the nature of a measure, it must be ascertained whether the content of a measure is wholly consistent with the form attributed to it by the institution concerned. [45]

87. The Ombudsman considers that an interview [46] will only fall within the scope of Article 19 of Regulation 1/2003, if its purpose is to collect information relating to the subject-matter of an investigation. Thus, for example, a meeting which has as its aim and content to determine whether information which has already been collected should be classified as confidential business secrets, or a meeting which has as its aim and content the organisation of a procedural step in the context of the investigation, are not " *interviews* " pursuant to Article 19 of Regulation 1/2003 (hereinafter " *Article 19 interviews* "). Further, a meeting which has as its aim and content to *provide* a third party with information concerning the Commission's views will not be an " *Article 19 interview* ". Further, a meeting which has as its aim and content the collection of information which does not relate to the " *subject-matter of an investigation* " (for example, the collection of information to be used in the evaluation of competition policy in general [47]) will not be an " *Article 19 interview* ". [48]

88. The Ombudsman also notes that the Commission has a reasonable margin of discretion as regards whether to conduct an " *Article 19 interview* ". [49] However, when the Commission exercises that discretion, and chooses to interview a third party for the purposes of gathering information in relation to the subject-matter of an investigation, the classification of the resultant interview should not be arbitrary, but must rather be based on the aim and content of the interview.

89. The Ombudsman has carefully examined the evidence in relation to the meeting of 23 August 2006 and has noted the following:

a. The Agenda of the meeting of 23 August 2006 indicates that the issues to be discussed at the said meeting were related to the subject-matter of the investigation in Case COMP/37.990. As such, it is clear that the Commission, by setting this Agenda, had the aim of gathering information in the meeting of 23 August 2006.

b. The note of 29 August 2006 summarises the impressions of one of the case handlers present at the meeting of 23 August 2006. However, while the note is a summary, it contains extensive factual information provided by Mr A (a senior executive at Dell) relating to at least a number of the issues discussed in the meeting of 23 August 2006. It is clear, from an examination of the note of 29 August 2006, that the aim and content of that meeting concerned directly the gathering of information from Dell, which related to the subject-matter of the investigation in Case COMP/37.990. Specifically, the note of 29 August 2006, in numerous instances refers to questions posed to Mr A by the Commission and to Mr A's responses. As such, it is clear that the Commission, by posing questions to Mr A, had the aim of gathering information in the meeting of 23 August 2006. These responses constituted information which was directly related to the subject-matter of the investigation in Case COMP/37.990. Thus, the content of the meeting was information directly related to the subject-matter of the investigation in Case COMP/37.990.

c. It is clear from an examination of Dell's written follow-up to the meeting of 23 August 2006 that the aim and content of the said meeting concerned directly the gathering from Dell of information concerning the subject-matter of the investigation in Case COMP/37.990. Dell's response is entitled " *Meeting with [Mr A] 23 August 2006 Follow -up to Oral Queries Raised by the European Commission* ". In its response, Dell provides answers to eight questions posed by the Commission. For example, the first paragraph of the answer to Question 4 clearly indicates that, in the meeting of 23 August 2006, the Commission asked Mr A questions directly related to the subject-matter of the investigation, and that, in the same meeting of 23 August 2006, Mr A provided information to the Commission in response to those questions. Similar conclusions can be drawn from an examination of the first paragraph of the answer to Question 6. As such, it is clear that the Commission, by posing questions to Mr A, had the aim of gathering information in the meeting of 23 August 2006. The content of the meeting was information directly related to the subject-matter of the investigation in Case COMP/37.990.

90. The Ombudsman therefore concludes that, in the meeting of 23 August 2006, the

Commission sought information from Mr A which was related directly to the subject-matter of the investigation in Case COMP/37.990, that the issues actually discussed in the meeting of 23 August 2006 related directly to the subject-matter of the investigation in Case COMP/37.990 and that Mr A provided concrete information to the Commission which was related directly to the subject-matter of the investigation in Case COMP/37.990. In light of the above, the Ombudsman concludes that the meeting of 23 August 2006 should, in light of its aim and content, have been classified as an " *Article 19 interview* ". Having reached this conclusion, the Ombudsman observes that the Community Courts have not yet had the opportunity to provide an interpretation of Article 19 of Regulation 1/2003. It must be recalled that the highest authority on the meaning and interpretation of Community law is the Court of Justice. [50]

91. Regulation 773/2004 lays down specific rules concerning the initiation of proceedings by the Commission, as well as the handling of complaints and the hearing of the parties concerned. Article 3 of Regulation 773/2004 (Power to take statements) reads as follows:

" *1. Where the Commission interviews a person with his consent in accordance with Article 19 of Regulation (EC) No 1/2003, it 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.*

2. The interview may be conducted by any means including by telephone or electronic means.

3. 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. "

92. Article 3 of Regulation 773/2004 thus contains a series of obligations which the Commission must comply with *whenever* a meeting, by reason of its aim and content, must be characterised as an " *interview* " pursuant to Article 19 of Regulation 1/2003. This interpretation is borne out by the use of the imperative case (" *shall* ") in relation to each of these obligations. It must be underlined that Article 3 of Regulation 773/2004 should not be interpreted as setting out conditions which must be met *in order for* an interview to be categorised as an " *Article 19 interview* ", but rather contains a series of obligations which must be complied with, *once* an interview is correctly categorised as an " *Article 19 interview* ". As is evident from paragraph 88 above, whenever the Commission interviews a third party *for the purposes of gathering information in relation to the subject matter of an investigation* , the interview should, given its aim and content, be classified as an " *Article 19 interview* ". In effect, non-compliance with an obligation set out in Article 3 of Regulation 773/2004 does not imply that an interview ceases to be an " *Article 19 interview* ", but rather that the Commission has failed to comply with an obligation in relation to an " *Article 19 interview* ".

93. The obligations which the Commission must comply with, whenever a meeting must be characterised as an " *Article 19 interview* ", include the obligation to state the legal basis and the purpose of the interview, and the obligation to recall the voluntary nature of the interview, at the

beginning of the interview. It also includes the obligation on the Commission to inform the person interviewed of its intention to make a record of the interview.

94. Article 3 of Regulation 773/2004 states that the Commission " may *record the statements made by the persons interviewed* in any form " (emphasis added). Article 3 of Regulation 773/2004 thus clearly gives the Commission discretion as regards *how* it records an Article 19 interview. [51] Article 3 of Regulation 773/2004 also states that, once a recording is made, a copy of any such recording must be made available to the person interviewed for approval. The wording of Article 3 of Regulation 773/2004 is, however, not necessarily as clear as regards whether the Commission is legally obliged to make a record of an Article 19 interview. [52] In sum, Article 3 of Regulation 773/2004 does not specifically state that a record shall be made of an " *Article 19 interview* ". [53] Further, Article 3.3 of Regulation 773/2004 states that " *[a] copy of* any *recording shall be made available to the person interviewed for approval.* " (emphasis added) The use of the word " *any* " in Article 3.3 of Regulation 773/2004 could be understood to imply that the Commission has, legally, discretion as regards whether to make a record of an " *Article 19 interview* ". [54]

95. Even if it were accepted that Article 3 of Regulation 773/2004 does not impose a *legal* obligation to make a record of an " *Article 19 interview* ", [55] but rather gives the Commission discretion as regards whether or not it makes a record of an " *Article 19 interview* ", the Ombudsman notes that, while failure to respect legal rules is a form of maladministration, the concept of maladministration is broader than the concept of legality. In particular, when exercising a discretionary power, the administration must always have good and legitimate reasons for choosing one course of action rather than another. [56]

96. As noted in Paragraph 82 above, the Commission's role, when ensuring that Articles 81 EC and 82 EC are respected, requires that, once it opens an investigation into a suspected infringement of Article 81 EC or Article 82 EC, it inform itself fully of all the relevant facts. Even if it were accepted that the Commission has a certain margin of discretion as regards the making of a record of an " *Article 19 interview* ", and, indeed, *even* if it were argued that an interview with a third party in which information relating to the subject-matter of an investigation is gathered should not be categorised as an " *Article 19 interview* ", the Ombudsman is of the view that it would exceed the Commission's margin of discretion, and thereby breach a principle of good administration, if the Commission were to use that margin of discretion in a way which would imply that it does not ensure that a proper record is made, in some form, of all the " *information relating to the subject-matter of an investigation* " which is provided to it in the context an investigation, and that the record is subsequently included in the file.

97. Again, *assuming* that the Commission has a certain margin of discretion as regards the making of a record of an interview with a third party in which information relating to the subject-matter of an investigation is gathered, [57] it is arguable that there could, exceptionally, be situations where principles of good administration might not require a proper interview note to be drafted.

98. First, if the information provided to the Commission is already in the Commission's file,

because it has been obtained by the Commission from another source, it might not be necessary, in accordance with principles of good administration, to draft a proper interview note. (However, if this is the case, the Commission should, at least, draft an internal note indicating that the information provided by the persons interviewed was already in the file. [58]) The same reasoning does not, however, apply as regards information which the Commission may be able to obtain *subsequent to the interview in question* . The Commission's ability to collect, at a subsequent point in its investigation, the precise information already provided to it in the (non-recorded) interview is, necessarily, uncertain. As such, it would not constitute good administration for the Commission to risk, through a failure to make a proper record of an interview, not including in the file " *information relating to the subject-matter of an investigation* " which has been provided to it. If the (non-recorded) information constituted inculpatory evidence, the Commission would risk losing the opportunity to make use of this inculpatory evidence in its eventual decision. This would limit the Commission's ability to ensure that Articles 81 EC and 82 EC are respected. If the (non-recorded) information constituted exculpatory evidence, the Commission would risk infringing the investigated party's rights of defence, in the event it were to adopt a decision finding that the investigated party had infringed Article 81 EC or Article 82 EC. The Ombudsman is of the view that, irrespective of whether the risks outlined above do or do not subsequently materialise, [59] it does not constitute good administration for the Commission to incur such risks by failing to draft a proper interview note when it obtains oral evidence which is not already, in some form, in the file.

99. Furthermore, if, after analysis of the information gathered from the persons being interviewed, it emerges that the information provided is not in fact information relating to the subject-matter of an investigation, it would not be necessary to draft a comprehensive interview note. [60] However, if this is the case, the Commission should, at least, draft an internal note indicating that the information provided by the persons interviewed did not constitute " *information relating to the subject-matter of an investigation* ".

100. A factor which must be taken into account by the Commission, when exercising its discretion as regards whether or not to make a record of an interview, will be the identity of the person(s) being interviewed. The Ombudsman notes that the significance of the meeting of 23 August 2006 for Case COMP/37.990 is enhanced by the fact that Mr A was a **[a Senior Dell executive]** . [61] He was also [**the Dell executive**] responsible for Dell's relationship with Intel. He was thus a direct witness of the circumstances which he described. [62] He was also accompanied by his senior in-house counsel and by senior outside counsel. [63] Finally, Mr A knew that the Commission had in its possession documents relating to his testimony before the FTC in 2003. He, therefore, had an opportunity to reflect on the reply he would give, in the event the Commission were to put to him questions regarding those matters. It follows, from all those circumstances, that Mr A's statements must be regarded as having been made deliberately and after mature reflection, thus making them particularly credible. These factors would have made it more important to record such statements appropriately. [64]

101. The Ombudsman is also of the view that a proper record of an interview should describe accurately all the information relating to the subject-matter of the investigation provided to the Commission in such an interview.

102. In order to ensure that this is the case as regards an " *Article 19 interview note* ", Article 3.3 of Regulation 773/2004 imposes a legal obligation that a copy of any recording made must be made available to the person interviewed for approval. An " *Article 19 interview note* " will thus become an " *Article 19 Statement* ", once it has been approved by the person(s) interviewed. [65] Since the purpose of an Article 19 interview is to gather information from third parties, an " *Article 19 interview note* " should only record information provided in the interview. [66] A properly drafted Article 19 interview note should not contain, for example, the assessments and personal views of the Commission or its services. The " *Article 19 Statement* " should, when completed (that is, once it has been approved by the interviewee or when the time period for its approval has passed), be included in the case file.

103. *Even if* it were accepted that an interview with a third party in which information relating to the subject-matter of an investigation is gathered should not be categorised as an " *Article 19 interview* ", the Ombudsman considers that it is good administrative practice to ensure that notes containing information relating to the subject-matter of an investigation gathered from third parties are accurate. This is all the more important in the context where the Commission exercises its investigatory powers under Article 81 EC and 82 EC, and where it has extensive powers of sanction. As such, if the Commission had any doubts regarding the accuracy of a note of an interview in which it obtained information relating to the subject-matter of an investigation, it would be in accordance with principles of good administration for it to verify its understanding of the facts with the interviewee.

104. It is evident that, if, in the course of an investigation, the Commission gathers information relating to the subject-matter of an investigation, it should add this information to the file. This is the case irrespective of whether the information is reflected in an " *Article 19 interview statement* " or in any other format.

105. The Ombudsman is of the view that, if there is an agreed agenda for such an interview, the agenda should be annexed to the " *Article 19 Statement* ", or any other relevant note. This is the case if the agenda were prepared by the interviewee and sent to the Commission, or prepared by the Commission and sent to the interviewee. Further, if, in the context of an interview, the Commission receives any other documents from the party being interviewed, it should also annex these to the relevant note. Such documents should also be included in the file.

106. According to the Commission, the Agenda [67] document was " *most likely* " a personal note of a case handler that was either sent to Dell by email prior to the meeting or handed over to Dell during the meeting. First, the Ombudsman finds it surprising that the Commission cannot categorically identify the source of the Agenda. In any event, even if it is assumed that the source of the Agenda is the Commission, it is not in dispute that the Agenda was transferred to Dell's representatives before or during the meeting. Second, the Ombudsman does not agree that such a document, which was transmitted to Dell in the context of an administrative proceeding, can continue to be classified by the Commission as an " *internal document* " of the Commission, once it was handed over to a third party by the Commission's services.

107. According to the Commission, the note of 29 August 2006 "summarises" the impressions of one of the case handlers present at the meeting of 23 August 2006. [68] It incorporates " *information from other sources, personal views, and the case handler's views on further investigative strategy.* " In the Commission's view, the note was not drafted for the purpose of being countersigned or agreed by any other attendees of the meeting (and indeed it never was countersigned or agreed by any other attendees of the meeting). According to the Commission, it was not meant to become, at any point in time, part of the facts resulting from the investigation. Rather, in the Commission's view, the note of 29 August 2006 was an *aide memoire* for the case handler for preparing further investigative measures. As such, the Ombudsman concludes, the note of 29 August 2006 cannot be classified as " *Article 19 interview note* ".

108. The Ombudsman thus agrees with the Commission that, since the note of 29 August 2006 constitutes the Commission's own interpretation of what was said at the meetings, that note was correctly classified as an " *internal document* ".

109. The Ombudsman is of the view that, since the note of 29 August 2006 is merely a summary, and contains information from other sources, as well as the views of the case handler who wrote the note, it could not, given its structure and specific content, be subsequently transformed into agreed minutes of the meeting for submission, for countersignature, to the other attendees of the meeting. The Ombudsman observes that the Commission shares this view (see paragraph 65 above).

110. According to the Commission, no notes or records, other than the note of 29 August 2006, exist in the Commission's file.

111. In Paragraphs 96 to 98 above, the Ombudsman noted that, even if it were assumed that Article 3 of Regulation 773/2004 does not create a legal obligation to record an " *Article 19 interview* " in all circumstances, [69] and, indeed, *even if* it were accepted that an interview with a third party in which information relating to the subject-matter of an investigation is gathered should not be categorised as an " *Article 19 interview* ", principles of good administration require that the Commission should ensure that a proper record is made, in some form, and subsequently included in the file, of all the " *information relating to the subject-matter of an investigation* " that was gathered by the Commission in the course of an investigation. He also noted that, subject to certain exceptions, it is at least arguable that principles of good administration do not necessarily require that a record should always be made of information provided to the Commission, when that information is *already* in the Commission's file. [70]

112. The Ombudsman notes, in this context, that it can be concluded from Dell's responses as set out in the note of 29 August 2006, [71] that not all the information supplied by Dell in the meeting of 23 August 2006 was already in the Commission's file before 23 August 2006. [72] For example, an examination of the note of 29 August 2006 indicates that, in that meeting, Mr A updated the Commission as regards Dell's policy, by providing it with information relating to **[2005, 2006 and 2007]** .

113. In addition, an examination of Dell's written follow-up to the meeting of 23 August 2006 confirms that facts occurring *subsequent* to Mr A's FTC testimony of March 2003 were also discussed in the meeting of 23 August 2006. The written follow-up consists of 1) Dell's understanding of questions which were posed by the Commission in the course of the meeting of 23 August 2006 [73] and 2) Dell's response to those questions. Most of the Commission's questions, set out in Dell's written follow-up, make reference to Mr A's FTC testimony. Dell's written follow-up indicates that in the meeting of 23 August 2006 the Commission also requested further and updated information (which would be provided by Dell in its written follow-up to the meeting). For example, Question 1 refers to a Commission request to Mr A " *to confirm* " when an identified software developer started a particular project. It is clear from that wording that the Commission wished Mr A " *to confirm* " information which had *already* been provided, at least in some detail, in the meeting of 23 August 2006. It is also evident from an examination of the Dell follow-up that the information which was " *confirmed* " relates to events which occurred as late as **[Redacted]** 2005. Thus, while the issues discussed in the meeting of 23 August 2006 may have been based on the FTC hearing testimony, their scope must have extended beyond what was provided by Mr A in his FTC testimony. There are numerous other examples in Dell's written follow-up, from which similar conclusions can be drawn. In this context, the Ombudsman provisionally concludes from the Dell follow-up, that not all the information supplied by Dell in the meeting of 23 August 2006 was already in the Commission's file before that date. [74]

114. Thus, in the meeting of 23 August 2006, the Commission *did* gather information relating to the subject-matter of its investigation, some of which was not in the file at that time (see paragraphs 111 and 113 above). The Commission *did not* make a proper note of that meeting, either as an " *Article 19 interview note* " or otherwise. The Agenda of the meeting *was not* included in the file. In this context, the Ombudsman concludes that, by choosing not to draft a proper note of the meeting of 23 August 2006, the Commission committed an instance of maladministration.

115. It is recalled that, in its opinions to the Ombudsman, [75] the Commission argued that it is under no obligation to draft any " *minutes* " of meetings with any person or undertaking and that, if it *chooses* to make notes of such meetings, such documents constitute its own interpretation of what was said at the meetings. For this reason, they are classified as internal documents. The Commission states that its view is consistent with the rulings of the Court of First Instance in *TACA* [76] and *Group Danone* . [77]

116. The Ombudsman notes that, in both *TACA* and *Group Danone* , the applicants sought the *annulment* of the Commission decisions, on the grounds that their rights of defence had been infringed as a result of failures by the Commission to respect an essential procedural requirement, namely, the applicants' rights of access to the file. [78] In order to appreciate fully the relevance of the above cited case law, it is necessary for the present inquiry by the Ombudsman to underline, first, that not every procedural irregularity will be sufficient to vitiate a Commission decision. It is a general principle of Community law that an applicant seeking the annulment of an administrative decision on the grounds of a procedural irregularity must show at least a possibility that the outcome of the administrative procedure would have been different

but for the procedural irregularity complained of. [79] As regards, specifically, rights of defence, an irregularity can only bring about the annulment of a decision, if it is such as to actually affect the applicant's rights of defence, and therefore the content of that decision. [80] Even if, for example, a party under investigation has not been given the opportunity to comment on certain inculpatory evidence, that defect will only entail the annulment of the decision in that respect, if the allegations concerned cannot be substantiated to the requisite legal standard on the basis of other evidence in the decision on which the party concerned was given the opportunity to comment. [81] The Ombudsman notes that the above-cited case law must be understood as referring to those procedural requirements which, if infringed, will lead to the *annulment* of the decision. It is clear that not every failure to disclose documents will lead the annulment of the whole or part of the Commission decision in question. [82] The Ombudsman notes, however, that *any* procedural irregularity may constitute an instance of maladministration, even if that procedural irregularity does not eventually, in a particular case, constitute grounds for the annulment of a decision. As such, the finding in paragraph 114 above is not, in any manner, called into question by the *TACA* and *Groupe Danone* case law.

117. The complainant alleges that the Commission's failure to make a proper note of the content of the meeting infringes his fundamental rights, namely, his rights of defence. While the mandate of the Ombudsman is to identify *any* instance of maladministration, [83] it is necessary to note at this stage, that the seriousness of a particular instance of maladministration will indeed be aggravated, if the instance of maladministration includes an infringement of a fundamental right, such as the rights of defence. Those rights are not only fundamental principles of Community law, but are also enshrined in Article 6 of the European Convention of Human Rights.

118. The Ombudsman notes that the applicants in *TACA* argued that their rights of defence had been infringed because the Commission failed to include in the case file minutes of discussions or telephone calls which it had had with a relevant third party. The Court of First Instance stated in *TACA* that:

" *... 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. There is by contrast* no general duty *on the part of the Commission to draw up minutes of discussions in meetings or telephone conversations with the complainants which take place in the course of the application of the Treaty's competition rules.* " [84] (Emphasis added)

The Ombudsman understands, from the above, that the rights of access to the file, and by extension the rights of defence, will not *automatically* be infringed, if the Commission does not draw up minutes of meetings or telephone conversations which took place in the course of the application of the Treaty's competition rules. Infringements of the rights of access to the file, and by extension the rights of the defence, through a failure to draw up minutes of meetings or telephone conversations, must be examined in relation to the *specific circumstances* of each particular case.

119. The rights of defence of a party under investigation will certainly be infringed if the

Commission fails to draw up minutes of meetings or telephone conversations, and subsequently, in its decision, relies on inculpatory evidence provided orally in such meetings or telephone conversations. [85]

120. It follows that the rights of defence of a party under investigation will not be infringed, if the Commission fails to draw up minutes of meetings or telephone conversations in which no *information* is provided to the Commission. This may be the case where the purpose of the meetings or telephone conversations is to discuss purely procedural matters. [86]

121. It also follows that, even if, in the context of a meeting or telephone call, the Commission obtains inculpatory evidence, and fails to draw up and include in the file a record of such a meeting or telephone call, it will not infringe the rights of defence of the party under investigation, provided it does not, in its eventual decision, make use of that inculpatory evidence. [87]

122. It also follows that, if, in the context of a meeting or telephone call, the Commission obtains inculpatory evidence which is *already* included in the file (for example, because it has already been obtained from the same or another source), the Commission will not infringe the rights of defence of the party under investigation, if it fails to draw up and include in the file a record of such a meeting or telephone call. This will be the case, even if the Commission relies on the inculpatory evidence in its eventual decision.

123. It may also be the case that the Commission fails to make a record of inculpatory evidence obtained in a meeting or telephone call, but *subsequently* obtains the same inculpatory evidence (from the same or another source) and includes that (subsequently obtained) inculpatory evidence in the file. The Commission will not infringe the rights of defence of the party under investigation, even if it relies on the (subsequently obtained) inculpatory evidence in a statement of objections and in its eventual decision. [88]

124. As regards *exculpatory* evidence, an applicant cannot successfully argue that its rights of defence have been infringed, if it merely refers in general terms to the possibility that such exculpatory evidence was provided to the Commission by third parties. This implies that, in judicial proceedings, there is an obligation on a party that alleges that exculpatory evidence has been withheld from it to at least provide, in its pleadings before the Court, specific arguments as regards the existence of the exculpatory evidence and specific arguments that the exculpatory evidence was provided to the Commission (but not included in the Commission's file). [89]

125. The Ombudsman also notes that, even if specific arguments are put forward as regards the existence of exculpatory evidence, and specific arguments are put forward that the exculpatory evidence was provided to the Commission in the course of a (non-recorded) meeting or telephone call, the rights of defence of the party under investigation will not have been infringed, if that exculpatory evidence had already been in the file, when a meeting or telephone took place. Further, the rights of defence of the party under investigation will not be infringed, if the exculpatory evidence in question is subsequently obtained from another source, and then added to the file.

126. The Ombudsman recalls that the complainant's allegation is that (a) the Commission failed to take minutes of the meeting held with Dell representatives on 23 August 2006, despite the fact that the meeting was directly concerned with the subject-matter of its investigation of Intel, and that, as a result, (b) the Commission did not make a record of potentially exculpatory evidence (emphasis added).

127. The Ombudsman has carefully examined the evidence made available to him in the context of the present inquiry. After examining the Agenda, the note of 29 August 2006 and the written Dell follow-up to the meeting of 23 August 2006, the Ombudsman concludes that it cannot be excluded that, at least in part, the meeting of 23 August 2006 concerned **[evidence]** [90] [91] of a nature to be potentially exculpatory of Intel.

128. The Ombudsman notes that, on 19 December 2008, the Commission gave Intel access to a redacted version of the note of 29 August 2006 and asked Intel to give its comments thereon.

129. The Ombudsman notes that the note of 29 August 2006 merely summarises the impressions of one of the case handlers present at the meeting of 23 August 2006. Apart from the written follow-up by Dell, the Commission has informed the Ombudsman that there are no other documents in the file relating to the meeting of 23 August 2006. The Ombudsman has not had sight of, and is not aware of, any other document in the file which would provide further information in relation to the precise content of the meeting of 23 August 2006. [92]

130. The Ombudsman has already indicated that a careful analysis of the written Dell follow-up to the meeting of 23 August 2006 indicates that there were indeed issues which were discussed in the meeting of 23 August 2006 that are not set out in the note of 29 August 2006, at least at the level of detail which the written Dell follow-up indicates they were discussed in the meeting of 23 August 2006. [93] After a careful examination of the documents made available to him, the Ombudsman notes, in particular, that the Commission asked a question in the context of the meeting of 23 August 2006 in relation to a discussion of Exhibit 12 of the FTC testimony of Mr A. [94] Exhibit 12 is an email from Mr G of Dell **[redacted]** . [95]

131. To be sure, that information which was not included in the note of 29 August 2006 (at least in any detail), but which is referred to in the written Dell follow-up as having been discussed in the said meeting of 23 August 2006, *is* information which is in the file (it is located in the written follow up of Dell). The Ombudsman notes, however, that he cannot confirm whether Mr A discussed further relevant issues in the meeting of 23 August 2006. The Ombudsman wishes to emphasise that he cannot do so precisely because there is no exhaustive account of the meeting of 23 August 2006 . [96]

132. The Ombudsman agrees with the complainant that, if the Commission had made a record or transcript of the meeting of 23 August 2006, there would have been no uncertainty as to precisely what Mr A said in the meeting of 23 August 2006, and, as a result, no debate over whether Mr A's statements would be relevant to the Commission's allegations and/or be exculpatory of Intel. The Ombudsman also recalls that the Community courts have stated that "

in adversarial proceedings established by the regulations for the application of Articles 81 EC and 82 EC, it cannot be for the Commission alone to decide which documents are of use for the defence of undertakings in proceedings involving infringement of the competition rules ". [97]

133. The Ombudsman, however, takes the view that a finding that rights of defence were infringed in a particular competition case would require a careful analysis of the entire file, carried out in conjunction with a careful analysis of the Statement(s) of Objections and, eventually, the decision. [98] Such a review of the file would seek to establish, *inter alia* , if there was any information, elsewhere in the file, which would clarify the precise content of the meeting of 23 August 2006. In the present inquiry, the Ombudsman has not reviewed the entire file or the Statements of Objection issued. [99] He thus cannot exclude, in the context of the present inquiry, that other documents may exist in the Commission's case file which would be relevant to the analysis.

134. As the Ombudsman noted in paragraph 115 above, *any* procedural irregularity may constitute an instance of maladministration, even if this procedural irregularity were not, in the context of the present inquiry, shown to constitute a breach of the rights of defence. The Ombudsman concluded above that the Commission did not make a proper note of the meeting of 23 August 2006. As such, and without making any conclusion in relation to a possible breach of Intel's rights of defence by the Commission, [100] the Ombudsman concludes that the Commission committed an instance of maladministration by not making a proper note of the meeting of 23 August 2006.

135. Article 3 (5) of the Statute of the Ombudsman states that " *[a]s far as possible, the Ombudsman shall seek a solution with the institution or body concerned to eliminate the instance of maladministration and satisfy the complaint.* " In his letter opening the present inquiry, the Ombudsman asked the Commission whether it was still possible, on the basis of the notes drawn up by the Commission officials present at the meeting, to request Dell to sign minutes of the meeting of 23 August 2006. In its further opinion, the Commission responded that the note of 29 August 2006, which is the only document setting out what was discussed in the meeting of 23 August 2006, " summarises the impressions *of one of the case handlers present at the meeting* " (emphasis added). It went on to point out that the note was not drafted for the purpose of being countersigned or agreed by any other attendees of the meeting. It was not meant to become, at any point in time, part of the facts resulting from the investigation. Rather, the note of 29 August 2006 was simply an *aide memoire* for the case handler. Further, the Ombudsman notes, that the Commission has now, by decision of 13 May 2009, closed its investigation into Case COMP/37.990. As such, it cannot now correct those deficiencies. In this context, the Ombudsman does not consider that a friendly solution is possible in the present case. The Ombudsman will therefore close his inquiry by making a critical remark below.

B. The allegation, and related claim, that the Commission encouraged Dell and AMD to enter into an information exchange arrangement which had the effect of allowing AMD to circumvent the rules limiting AMD's right to have

access to the Commission's investigation file

Background

136. AMD was the complainant in Case COMP/37.990. A complainant in an investigation by the Commission for the purposes of applying Article 81 EC or Article 82 EC has no rights of access to the file during the investigation. The complainant only has access to a redacted version of the Statement of Objections (that is, a version of the Statement of Objections from which "confidential information", such as business secrets, has been removed), in order to allow it, that is, the complainant, to make its views known to the Commission. [101]

137. During the course of its inquiry, the Commission obtained various documents from Dell. Information from some of these documents was used by the Commission in the Statement of Objections sent to Intel on 26 July 2007. Intel and the Commission immediately began the process of determining the precise content of the redacted version of the Statement of Objections which would be sent to AMD. Intel argued that certain of the information obtained from Dell, and used in the Statement of Objections, should be classified as confidential business secrets of Intel. Intel thus opposed the inclusion of such information in the redacted version of the Statement of Objections.

138. On 10 December 2007, the Hearing Officer rendered his final decision on the acceptability of Intel's proposed redactions. Based upon this decision, the final non-confidential, redacted version of the Statement of Objections was created and then transmitted to AMD on or around 21 December 2007.

Arguments presented to the Ombudsman [102]

139. The complainant alleges that the Commission circumvented the applicable rules concerning access to the file by assisting and/or encouraging Dell and AMD to enter into a " *file access agreement* ". According to the complainant, the **[agreement]** was illegal and gave AMD access to " *confidential file documents* " that Dell had, during the Commission's inquiry, provided to the Commission. The complainant alleges that, at the very least, the Commission, "tolerated" the AMD/Dell **[agreement]** by allowing AMD to use these documents at an oral hearing held subsequent to the issuance of the Statement of Objections to Intel. [103]

140. The complainant argued that, but for the Commission's intervention in identifying to Dell the Statement of Objections extracts it wished Dell to communicate to AMD, and the **[agreement]** it encouraged, AMD would never have gained access to certain key material it used at the Oral Hearing. In the complainant's view, **[the]** use of this material clearly violated Intel's rights of defence.

141. As evidence supporting his allegation, the complainant made reference to a letter from Dell's outside counsel to the Ombudsman dated 18 September 2008, in which Dell's counsel states that:

"[*Dell*] *understood that a number of quotes from Dell documents provided to the Commission … were used by the Commission in the Statement of Objections … Dell was asked by the Commission and authorized the use of such quotes - some of which contained confidential business secrets - vis-à-vis Intel on the basis of a non disclosure agreement with Intel … Dell also provided the Commission with a redacted and non-confidential version of those quotes for AMD and other third parties …[In] order to avoid a lengthy debate over confidentiality claims, the Commission suggested to Dell to enter into a non disclosure agreement with AMD's counsels and economists for the sharing of Dell documents used in the [Statement of Objections]* ".

142. In the complainant's view, the Commission thus encouraged Dell to provide excerpts from the Statement of Objections to AMD, in violation of Article 8(1) of Regulation 773/2004 and Article 9 of the Hearing Officer's Mandate. In the complainant's view, this misconduct undermines the Commission's assertion that Dell acted on its own initiative. This was all the more serious because the Commission knew that, at the time it encouraged Dell to make this material available to AMD, Intel's confidentiality claims were still under review.

143. The complainant also provided the Ombudsman with an email from Dell's outside counsel (Mr C) dated 3 September 2007, in which Mr C informs a colleague that an official from the Commission (Mr D) had telephoned Mr C to ask whether Dell " *would consider using an [* information exchange agreement *] with AMD similar the one [* Dell *] contracted with Intel for the [* Statement of Objections *] quotes* ". [104]

144. The complainant also provided the Ombudsman with a letter from Dell's outside counsel to the Commission dated 14 August 2007. According to the complainant, the letter confirms that, as early as 9 August 2007, the Commission provided Dell with a list of quotations from the confidential version of the Statement of Objections. In the said letter, Dell's counsel explained to the Commission that the information for which Dell sought confidentiality relates, *inter alia* , to Dell's " *confidential business dealings and negotiations with Intel.* " In other words, according to the complainant, the information for which Dell requested confidential treatment was not solely related to Dell, but rather concerned confidential dealings and negotiations between Dell and Intel. This reflected a claim that Intel also made in its discussions of the redaction of the Statement of Objections with both the case team and the Hearing Officer. According to the complainant, this letter proved that the Commission had already been informed by Dell that the selected quotations contained not only Dell business secrets, but also Intel business secrets and/or other confidential information (the disclosure of which to AMD, Dell was not in a position to authorise) when, on 3 September 2007, the Commission suggested that Dell enter into **[the agreement]** with AMD.

145. The complainant also provided the Ombudsman with an internal email from Mr C (a Dell outside counsel) dated 23 August 2007. The email relates to a telephone conversation between Mr C and a Commission official (Mr D) in which Mr C explained that " *most quotes came from either confidential negotiations with Intel or [Dell's] own internal supply strategy assessments.* " According to the complainant, this email corroborates the conclusion that, at the time the Commission suggested that Dell enter into **[the agreement]** with AMD and provide it with selected quotations from the confidential version of the Statement of Objections, the

Commission knew that the information to be disclosed to AMD under such agreement would also contain Intel business secrets or other confidential information.

146. The complainant also provided the Ombudsman with e-mails between Mr C and Mr D dated 25 and 26 September 2007. According to the complainant, this email exchange confirms that the Commission encouraged Dell to enter into the **[agreement]** with AMD and to provide it with confidential material from the Statement of Objections. In an email dated 26 September 2007, Mr D thanked Mr C " *for your constructive help on this subject.* " In the complainant's view, Mr D's gratitude for Dell's " *constructive help* " establishes beyond dispute that the Commission welcomed the fact that Dell was willing to enter into **[the agreement]** with AMD, and indeed that the Commission had promoted and encouraged the agreement.

147. According to the complainant, on 16 October 2007, the Commission sent to Intel a counter-proposal for a redacted version of the Statement of Objections. In this same letter, the Commission explained to Intel that " *some of the OEMs have decided* " to provide AMD with confidential information which " *may be quoted in the Statement of Objections and may be redacted in the version of the Statement of Objections that the Commission will provide to AMD* ". The complainant stated that, despite having already received a copy of the AMD/Dell agreement, the Commission informed Intel that " *should the Commission be notified of such an exchange of information, it will no longer regard the concerned information as being confidential vis-à-vis AMD.* " Intel then emailed the Commission and contacted the Hearing Officer regarding the Commission's letter of 16 October 2007 and the implications such an approach would have on the confidentiality provisions governing the investigation. [105]

148. However, according to the complainant, when the Hearing Officer questioned the case team about the existence of such agreements, the case team denied that any such agreement had been communicated to it. This, in the complainant's view, was in blatant disregard of Mr D's prior correspondence with Dell. The Hearing Officer reported to Intel on 18 October 2007, nearly a month after Dell's submission of the final draft to Mr D, that no such **[agreements]** had " *been notified in any form to the case-team, as it has been confirmed to me.* " According to the complainant, the Hearing Officer therefore declined to investigate further, dismissing Intel's claims as " *purely hypothetical* " and stating that further investigation could be warranted in the event such an agreement were ever executed. The complainant stated that, in any case, the Hearing Officer suggested to Intel that bilateral agreements between private parties to exchange certain information may be outside the scope of the administrative procedure. [106]

149. By way of evidence, the complainant also stated that, at the Oral Hearing on 12 March 2008, AMD's outside counsel stated the following:

" **[Redacted]** "

150. According to the complainant, the Court of Justice has mandated that " *a third party who has submitted a complaint may not in any circumstances be given access to documents containing business secrets.* " [107] According to the complainant, it is indisputable that AMD was permitted to use confidential Dell file documents at the Oral Hearing **[redacted]** .

151. The complainant argued that the Commission did not take such a " *relaxed approach* " to other third-party arrangements, when it believed that it suited its interests not to do so. Rather, the Commission very carefully supervised the file access agreements entered into between Intel and OEMs. [108]

152. Similarly, the Commission objected to Intel providing a copy of the Statement of Objections to the FTC in response to informal and formal requests from the FTC for a copy of the Statement of Objections. In both these cases, the Commission exercised its powers as a custodian of the file and guardian of the file's confidentiality, in marked contrast to the position it took concerning the AMD/Dell **[agreement]** .

153. The complainant argued that the Commission's failure to protect the confidentiality of its file, and to uphold the rules concerning file access provided for in Article 287 EC, Regulation 1/2003 and Regulation 773/2004, constitutes a grave and intentional breach of the Commission's duty to uphold the EC Treaty. In the complainant's view, this infringement of the Commission's Treaty obligations also constitutes a violation of Article 4 of the European Code of Good Administrative Behaviour (which requires officials to act according to law and to apply the rules and procedures laid down in Community legislation), as well as Article 10 (legitimate expectations), Article 8 (impartiality and independence) and Article 9 (objectivity).

154. In its opinions to the Ombudsman, dated 20 March 2009 and 10 June 2009, the Commission noted that it was Dell itself that exchanged its information with AMD bilaterally. It stated that nothing in the materials provided by Dell and Intel to the Ombudsman shows that the Commission has itself disclosed information to AMD in contravention of Article 287 EC. The Commission argued that Intel had not provided any evidence to the Ombudsman of why Intel has any legal interest in an exchange of information between Dell and AMD. Such proof would be necessary, since the Commission has not definitively accepted any confidentiality claims of Intel related to that information.

155. The Commission concluded that Dell had, of its own volition, decided to exchange what it considers to be its own proprietary information with AMD. It was immaterial for the assessment of maladministration whether Dell was itself inspired to do so by previous exchanges with Intel, where the Commission was only at first involved and which were then undertaken by Dell on its own initiative. The Commission argued that Dell was entirely free to provide the information in a non-confidential version under the Commission's normal procedure. However, it chose to exchange its information bilaterally with AMD. The Commission stated that Dell did not consult with the Commission before concluding the agreement with AMD. In the Commission's view, this left no room for any attribution of this exchange to the Commission, which would be of relevance under Article 287 of the EC Treaty.

156. On 14 April 2009 and 16 April 2009, the complainant submitted observations on the Commission's opinion of 20 March 2009. The complainant made reference to what, in his view, were the Commission's attempts to deny its role concerning the AMD/Dell **[agreement]** . He stated that, in its opinion of 20 March 2009, the Commission sought to question the description

of the events contained in the 18 September 2009 letter of Dell's outside counsel. However, it did not offer any evidence supporting its claim. Rather, the Commission merely stated that it has " *checked its records* " and had " *no indication that any such suggestion has been made or even that any such phone call [* as the one described from 3 September *]* [109] *would have taken place* ". On this basis, the Commission went on to " *conclude* " that Dell entered into the agreement " *of its own volition* ". This unsupported conclusion was, in the complainant's view, contradicted by the description of the events provided by Dell's outside counsel and by the emails exchanged between Dell's outside counsel and Mr D on 25-26 September 2007. Conversely, in the complainant's view, the Commission provided no evidence that it interviewed Mr D or other members of the case team regarding these events; it does not describe which records have been checked and whether they include the telephone records of the relevant case team members; and it provides no documentary evidence substantiating its "conclusion" that Dell's counsel, without apparent motive, would have invented or misrepresented the relevant facts.

157. The complainant also stated that although the Commission indicated, in its opinion of 20 March 2009, that it had prepared a note regarding a 30 August 2007 " *high level telephone conversation* " with Dell, the Commission did not explain how details of a conversation which took place on 30 August 2007 could refute plain evidence that it subsequently suggested, received, and reviewed the **[redacted]** AMD/Dell **[agreement]** .

158. The complainant also stated that, in its opinion of 20 March 2009, the Commission admits that (a) it did review the AMD/Dell agreement (thereby contradicting its claim to the Hearing Officer that no such document has been " *notified* " [sic] to it), (b) the document apparently was designed to grant AMD " *access to file* ", and (c) the Commission subsequently attempted to communicate suggestions regarding the agreement to Dell. Given these facts, the Commission's " *conclusion* " that Dell did not " *consult with the Commission before concluding the agreement with AMD* " is simply not credible.

159. Finally, the complainant noted that, in its opinion of 20 March 2009, the Commission stated that it " *has no indication that AMD has received anything but information corresponding to its right, namely extracts from the Commission's Statement of Objections of 26 July 2007* ". According to the complainant, the Commission's assertion is patently untrue, since (i) prior to the finalisation of the redaction of the Statement of Objections, in December 2007, AMD had no right to receive any Statement of Objections material; and (ii) AMD did, as is well known to the Commission, gain access to material that was, in fact, redacted from the Statement of Objections. According to the complainant, the Commission's actions, therefore, effectively served to eliminate the protection afforded to confidential information in Commission proceedings and to negate the role of the Hearing Officer as final arbiter of conflicting claims of confidentiality. Moreover, the Commission then compounded its misconduct by permitting AMD to use **[this material at the Oral Hearing]** .

160. In its second further opinion of 10 June 2009, the Commission explained that the legal framework for access to the file by addressees of a Commission Statement of Objections is provided for in Articles 27 (2) of Regulation 1/2003 and 15(2) of Regulation 773/2004. In

accordance with these provisions, Intel had a right to access all information contained in the Commission's file " *with the exception of internal documents, business secrets of other undertakings, or other confidential information.* " The establishment of the non-confidential versions referred to in Regulation 773/2004 is a complex exercise because the confidentiality of every piece of information has to be justified and has to be balanced against the respective rights of defence of the addressee of the Statement of Objections. The exercise was particularly difficult and intensive in the present case, as the case file contained several hundred thousand pages.

161. The Commission stated that, in the Intel case, it implemented the above provisions by applying a " *negotiated procedure* ". Such a procedure was first used for Intel's access to file after the first Statement of Objections of 26 July 2007 (it was suggested to the Commission by another OEM which had provided information to the Commission in the course of its investigation). [110] The rationale for such a course of action was the fact that the OEM would otherwise have been obliged to devote significant time and resources to redacting its voluminous contribution to the Commission's file. The essential element of this procedure was that, instead of receiving access to only a redacted version of the submissions which certain " *information providers* " made available for inclusion in the Commission file, Intel made agreements to receive the entirety, or the main parts, of the submissions of these " *information providers* " in un-redacted format (that is, including confidential information in its entirety). In exchange, Intel agreed to limit access to this information to a restricted circle of persons (namely, Intel's outside counsels and economic advisers and in some cases certain in-house counsels). In sum, the solution agreed between Intel and the " *information providers* " excluded Intel's access to the information by employees dealing with the daily business of the company. Such agreements are, the Commission stated, widely used in US antitrust cases, such as in the one currently pending between Intel and AMD before the District Court of Delaware. The Commission noted that, in the Intel case, various reasons spoke for this approach, *inter alia* a) the voluminous file, which would have led to significant delays in the procedure and disproportionate costs for the information providers in establishing non-confidential versions of the documents provided, and b) discovery proceedings in the AMD/Intel litigation in the USA, where largely the same information was routinely exchanged under conditions that are similar to the agreements which Intel concluded in the Commission proceedings. [111]

162. The Commission stated that several parties had concluded such agreements with Intel. The agreement concluded between Intel and Dell was, however, different from the others in that the agreement covered only a limited part of the information provided by Dell. Shortly afterwards, the Commission noted, from Intel's submissions, that Dell had in fact provided Intel with a lot more information in un-redacted form. The Commission asked Dell why this was the case and learned that Dell had concluded another agreement with Intel.

163. In light of all of the above, the Commission noted that the possibility of the conclusion of information exchange agreements was an option that had been discussed and explored by Dell well before 30 August 2007, when, according to the Commission, a high level telephone call with Dell took place. At that time, or shortly after, Dell, on its own initiative, engaged in such exchanges of its information with AMD.

164. The Commission then made reference to the fact that, in its letter of 18 September 2008 to the Ombudsman, Dell's counsel states that " *the Commission suggested that Dell also enter into [* an information exchange agreement *] with AMD's counsels and economists* ". According to the Commission, it should first be stressed that Dell was entirely free to opt for such an agreement. Dell's motives for concluding this agreement are not known to the Commission. One possible incentive for an OEM to enter into such an agreement was to avoid justifying and substantiating to the Commission each confidentiality request *vis-à-vis* AMD (it should be recalled, the Commission pointed out, that AMD had a right to receive a " *meaningful* " non-confidential version of the Statement of Objections). According to the Commission, other incentives are imaginable and might have played a role for Dell. In any case, according to the Commission, it, that is, the Commission, did not oblige Dell to enter into an agreement with AMD. However, as was the case for bilateral agreements between Intel and information providers, the Commission could not simply ignore the possibility of such agreements.

165. According to the Commission, the Commission internally started to discuss the possibility of an agreement between Dell and AMD after a high level telephone call with Dell on 30 August 2007. [112] Mr B (Dell's General Counsel) and Dell's outside counsels (one of whom was the associate allegedly called by the Commission two working days later) took part in this call. The agenda for that telephone call, which was sent to Dell in advance of that meeting, [113] clearly shows that the Commission intended to discuss Dell's requests for confidentiality *vis-à-vis* AMD in detail and on the basis of the Commission's standard procedure under Regulation 773/2004. There was no mention of another option in this agenda. According to the Commission, various options were discussed during that phone call, including an information exchange agreement with which Dell was familiar, based on its already existing and recently concluded bilateral agreement with Intel. It is plausible that in this phone call, either Mr B, or Dell's outside counsel, first mentioned the option of a bilateral information exchange also with AMD, because the agenda drawn up by the Commission and sent to Dell in advance of the telephone call did not mention this point. In any event, it is certain that in that telephone call, the idea of an AMD-Dell information exchange agreement was floated. As confirmed by the internal emails of the Commission, only after this telephone call did the Commission start to internally discuss the various issues in the context of such an AMD-Dell exchange. This included discussions *inter alia* with the Legal Service of the Commission. Thus, Intel's description of how the idea of a Dell-AMD agreement came into being and its reliance on certain selective information submitted on a staggered basis by Dell misrepresents the facts in order to create the impression that the Commission would have suggested a Dell-AMD agreement. The reality is that the Commission was confronted with this option for the first time in the telephone call with Dell on 30 August 2007 and only then started analysing it internally.

166. According to the Commission, Dell sent a signed agreement to the Commission on 25 September 2007, that is, before the Commission had completed its internal analysis. This was the only version of an agreement the Commission had seen until 8 June 2009. However, this agreement was largely in contradiction to the more limited scope of a complainant's right to access to information under Community law. This was, in particular, because the agreement referred to "access to file" by AMD. However, AMD, as a complainant, did not have a right of

access to the Commission file, but only a right to obtain a non-confidential version of the Statement of Objections. While " *terminological statements* " in such an agreement were legally not of direct concern to the Commission, it would have led the contracting parties to arrangements which were *prima facie* in contradiction with the administrative procedure. The Dell external counsel who sent it to Mr D of the Commission's case team explained that the agreement had not yet been executed. This is reflected in the internal email sent from Mr D to his superiors after the agreement had been received. The Commission communicated to Dell that the agreement received was in contradiction with its position in several telephone calls, but there is no written record of these communications.

167. According to the Commission, AMD informed the Commission, by letter of 13 November 2007, that it had entered into an information exchange agreement with Dell, without communicating to the Commission the executed agreement as such. This is consistent with the Hearing Officer's letter of 18 October 2007 to Intel, which states that " *the agreements [* Intel *] mention have not been brought to the attention of the Hearing Officer. Neither have they been notified in any form to the case-team, as it has been confirmed to me* " and the letter of the Hearing Officer to Intel of 7 May 2008 stating that " *such an agreement, the text of which has not been notified to me, concluded by a party that as such has no rights of defence or rights to access to file, is purely bilateral and neither obliges nor empowers the Commission.* "

168. In order to clarify the chain of events for the Ombudsman, the Commission, therefore, asked AMD to provide it with the final copy of the agreement that was eventually executed between Dell and AMD and under which information was exchanged between the two companies. [114] The Commission also asked AMD to describe the steps involved following the conclusion of the initial draft agreement between AMD and Dell and leading up to the subsequent signature and execution of the final agreement. AMD has done so by letter of 8 June 2009, which was inspected by the Ombudsman on 10 June 2009. **[Redacted]** . From the executed agreement attached to AMD's letter, it is clear that Dell and AMD then proceeded to conclude and execute a fundamentally different agreement from the one that was sent to the Commission by Dell three weeks earlier. **[Redacted]** [115]

169. The Commission then proceeded to implement AMD's access to a non-confidential version of the Statement of Objections under the usual procedure. Under that procedure, AMD received a non-confidential version of the Statement of Objections by letter of 21 December 2007.

170. The Commission noted Intel's argument that, since the information which Dell gave to AMD constitutes " *Intel's business secrets* ", it has an interest in the information exchange agreement between Dell and AMD. The Commission first made detailed arguments to the Ombudsman concerning why, in its view, Intel's confidentiality arguments are not, in fact, well-grounded. The Commission then recalled that Dell was entirely free to dispose of its information as it wished. The Commission also noted that it did not oblige Dell to make its information available to AMD.

171. As regards Intel's claim of maladministration made in its observations of 10 July 2008, 18 September 2008 and 14 April 2009, the Commission stated that Intel alleged that the Commission gave AMD " *access to its file* ", in contravention of Article 8 (1) of Regulation

773/2004, Article 28 of Regulation No 1/2003 and Article 287 of the EC Treaty. However, in its observations of 14 April 2009, Intel also alleges that the Commission encouraged Dell to provide extracts from the 26 July 2007 Statement of Objections to AMD in violation of Article 8 (1) of Regulation 773/2004 and Article 9 of the Hearing Officer's Mandate.

172. As regards the Commission's organisation of the oral hearing of 11-12 March 2008, the Commission noted that AMD was not allowed to attend the *in camera* sessions at which the facts submitted by Dell to the Commission were discussed with Intel. **[Redacted]** [116]

173. The Commission went on to argue that the legal provisions quoted by Intel in support of its case contain a variety of rules and principles binding upon the Commission and that each of the rules and principles has conditions and limits. Article 287 of the EC Treaty, and relevant provisions in Regulation 1/2003 and Regulation 773/2004, [117] impose an obligation on Community officials not to disclose information covered by professional secrecy. Article 8(1) of Regulation 773/2004, which, according to the Commission, appears to be Intel's main basis for a maladministration claim, deals with the Commission's obligations in case of a rejection of a complaint. It is, therefore, not applicable in the present case, because the Commission's obligation to provide AMD with a non-confidential copy of the Statement of Objections resulted from Article 6 of Regulation 773/2004. Article 16 of Regulation 773/2004 determines the rules on the basis of which the Commission shall identify confidential information on its file, which " *shall not be communicated or made accessible by the Commission* ". Finally, Article 9 of the Hearing Officer's mandate [118] establishes the procedure under which the Commission discloses information, if it finds that such information is not protected as a business secret, or if it finds that there is an overriding interest justifying disclosure despite its confidential nature, namely, through a procedure which, as a first step, requires a reasoned decision that is communicated to the undertaking concerned.

174. Intel does not contest that, in the present case, it was Dell, and not the Commission, that passed on information to AMD, and that thus the information exchange took place *inter partes* . All the obligations listed above clearly apply only to a situation in which the Commission itself discloses information. *Inter partes* exchanges of information regularly take place in parallel to antitrust proceedings. In the present case, the Commission has had knowledge of such potential exchanges and has expressed its view on their appropriateness **[redacted]** . This cannot, however, be seen as any action on the basis of which the actual exchange *inter partes* could be imputed to the Commission.

175. Accordingly, in the Commission's view, when Intel reproaches the Commission that " *AMD gained access to confidential information to which it was not entitled to have access* " or that " *AMD had no right to receive any SO material* ", Intel confuses two issues, namely, actions outside the administrative procedure on the one hand, and rights and obligations within this procedure and the role of the Commission, on the other hand. To conclude from the fact that, as a result of certain information being exchanged bilaterally between Dell and AMD, the Commission acted illegally is incorrect and misleading. In fact, the confidential character of any information exists exclusively within the administrative procedure of the Commission. Beyond the procedure, there is no abstract " *entitlement* ", be it positive or negative, to " *information* "

as Intel's argument presupposes. The fact that, prior to any final decision of the Hearing Officer, AMD might not have been legally entitled to receive information within the administrative procedure and thus might have received information from Dell under the Dell-AMD information exchange agreement which it would not have received from the Commission, does not concern the Commission, since neither rights nor obligations for the Commission derived from the Dell-AMD agreement. As to the role of the Commission and its administrative procedure, the only question, according to the Commission, is whether the Commission in any way disclosed information in its possession. As is clear from the foregoing, the Commission at no point in time disclosed directly or indirectly any confidential information in the administrative procedure. Moreover, the Commission does not have any power, let alone any obligation, to prevent third parties from disclosing information which they have submitted to the Commission, but which was already in their possession before the Commission started its investigation. The Commission's only way to determine the validity of a confidentiality claim is by decision to either grant access to the information, and thereby to turn down the confidentiality request, or to deny such access. In case of such an *inter partes* exchange of information, there is no legal basis for the Commission to interfere with the information provider's decision to share with other companies the information in its possession.

176. Finally, the Commission states that Intel's reference to Article 9 of the Hearing Officer's mandate does not support any claim of maladministration. Article 9 of the Hearing Officer's mandate does not constitute any obligation on the part of the Commission, but merely empowers the Hearing Officer to turn down confidentiality claims by reasoned decision. As is clear from the Hearing Officer's letter of 10 December 2007, this letter does not constitute a decision on the basis of Article 9 of the Hearing Officer's mandate. Hence, even if Intel's assertion that the Commission, beyond holding internal discussions on the feasibility of such an approach, had initiated or encouraged Dell's exchange of information with AMD were true, *quod non* , this would not have been in contravention of any of the norms quoted by Intel in support of its maladministration claim. Dell at all times remained free to decide whether it wished to enter into a bilateral agreement with AMD and it remained Dell's sole responsibility to respect possible confidentiality agreements vis-à-vis Intel, when doing so. The Commission cannot identify any other rules or principles which could even theoretically support Intel's purported claim.

177. The Commission also stressed that, as explained above, despite the fact that agreements between private parties are not directly related to the administrative procedure and the fact that the Commission took no active part in the conclusion of the Dell/AMD agreement, it, nevertheless, took active steps to discourage an agreement between Dell and AMD, the terminology of which referred to an " *access to file* " and to Article 15 of Regulation 773/2004. In this respect, the Commission noted that AMD, a complainant, had no rights of " *access to the file* " under Community law. Moreover, the Commission discouraged an agreement presented by Dell, through which the Commission's Hearing Officer would be involved as an arbiter and which made reference to Dell's possibility to waive its rights for access to file. In this context, the Commission stressed that it was not legally obliged to take such steps to discourage Dell from concluding such an agreement and that Dell and AMD would, nevertheless, have been entitled to engage in the intended information exchanges, leaving the Commission with no possibility to prevent that from happening. In view of the above, the Commission submits that Intel's claims

regarding any purported " *access to file* " granted by the Commission in relation to the Dell/AMD information exchange agreement are manifestly unfounded.

178. As regards the issue of the Dell-AMD information exchange agreement, the Commission considered that, irrespective of preparatory internal discussions to this end, it, at no stage, " *encouraged* " Dell and AMD to conclude an information exchange agreement in order to ease its own procedures. In particular, the Commission has not obliged Dell to conclude an agreement with AMD. On the contrary, the Commission took active steps to discourage the execution of **[a first draft of an]** agreement between Dell and AMD **[redacted]** . At the same time, the Commission has not been under any obligation to interfere with any *inter partes* exchange of information between Dell and AMD, even when it learned about the companies' intention to conclude agreements to that effect. It was Dell's responsibility to heed possible confidentiality obligations *vis-à-vis* Intel when it passed on information to AMD. The Commission has provided AMD with a version of the Statement of Objections in which all Dell information was redacted. In view of the above, the Commission maintained that the complainant's allegations of maladministration are unfounded.

179. In his further observations dated 15 June 2009 and produced in response to the Commission's further opinion of 10 June 2009, the complainant made reference to three arguments raised by the Commission in its further opinion. These were that:

(i) the **[redacted]** agreement was purely a "bilateral" agreement between Dell and AMD and the Commission therefore had no obligation to take any action;

(ii) the Commission was not obligated to take any action because the agreement was not a "file access agreement", and;

(iii) Intel had no confidentiality interest in the material provided to AMD and therefore was not injured.

In his view, the Commission's interpretation of these issues does not conform to the facts, and is thus incapable of excusing its serious breaches of Community law.

180. In his view, the Commission cannot excuse its failure to ensure respect for the procedures set forth in Articles 6 and 16 of Regulation 773/2004, and Article 9 of the Hearing Officer's Mandate, by claiming that the agreement, whose conclusion it had encouraged and of which it was fully aware, was merely " *bilateral* ". He argued that the Commission is the " *guardian* " of the case file. As such, it is charged with the obligation to ensure that rules relating to file access are fully respected and the confidentiality of information contained in the case file preserved. Those rules include Intel's rights under Articles 6 and 16 of Regulation 773/2004 and Article 9 of the Hearing Officer's Mandate. These provisions are intended to ensure that, information claimed to be confidential by Intel " *shall not be communicated or made accessible by the Commission in so far as it contains business secrets or other confidential information of any other person* " until such time as the Hearing Officer has " *found that the information is not protected and may therefore be disclosed* " and that finding has been communicated to the

defendant. At the relevant time, the Commission was on notice that Intel had invoked the procedure provided for in the above-mentioned legislation in respect of the materials the Commission wished Dell to provide to AMD. Dell's letter of 14 August 2007 put the Commission on further notice that the quotations at issue contained Intel confidential information, and, as a result of its discussions with Intel, the Commission had actual notice that Intel had asserted confidentiality claims in respect of this material. Nevertheless, despite this knowledge, the Commission encouraged, and then permitted, AMD to obtain access to this material before the Hearing Officer could make a determination as to its confidentiality. By so acting, the Commission violated Articles 6 and 16 of Regulation 773/2004 and Article 9 of the Hearing Officer's Mandate.

181. The Commission cannot, in the complainant's view, excuse its failure to protect Intel's rights by asserting that the agreement was bilateral or that the discussions between AMD, Dell and the Commission concern exclusively the legal situation in relation to AMD's right under Article 6 Regulation 773/2004. In light of its initiation of, and direct involvement in, procuring the AMD/Dell agreement, the Commission cannot maintain that the agreement was merely " *bilateral.* " It is undisputed, in the complainant's view, that (i) the Commission provided Dell with a selection of quotations from the confidential Statement of Objections and (ii) suggested or requested that Dell provide these quotations to AMD in un-redacted form. In its opinion to the Ombudsman, the Commission does not deny that it suggested that Dell should " *consider using an [* information exchange agreement *] with AMD similar to the one [* Dell *] contracted with Intel for the [* Statement of Objections *] quotes* " [119] . Moreover, he states that the Commission now admits that, when Dell provided it with a final, signed draft of such an agreement for its review, it suggested that the agreement needed to be restructured. Given these facts, he states that the Commission is " *disingenuous* " when it argues that " *the Commission took no active part in the conclusion of the Dell/AMD [* information exchange agreement *]* ". In particular, he argues that the Commission's claim that " *any involvement of the Commission or reference to it in the context of the bilateral exchange has been removed in the new version of the agreement that was in the end executed bilaterally between Dell and AMD* " neither changes the fact that the Commission encouraged and played an active role in the conclusion of the **[redacted]** agreement, nor relieves the Commission of its custodial obligations as guardian of the case file.

182. The complainant argues that the Commission's claim that the **[redacted]** agreement touches exclusively on Article 6 of Regulation 773/2004 ignores the fact that it is precisely the procedure provided for under Article 6 (as well as under Article 16 of Regulation 773/2004 and Article 9 of the Hearing Officer's mandate) that was circumvented by the Commission's encouragement and active participation in the conclusion of the AMD/Dell information exchange agreement.

183. In the complainant's view, the Commission's claim that it " *does not have any power, let alone any obligation to prevent third parties from disclosing information which they have submitted to the Commission* " bears no relation to what actually occurred, because it ignores the " *direct and active role* " played by the Commission in the conclusion of the AMD/Dell agreement. In the complainant's view, the question before the Ombudsman is not the legality of an independent, *inter partes* agreement executed by third parties without the Commission's

knowledge. Rather, the question is whether the Commission, with knowledge that Intel's confidentiality claims to the material had not yet been resolved and indeed that the material in question " *may be redacted in the version of the Statement of Objections that the Commission will provide to AMD* ", acted improperly by actively encouraging and participating in the conclusion of an agreement giving AMD impermissible access to file material, thereby circumventing Intel's procedural rights to have its claims to confidentiality resolved by the Hearing Officer. As the guardian of the case file, the Commission was obligated to prevent the conclusion and implementation of any such agreement, particularly where it had been given a draft of the agreement and had concluded that it was " *prima facie in contradiction with the administrative procedure* ".

184. In the complainant's view, the Commission was also required to prevent AMD from using the information it had **[redacted]** obtained at the Oral Hearing. This is especially true, since the Hearing Officer's final confidentiality determinations showed that the information was in fact confidential and that AMD would not have gained access to the material in question under a properly-supervised procedure. Nevertheless, the Commission permitted AMD to introduce this " *[redacted] material* " **[redacted]** , even after AMD put the Commission and Hearing Officer on notice at the beginning of the Oral Hearing that it intended to use the confidential material in question.

185. For similar reasons, the Commission is not excused by its claim that it intervened to transform the communicated agreement from a " *file access agreement* " to an agreement " *executed bilaterally between Dell and AMD* ". First, as shown above, the Commission's involvement in providing the material and suggesting that it be shared in un-redacted form with AMD, as well as its admission that it became intimately involved in restructuring the agreement, only confirm that the Commission played an active role in bringing about an agreement that was designed to, and actually did, circumvent Articles 6 and 16 of Regulation 773/2004 and Article 9 of the Hearing Officer's Mandate. Second, the presence or absence in the agreement of references to " *waivers of Dell's or AMD's respective rights under Regulation 773/2004* " or provision " *for an involvement of the Hearing Officer as an arbiter in case documents* " does not alter the purpose or effect of the original agreement **[redacted]** ; nor does it decrease the Commission's direct involvement in the procurement of the agreement and the infringement of those procedures. Third, the notion that the classification of the agreement as a " *bilateral exchange* " rather than a " *file access agreement* " could excuse the Commission from informing Intel or the Hearing Officer of the existence of the agreement is overly formalistic: it ignores the fact that the agreement which Dell communicated to the Commission on 25 September 2007 and the one communicated to the Commission on 13 November 2007 by AMD had the identical purpose and effect.

186. The complainant also noted that, although the Commission states that it made Intel " *aware* " of AMD's notification of the agreement on 13 November 2007, it failed to mention that it waited until 23 July 2008 to provide Intel with a copy of that letter, which it included as part of Intel's access to the file in connection with the Supplementary Statement of Objections. This was some eight months after the notification of 13 November and four months after AMD's use of the confidential material at the Oral Hearing.

187. Last, in addition to Intel's interest in the protection of its procedural rights, Intel also had demonstrable confidentiality rights in the actual quotations which AMD used **[redacted]** at the Oral Hearing. Whilst the import and veracity of the material in the documents in question could not be determined at the time the redaction exercise took place, examination of the actual extracts confirms that - as the Hearing Officer ruled - they merited confidential treatment in that they purported to relate to Intel's commercial negotiations with Dell, a subject plainly appropriate for protection vis-à-vis Intel's primary competitor. This conclusively refutes the Commission's claims that the quotations in question did not contain any Intel business secrets.

The Ombudsman's assessment

188. The complainant's second allegation is that the Commission "encouraged" Dell and AMD to enter into an information exchange arrangement, which had the effect of allowing AMD to circumvent the rules limiting AMD's right to have access to the Commission's investigation file.

189. As a first preliminary point and in order to define clearly the nature of the allegation against the Commission, the Ombudsman considers it necessary to deal first with the complainant's argument that Intel's " *rights of defence* " were infringed by AMD's use in the oral hearing of what Intel claimed to be Intel's " *confidential information* ".

190. A complainant in a competition case has limited rights to obtain from the Commission information contained in the Commission's investigation file. It has no right of " *access to the file* " during the Commission investigation. It only has access to a non-confidential version of the Statement of Objections. (The Ombudsman notes, in this regard, that Commission is required to send a non-confidential version of the Statement of Objections to the complainant for the purpose of allowing the latter to make written and oral submissions to the Commission in relation thereto). [120] The purpose of redacting a non-confidential version of the Statement of Objections is to ensure that the complainant in the competition case does not, through its right to obtain a version of the Statement of Objections, obtain knowledge of confidential information relating to third parties. [121] If the Commission were (because of an error) to include in the version of the Statement of Objections sent to a complainant, information which should be classified as " *confidential* ", it would potentially breach the Commission's obligations pursuant to Article 287 EC, [122] Article 28 of Regulation 1/2003 [123] and Article 16 of Regulation 773/2004, [124] and potentially make the Community extra-contractually liable for any damage incurred. However, while any such erroneous transmission of confidential information by the Commission might affect the legitimate business interests of a third party, [125] the (erroneous) transmission of such information will not, *as such* , [126] affect the " *rights of defence* " of the party under investigation. [127] Certainly, a complainant may have greater knowledge of the content of a Statement of Objections sent to the party under investigation as a result of receiving confidential information relating to a third party. However, this fact alone does not imply that the ability of the party under investigation to defend itself against the allegations set out in the Statement of Objections is affected.

191. If the Commission cannot infringe the " *rights of defence* " of a party under investigation,

even if it were (because of an error) to transmit to a complainant confidential information contained in the Statement of Objections, it follows that it could not infringe the " *rights of defence* " of a party under investigation, if it were ever found that it suggested, or even encouraged, a third party to transmit confidential information to a complainant. [128] In sum, the Ombudsman does not agree, as a point of principle, with the argument put forth by the complainant, that the rights of defence of a party under investigation would be infringed, if the complainant in the competition case were provided with, or otherwise obtained, information which that complainant might use to formulate arguments to be communicated to the Commission in the context of a Commission investigation. [129]

192. As a second preliminary point, the Ombudsman is of the view that the fact that a third party (such as Dell) provides information to the Commission, in the context of the Commission's investigation of an infringement pursuant to Article 81 EC or Article 82 EC, does not give the Commission any power to prevent that third party from deciding, on its own, to make use of that information in a manner which that party sees fit. [130] In principle, absent the possibility that an exchange of information between undertakings might itself constitute an infringement under Article 81 EC, the fact that a party (such as Dell) provides information to the Commission in the context of the Commission's investigation of an infringement pursuant to Article 81 EC or Article 82 EC, does not bestow on the Commission any power to prevent that third party from exchanging the very same information with a third party.

193. The principle that the Commission is not empowered, *by the mere fact that information has been transmitted to it by a third party* , to prevent that third party from using the same information for other purposes, applies, even if the information provided to the Commission is classified as " *confidential information* " for the purposes of the Commission's investigation based on a request for confidentiality submitted by the party under investigation. In such circumstances, it cannot be for the Commission to protect any interests the party under investigation may have in relation to that information.

194. As a third preliminary point, the Ombudsman notes that the Commission, when complying with its obligation to provide a complainant with a redacted version of the Statement of Objections, will not breach any applicable rule or principle, *unless* it includes " *confidential information* " in the redacted version of the Statement of Objections information. Indeed, it is not in dispute, in the context of the present inquiry, that the Commission did not directly transmit to AMD any confidential information relating to Intel. If the Commission decides, because, for example, it has been informed of an information exchange agreement between the complainant and a third party, *to refrain* from including certain information in the redacted version of the Statement of Objections, this course of action will not constitute a breach of confidentiality by the Commission.

195. As a fourth preliminary point, the Ombudsman's is of the view that the ruling in *AKZO Chemie BV v Commission* , [131] that a third party who has submitted a complaint may not " in any circumstances be given *access to documents containing business secrets* " (emphasis added) should be interpreted as meaning that the rules on access prevent *the Commission* from giving a complainant access to confidential information *in any circumstances* . This could

be understood to include the Commission requesting, encouraging or facilitating a third party to give a complainant access to that information. The ruling in *AKZO* does not, however, imply that the Commission has an obligation *to prevent* third parties giving information which, *independently of the Commission* , they possess, to a complainant.

196. The Ombudsman is also of the view that, should a complainant obtain, through an information exchange agreement with a third party, information which the Commission may have classified as " *confidential information* " for the purposes of its investigation file, the Commission does not have the power to prevent that third party from referring to, or otherwise making use of that information, when making written or oral submissions to the Commission. [132] The Ombudsman observes that a complainant which makes written or oral submissions to the Commission in relation to a Statement of Objections can rely on facts and arguments presented in the non-confidential version of the Statement of Objections. He also observes that a complainant can also rely on any other facts or arguments which it received from other sources and which it considers relevant for the formulation of its comments in relation to the Statement of Objections. Provided the complainant did not receive such information from the Commission (see paragraphs 189, 190 and 191 above and 198 below), it is not for the Commission to question how the complainant may have obtained such facts or arguments.

197. As a fifth preliminary point, the Ombudsman is of the view that the Commission is entitled to give its views to third parties as regards the procedural issues that might arise in relation to the correct handling of its procedures, in the event a third party that has provided information to the Commission informs the latter that it intends to enter into, or that it has entered into, an information exchange agreement with a complainant. As such, should the Commission be informed of a draft information exchange agreement, or even of a finalised information exchange agreement, that purports to grant a complainant, " *access to the file* ", the Commission is entitled to inform that third party that complainants do not have any rights of " *access to the file* " in a Commission procedure applying Article 81 EC or Article 82 EC. [133] Further, the Commission would, in such circumstances, be entitled to take into account any such agreements when drafting non-confidential versions of Statements of Objections.

198. Notwithstanding the above, the Ombudsman is of the view, that, while the consequence of an *erroneous* transmission of information to a complainant by the Commission in the context of an investigation may only be that the Community may become extra-contractually liable for any damage incurred, the same cannot necessarily be concluded as regards any *intentional* transfer of confidential information to a complainant by the Commission. The Ombudsman is of the view that any *intentional* transfer of confidential information to a complainant by the Commission could also, potentially, call into question the overall impartiality of the Commission in its investigation, in contravention of principles of good administration. [134] This would especially be the case, if the express intention of the Commission, when transferring confidential information to a complainant, were to be to reinforce the position of one party in the administrative proceedings which the Commission was in charge of.

199. In line with this reasoning, the Ombudsman is also of the view that it would not be in accordance with principles of good administration for the Commission to request, encourage or

facilitate an information exchange agreement between third parties, especially if the Commission were aware of a risk that the agreement would involve the transfer of confidential information of another third party. While the Ombudsman takes no view as to the validity of the confidentiality claims made by Intel in the context of Case COMP/37.990, he notes that the Commission did not exclude that certain of those confidentiality claims might have been valid. In such circumstances, it would not have been in accordance with principles of good administration for the Commission, as a public authority, to have requested, encouraged, or facilitated a third party to take measures which would (even potentially) have infringed the rights of another third party to protect its confidential information. [135]

200. Furthermore, were the Commission to request a third party to disclose to a complainant in a competition case confidential information, to which that complainant would otherwise not have access in the context of the application of Article 6 of Regulation 773/2004, this might also call into question the overall impartiality of the Commission in the context of the investigation. [136]

201. The complainant in the present inquiry argues that the Commission encouraged the information exchange agreement between Dell and AMD by providing Dell, as early as 9 August 2007, with a list of quotations from the confidential version of the Statement of Objections. The Ombudsman understands, from the letter of 14 August 2007, that the purpose of the letter of 9 August 2007 was to inform Dell of the various quotations contained in the Statement of Objections, which may have contained information of, or relating to, Dell. The provision of this list of quotations from the Statement of Objections to Dell would permit Dell to identify what it considered to be confidential information which should not be disclosed to AMD in the context of the provision to AMD of the redacted version of the Statement of Objections. The purpose of Dell's response of 14 August 2009 was to convince the Commission that it should not include, in the redacted version of the Statement of Objections to be sent to AMD, information that Dell considered to be confidential. This understanding is confirmed by the Ombudsman's examination of an email of 23 August 2007 from a Dell outside counsel (Mr C) to a colleague, in which Mr C states that an official from the Commission (Mr D) discussed with him the redaction from the Statement of Objections of quotations that Dell considered to be confidential.

202. The Commission's letter and Dell's response were thus part of the " *normal procedure* ", whereby the Commission seeks to determine what information should be redacted from the confidential version of the Statement of Objections in order to create a non-confidential version of the Statement of Objections. As a result, the Ombudsman does not consider that the letter of 14 August 2007 constitutes evidence that the Commission requested, encouraged or facilitated an information exchange agreement between Dell and AMD.

203. The complainant in the present inquiry also argues that the email of 3 September 2007, in which a Dell outside counsel (Mr C) informs a senior colleague that an official from the Commission (Mr D) had telephoned Mr C to ask whether Dell " *would consider using an [* information exchange agreement *] agreement with AMD similar to the one [* Dell *] contracted with Intel for the [* Statement of Objections *] quotes* " constitutes proof that the Commission did request Dell to enter into an information exchange agreement with AMD for the purposes of providing AMD with information which AMD would not have access to in the redacted version of

the Statement of Objections. The complainant also makes reference to an 18 September 2008 letter from Dell's counsel to the Ombudsman, where Dell's outside counsel states that " *the Commission suggested to Dell to enter into a non disclosure agreement with AMD's counsels and economists for the sharing of Dell documents used in the SO* ".

204. The Ombudsman notes that the Commission does not agree that it suggested to Dell to enter into an information exchange agreement with AMD. The Commission states that it only started to discuss internally the possibility of an information exchange agreement between Dell and AMD after a high level telephone call with Dell on 30 August 2007, in which such an information exchange agreement was discussed. The Commission argues that, since the agenda drawn up by the Commission and sent to Dell in advance of the telephone call did not mention an information exchange agreement between Dell and AMD, [137] it is " *plausible that in this phone call, either Mr B,* [138] *or Dell's outside counsel, first mentioned the option of a bilateral information exchange also with AMD.* "

205. The Commission confirms categorically that an information exchange agreement between Dell and AMD was actually discussed during that phone call.

206. On the basis of this agenda for the telephone call, [139] the Ombudsman agrees that the Commission's intention, at the outset of the telephone call of 30 August 2007, was to discuss the redaction of Dell quotations from the Statement of Objections. However, the Ombudsman can draw no conclusion, from the mere fact that the agenda does not mention an information exchange agreement between Dell and AMD, as to whether it was the Commission or Dell that raised the issue.

207. The Ombudsman notes that the Commission does not state categorically that it was Dell that raised the possibility of an information exchange agreement, nor does it state categorically that it was not the Commission that raised the possibility of an information exchange agreement. Rather, it maintains that it was " *plausible* " that the issue was first mentioned by Dell.

208. The Ombudsman recognises that, *ab initio* , it is " *plausible* " that either the Commission or Dell would raise the issue of an information exchange agreement in such a telephone call. The Ombudsman understands that such agreements may present advantages to a party that is required by the Commission to supply the latter with redacted versions of evidence previously submitted to the Commission. [140] Indeed, the Ombudsman has, in the course of his inspection of the Commission's file, had sight of correspondence between the Commission and another OEM, [141] in which that other OEM makes the Commission aware of (a) the burden associated with supplying the Commission with redacted versions of the (numerous) documents of that OEM contained in the Commission's file and (b) the advantage (for that OEM) of avoiding such costs by entering into an information exchange agreement (with Intel). It would not be unusual for a party, which is requested by the Commission to discuss, during a " *high level* " telephone call with the latter, the details of the redaction of information supplied to the Commission, to suggest to the Commission an alternative which would be less onerous for that party. The Ombudsman understands that the Commission also might see " *advantages* " in such information exchange agreements taking place. The existence of an information exchange

agreement between a party that has provided information to the Commission and a complainant may make it unnecessary for the Commission, when it is attempting to produce a " *meaningful* " non-confidential version of the Statement of Objections, to verify, and take a position on, confidentiality claims from the party under investigation relating to that information. This understanding of the Ombudsman is, in his view, confirmed by the Commission's subsequent actions. In sum, despite not being convinced of the validity of Intel's confidentiality claims, the Commission redacted from the Statement of Objections the Dell quotations which Intel claimed also contained confidential information relating to Intel. The reason, the Ombudsman understands, that the Commission did not pursue further the issue of whether such claims were or were not valid was because the Commission was aware that, for AMD, the redacted version of the Statement of Objections was meaningful, given that AMD had access, through the information exchange agreement, to the contested Dell quotations.

209. When presented with two divergent accounts of facts, both of which are *ab initio* plausible, the Ombudsman will seek to verify, if there is any evidence which gives greater credence to one account of the facts over the other.

210. The Ombudsman first notes that the 3 September 2007 email reflects Mr C's [142] understanding of a conversation with Mr D (a Commission official). As such, it cannot be certain that the email reflects *precisely* the words used by Mr D in that conversation. However, it can be understood that the email reflects Mr C's honest understanding, especially in light of the fact that the email was drafted *in tempore non suspecto* , that is, without thought having been given as to whether it would subsequently be of use as evidence. [143] As such, the Ombudsman concludes that it is sufficiently proven that the issue of an information exchange agreement was mentioned in the telephone conversation of 3 September 2007. [144]

211. In light of the above, the Ombudsman considers that the fact that Mr C and Mr D discussed an information exchange agreement in the telephone conversation of 3 September 2007 does not imply that this was the first occasion that this issue was discussed between the Commission and Dell. [145] The Ombudsman notes that Mr D is a (relatively) junior member [146] of the case team. The Ombudsman considers it unlikely that, if the Commission wished to communicate to Dell's outside counsel an important development in its procedure with Dell, it would have left such an initial discussion to a junior member of the case team. Rather, the Ombudsman considers it more likely that the issue was previously discussed in the context of what the Commission calls a " *high level* " telephone call on 30 August 2007, in which Dell's most senior in-house counsel, Dell's senior outside counsel, and the senior members of the Commission's case team participated.

212. As regards whether, in the context of the " *high level* " telephone call of 30 August 2007, it was the Commission or Dell (or Dell's outside counsel) that first raised the issue of the information exchange agreement, the Ombudsman notes that the Commission refers to an " *internal note* " concerning the " *high level* " telephone call of 30 August 2007. The Ombudsman has examined this note in the context of his inspection. The note purports to contain the impressions of the Commission officials present at the meeting of 30 August 2007. The note in question, however, does not appear to be a contemporaneous account of the " *high level* "

telephone call in question. The note states that it is certain that the idea of an information exchange agreement was " *floated* " at the meeting. It does not state precisely who " *floated* " that idea (at most, it could suggest that it was " *plausible* " that Dell or Dell's outside counsel suggested that Dell use an information exchange agreement).

213. The complainant also referred to e-mails between Mr C and Mr D dated 25 and 26 September 2007. He argued that this email exchange confirms that the Commission encouraged Dell to enter into the **[agreement]** with AMD and to provide it with confidential material from the Statement of Objections. The Ombudsman notes that Mr D, in an email of 26 September 2007, thanked Mr C " *for your constructive help on this subject.* " In the complainant's view, Mr D's gratitude for Dell's " *constructive help* " established beyond dispute that the Commission welcomed the fact that Dell was willing to enter into **[an agreement]** with AMD, and indeed that the Commission had promoted and encouraged the agreement.

214. The Ombudsman has, in the context of his inspection of the file, had sight of internal emails provided to him by the Commission, which indicate that the references to " *constructive help on this subject* " made by Mr A were not made in relation to the " *encouragement* " of an information exchange agreement between Dell and AMD, but rather to Dell's cooperative attitude as regards the modification of a draft information exchange agreement sent by Dell to the Commission. The modifications which the Commission considered necessary (in order to comply with the rules of access to file) related to the removal of references to a right of AMD to have " *access to file* ". [147] Indeed, internal emails suggest that, throughout September 2007, the Commission was actively pursuing the traditional procedure of redacting the Statement of Objections.

215. In light of the above, the Ombudsman does not consider that the e-mails between Mr C and Mr D dated 25 and 26 September 2007 constitute conclusive evidence that the Commission encouraged Dell to enter into an information exchange agreement.

216. The Ombudsman is of the view that, if the Commission had, in accordance with principles of good administration, drafted, at the relevant time, an internal note of the significant elements of the telephone call of 30 August 2007, it would have been able to provide important evidence as regards who first suggested an information exchange agreement between Dell and AMD. [148] The Ombudsman regrets that the failure to draft an internal note of the telephone call at the relevant time allows for uncertainty to exist in relation to its precise content. The Ombudsman also considers that, had the Commission drafted such an internal note at the time, it would also have been able to deal properly with the accusations that its officials inappropriately first raised the issue of an information exchange agreement.

217. Since the complainant did not raise any allegation or argument in respect to the failure to draft an internal note of the telephone call of 30 August 2007, the Ombudsman will, therefore, not pursue the issue in the present inquiry, but will instead make a further remark.

218. The Ombudsman considers it likely that the possibility of an information exchange agreement between Dell and AMD was first raised in the telephone call of 30 August 2007.

Given that no contemporaneous documentary evidence of the content of that telephone call exists, and taking into account the Ombudsman's findings in relation to the evidence submitted to him (see paragraphs 201 to 215 above), the Ombudsman considers that the available evidence is not sufficient for him to take a position as regards whether it was the Commission that first suggested to Dell that the latter enter into an information exchange agreement with AMD. As the Ombudsman does not consider that his inquiries would uncover further evidence that might clarify the precise content of the telephone conversation of 30 August 2007, he, therefore, concludes his inquiry with a finding that no further inquiries by the Ombudsman in relation to this allegation are justified.

C. Conclusions

On the basis of his inquiry into the first allegation, the Ombudsman closes his inquiry with the following critical remark:

By failing to make an adequate written note of the meeting of 23 August 2006, for the purposes of establishing agreed minutes of that meeting, the Commission infringed principles of good administration.

On the basis of his inquiry into the second allegation, the Ombudsman finds that no further inquiries by the Ombudsman are justified. He therefore closes his inquiry.

The complainant and the European Commission will be informed of this decision.

FURTHER REMARK

It would be in the interests of good administration for the Commission to instruct its staff to ensure that a proper internal note, which should be placed in the file, is made of the content of the meetings or telephone calls with third parties concerning important procedural issues.

P. Nikiforos DIAMANDOUROS

Done in Strasbourg on 14 July 2009

[1] Article 82 EC prohibits the abuse of a dominant position.

[2] See Joined Cases T-191/98 and T-212/98 to T-214/98 *Atlantic Container Line and Others v*

Commission [2003] ECR II-3275 (otherwise known as *TACA*).

[3] A copy of this document was submitted to the Ombudsman by the complainant.

[4] The Hearing Officer is a Commission official whose role is to enhance the impartiality and objectivity of Commission competition proceedings. The mandate of the Hearing Officer is set out in Commission Decision 2001/462 of 23 May 2001 on the terms of reference of hearing officers in certain competition proceedings (OJ L 162, 19 June 2001, pages 21-24).

[5] See Cases T-457/08 R *Intel v Commission* (not yet reported) and T-457/08 *Intel v Commission* (not yet reported).

[6] See Order of the President of the Court of First Instance of 27 January 2009 in Case T-457/08 R, *Intel Corp v Commission* (not yet reported).

[7] See footnote 6 above.

[8] In its opinion of 20 March 2009, the Commission took the view that it is not certain that the fact that Intel withdrew its application in Case T-457/08 automatically renders Intel's complaint to the Ombudsman admissible again. However, without prejudice to its position in future cases, the Commission stated that, in this specific instance, it will not pursue further the issue of the potential inadmissibility of the complaint.

[9] In his 16 February 2009 letter to the Commission, the Ombudsman stated that the very short deadline was justified, given that the Commission had been aware of the allegations since 22 July 2008 and of all of the evidence since 26 September 2008.

[10] The complainant states that the written post-meeting follow-up, sent from Dell to the Commission, suggests that the Agenda was indeed followed.

[11] A Statement of Objections is a formal step in Commission competition law investigations, in which the Commission informs the parties concerned in writing of the objections raised against them. The addressee of a Statement of Objections can reply (in writing) to the Statement of Objections, setting out all facts known to it which are relevant to its defence against the objections raised by the Commission. The addressee may also request an oral hearing to present its comments on the case. The Commission may then take a decision on whether the conduct addressed in the Statement of Objections is compatible or not with the EC Treaty's competition law rules (Articles 81 and 82 EC). Sending a Statement of Objections does not prejudge the final outcome of the procedure. The Commission may also choose to send one or more Supplementary Statements of Objections.

[12] A full copy of this testimony was provided to the Ombudsman by the complainant.

[13] The complainant states that, on 22 January 2008, Intel wrote to the Commission's Hearing Officer concerning a number of requests for access to the file. Those requests included a

request for a copy of the interview with Mr A. On 19 February, 2008, the Hearing Officer responded saying that " *I have no knowledge of the interview with [Mr A] dated 23 August 2006 and have asked the Case Team to react on this request.* "

[14] The complainant states that, on 21 February 2008, the case team sent an email confirming that Mr A had indeed attended a meeting with the Commission on 23 August 2006, but that " *the Commission did not interview [Mr A] during this meeting, and no minutes of the meeting were taken.* " On 10 March, 2008, the Hearing Officer responded that, according to the information she had received from the case team, " *no interview according to Article 19 of Regulation 1/2003 took place, nor were any minutes taken during or after the meeting which form part of the file.* " She indicated, however, that she would inquire into the matter.

[15] The complainant states that Intel wrote again to the Hearing Officer on 14 April 2008, explaining the significance of the case team's approach to the interview with Mr A, and expressing its concern that the case team had not made a detailed record of such an important meeting. In a letter dated 7 May 2008, the Hearing Officer acknowledged that a case team member had produced a " *note to the file* " concerning the 23 August 2006 meeting. The Hearing Officer stated that the note in question should have been put on the case file. However, she also ruled that Intel did not have a right of access because the note was an " *internal note* " and " *apparently* " had not been relied on in the Statement of Objections addressed to Intel.

[16] Article 11 (Fairness) states that " *[t]he official shall act impartially, fairly and reasonably.* "

[17] Article 12 (Courtesy) reads as follows

" *1. The official shall be service-minded, correct, courteous and accessible in relations with the public. When answering correspondence, telephone calls and e-mails, the official shall try to be as helpful as possible and shall reply as completely and accurately as possible to questions which are asked.*

2. If the official is not responsible for the matter concerned, he shall direct the citizen to the appropriate official.

3. If an error occurs which negatively affects the rights or interests of a member of the public, the official shall apologise for it and endeavour to correct the negative effects resulting from his or her error in the most expedient way and inform the member of the public of any rights of appeal in accordance with Article 19 of the Code. "

[18] Articles 7, 8 and 9 of the European Code of Good Administrative Behaviour require, respectively, that a European institution or body should " *avoid using [its] powers for purposes which have no basis in the law or which are not motivated by any public interest,* " should be " *impartial and independent and refrain from any arbitrary action adversely affecting members of the public,* " and should " *take into consideration the relevant factors and give each of them its proper weight in the decision.* "

[19] The Ombudsman understands that these documents concerned Mr A's testimony before the FTC in 2003.

[20] Access to the file is an important procedural step in competition and merger cases. It allows the addressee of a Statement of Objections (see footnote 11 above) to have sight of all of the evidence, whether it is incriminating or exonerating, in the Commission's file. A party can then understand the facts which led the Commission to send a Statement of Objections, and draw the Commission's attention to elements of the file which the party believes have not been given sufficient weight. This is a fundamental procedural safeguard which ensures the rights of defence of companies. The Commission has published a Notice on the rules for access to the Commission file (Official Journal C 325, 22 December 2005, p. 7-15).

[21] The Commission's emphasis.

[22] Cited at footnote 20 above.

[23] Cited at footnote 2 above.

[24] See Case T-38/02 *Groupe Danone v Commission* [2005] ECR II-4407.

[25] The Commission noted that the investigation period covered by the Statement of Objections of 26 July 2007 relates to the period starting from December 2002, while Mr A's testimony before the FTC of March 2003 mostly relates to the period proceeding December 2002.

[26] The Ombudsman understands that the Commission refers to the Agenda (see Paragraph 36 above).

[27] In the light of the Statements of Objections communicated by the Commission to Intel on 27 July 2007 and 17 July 2008, the Commission is of the view that Mr A's testimony before the FTC in 2003, on which Intel relies and which it considers to be exculpatory, does not support Intel's claim that the rebates paid to Dell were not conditioned upon exclusivity.

[28] The Ombudsman recalls that the Commission's opinion was submitted in March 2009. It adopted a decision in May 2009.

[29] Cited in footnote 2 above.

[30] Cited in footnote 24 above.

[31] See Case T-30/91 Solvay v Commission [1995] ECR II-1775 at paragraph 81.

[32] See Decision in Case COMP/37.990 of 13 May 2009 (not yet reported).

[33] In this respect, the complainant made reference to Case T-314/01 *Avebe v. Commission*

[2006] ECR. II-3085 at paragraph 66; Case T 30/91 *Solvay v Commission* [1995] ECR II-1775, paragraph 81 *et seq* .; Joint 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 A/S and others v. Commission* [2004] ECR I-123 at paragraph 75.

[34] The Community Courts have stated that " *the guarantees afforded by the Community legal order in administrative proceedings include, in particular, the principle of sound administration, which entails the duty of the competent institution to examine carefully and impartially all the relevant aspects of the individual case* ". See Case T-339/04 *France Télécom v Commission* [2007] ECR II-521 at paragraph 94. See also *TACA* , cited at footnote 2 above, at paragraph 404. In contrast, *before* it decides to open an investigation, the Commission is only obliged to take into consideration the factual and legal elements brought to its attention by the complainant (for the purposes of deciding whether there is a sufficient Community interest to open an investigation). See *Automec Srl v Commission (Automec II)* [1992] ECR II- 2223 at paragraph 86. See also Case 210/81, *Oswald Schmidt, trading as Demo-Studio Schmidt v Commission* [1983] ECR 3045 at paragraph 19; Case C-119/97 P *Union française de l'express (Ufex) and Others v Commission* [1999] ECR I-1341 at paragraph 86.

[35] See Joined cases 43/82 and 63/82, *VBVB and VBBB v Commission* , [1984] ECR 19 at paragraph 18.

[36] See *Microsoft v Commission* Case T-201/04 [2007] ECR II-3601 at paragraph 1275.

[37] Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, OJ L 1, 4 January 2003, pages 1-25.

[38] The Ombudsman notes that Regulation 1/2003 entered into force after the decisions which gave rise to the rulings of the Court of First Instance in *TACA* and *Groupe Danone* (cited above at footnotes 2 and 24 respectively).

[39] Council Regulation No 17/62 (1962) OJ 204.

[40] See paragraphs 56 to 60 above.

[41] Paragraph 12 of the Notice states that:

" *There is no obligation on the Commission departments to draft any minutes of meetings with any person or undertaking. If the Commission chooses to make notes of such meetings, such documents constitute the Commission's own interpretation of what was said at the meetings, for which reason they are classified as internal documents* ".

[42] Cited in footnote 2 above.

[43] Cited in footnote 24 above.

[44] See Joined Cases 16/62 and 17/62 *Confédération nationale des producteurs de fruits et légumes and others v Council* (ECR English special edition page 471); Case 45/86 *Commission v Council* [1987] ECR 1493; Case C-300/89 *Commission v Council* [1991] ECR I-2867 paragraph 10; and Case C-295/90 *Parliament v Council* [1992] ECR I-4193 at paragraph 13.

[45] Case C-322/88 *Salvatore Grimaldi v Fonds des maladies professionnelles* [1989] ECR 4407 at paragraph 14.

[46] Interviews may take many forms, such as meetings, telephone calls or video conferencing (see Article 3(2) of Regulation 773/2004).

[47] For example, meetings which take place in the context of the assessment of block exemption regulations or meetings which take place in the context of the assessment of policy " *guidelines* ".

[48] Arguably, an interview which is conducted prior to the formal commencement of an investigation (such as an interview with a complainant) is not an " *interview* " pursuant to Article 19 of Regulation 1/2003. It may still constitute good administrative practice to make an appropriate record of such meetings.

[49] This rule is derived from the wording of Article 19 of Regulation 1/2003 itself, which states that " *the Commission* may *interview any natural or legal person who consents to be interviewed* ", and the case law (see Joined Cases 43/82 and 63/82, *VBVB, and VBBB v Commission* , [1984] ECR 19 at paragraph 18, which states that " *the Commission has a reasonable margin of discretion to decide how expedient it may be to hear persons whose evidence may be relevant to the inquiry* ".

[50] See, for example, the Decision of the European Ombudsman on complaint 1056/25.11.96/STATEWATCH/UK/IJH against the Council at paragraph 3.5.

[51] The Commission could record the Article 19 interview by drafting a note, or through an audio recording or a video recording. The Ombudsman is of the view that the Commission should use the most appropriate means to record the Article 19 interview, given the specific object, content and context of an interview. Thus, if the interview relates to a very complex set of facts, which would be difficult to transcribe accurately *in situ* , the Commission should choose to make an audio or video recording of the interview.

[52] In contrast, Article 14.8 of Regulation 773/2004 (Conduct of oral hearings) clearly creates an obligation on the Commission to ensure that the statements made by each person at the oral hearings are recorded. It states that " *[t]he statements made by each person heard* shall *be recorded.* " (Emphasis added)

[53] While it is arguable, on the basis of the *wording* of Article 3, that it is unclear whether there exists a legal obligation to make a record of an " *Article 19 interview* ", it is also arguable that a

teleological interpretation of Article 3 of Regulation 773/200 leads to the conclusion that it should be interpreted as requiring that a record, in some form, must be made of an Article 19 interview. In sum, the purpose of Article 19 is to allow the Commission to gather information in relation to the subject-matter of an investigation. The purpose of Article 19 would, arguably, be undermined if the Commission did not make a record of the information it gathers. It is also arguable that a contextual interpretation of Article 19 of Regulation 1/2003, in conjunction with Article 3 of Regulation 773/2004, would lead to the conclusion that there is indeed an obligation to make a record of an Article 19 interview. The wording of Article 19 of Regulation 1/2003 is similar to the wording of Article 18 and Article 20 insofar as Article 18 and Article 20 also give the Commission the power, but not the obligation, (respectively) to make requests for information and to carry out inspections. It could not be disputed that, whenever the Commission *chooses* to exercise the powers set out in Articles 18 and 20, the results of the exercise of these powers (the response of the party to whom an Article 18 request is made and the documents obtained in an inspection along with the "explanations" made in relation thereto) *must* be placed in the case file. A further contextual argument in favour of interpreting Article 3 of Regulation 773/2004 to include an obligation to record an " *Article 19 interview* ", can be derived from Article 3 itself. Article 3.1 of Regulation 773/2004 states that the Commission must " *inform the person interviewed of its intention to make a record of the interview* ". Thus, the Commission must have, at least, the intention of making a record of an Article 19 interview when the interview commences. It would appear incongruous for Article 3.3 to be interpreted as allowing the Commission, without good reason, to refrain thereafter from making a record of the " *Article 19 interview* ".

[54] Of course, the use of the word " *any* " could also be understood as implying that while the Commission must have the intention of making a record of any statement made in relation to the subject-matter of the investigation, and *must* follow through with that intention if any statement is actually made in relation to the subject-matter of the investigation, there is no certainty, *ab initio* , that the party being interviewed will, in response to the questions posed by the Commission, actually respond with information in relation to the subject-matter of the investigation. If no information were actually provided in relation to the subject-matter of an investigation, no record pursuant to Article 19 of Regulation 1/2003 would be possible.

[55] The Ombudsman notes that the Community Courts have not yet had the opportunity to rule on the correct meaning of Article 19 of Regulation 1/2003 or Article 3 of Regulation 773/2004. It must be recalled that the highest authority on the meaning and interpretation of Community law is the Court of Justice (see, for example, Decision of the European Ombudsman on complaint 1056/25.11.96/STATEWATCH/UK/IJH against the Council at paragraph 3.5).

[56] See paragraph 1.7 of the Ombudsman's Decision on complaint 995/98/OV and paragraph 2.8 of the Ombudsman's Decision on complaint 1999/2007/FOR (available on the website of the European Ombudsman).

[57] The Ombudsman underlines that he does not necessarily agree with this assumption. He also notes that the Community Courts have not yet had an opportunity to give an "authentic" interpretation of this aspect of Article 3 of Regulation 773/2004. See footnote 90 above.

[58] In such a note, the Commission should sufficiently identify the information which is already in the file. It should also evaluate whether, the drafting of an " *Article 19 Note* " and the subsequent transformation of that note into an " *Article 19 Statement* " would be necessary in order to corroborate or verify information which is already in the file.

[59] Whether these risks materialise will depend on whether the information which was provided in the Article 19 interview was, in fact, subsequently included in the case file *in time* to allow the party under investigation to exercise its rights of defence during the administrative process.

[60] It cannot be excluded that, despite the fact that the persons being interviewed will have given their consent to be interviewed in relation to the " *subject-matter of an investigation* ", they may not in fact provide during the interview any " *information relating to the subject-matter of an investigation* ".

[61] See Joined Cases T-67/00, T-68/00, T-71/00 and T-78/00 *JFE Engineering Corp. v Commission* [2004] ECR II-2501 at paragraph 206 (by analogy).

[62] *Idem* at paragraph 207. The Ombudsman notes that, *inter alia* , Mr A's FTC testimony, and the exhibits attached thereto, confirm that Mr A was a " *direct witness* " of the events he described.

[63] *Idem* at paragraph 208 (by analogy).

[64] *Idem* at paragraphs 209 and 210.

[65] The approval can be explicit or implicit. Article 3.3 states that a copy of the interview note must " *be made available to the person interviewed for approval.* " It goes on to state that " *[w]here 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.* " The Ombudsman, therefore, understands this provision to mean that, if a party does not communicate corrections to the Commission within the time-limit set, the Commission is empowered to consider that the record it has made is accurate.

[66] There is nothing which prevents the Commission's services from drafting, at the same time, and in addition to an " *Article 19 interview note* ", separate internal notes which contain the assessments and personal views of the Commission's services in relation to the interview. Indeed, depending on the nature of the Article 19 interview, it may be appropriate for the Commission's services also to make such internal notes.

[67] See Paragraph 36 above.

[68] A careful analysis of the written follow-up of Dell to meeting of 23 August 2006 indicates that there were indeed issues that were discussed in the meeting of 23 August 2006, which are

not set out in the note of 29 August 2006, at least at the level of detail which the written follow-up by Dell indicates they were discussed in the meeting of 23 August 2006. For example, in response to Question 4, Dell states the following:

" *The Commission asked this question in the context of a discussion of Exhibit 9 of the Testimony which includes an email from [Mr A] to [Mr F] of Intel in April 2002 in which the performance of [an AMD product] is discussed. [Mr A's] view, based on a performance analysis conducted by his team at the time, was that [the AMD product] would outperform [an Intel product]. The Commission is seeking the benchmarks that were used to conduct this analysis.* "

The Ombudsman notes that, while this excerpt from the written follow-up of Dell refers specifically to a discussion which took place in the meeting of 23 August 2006, the note of 29 August 2006 does not contain such detailed references. A similar conclusion can be drawn from an analysis of Dell's response to Question 6.

[69] See footnote 57 above.

[70] Of course, if Article 3.3 of Regulation 773/2004 were interpreted as imposing a legal requirement to make a record of *all* interviews in which information concerning the subject-matter of an investigation was provided to the Commission, this would imply that principles of good administration would also impose such a requirement. In effect, principles of good administration cannot impose a standard which is *lower* than the legal standard.

[71] The Ombudsman refers here to the non-confidential version of the note provided to the Ombudsman by the complainant.

[72] The Ombudsman has not examined the entire Commission file, which, he understands, consists of several hundred thousand pages. However, he has examined Mr A's 2003 FTC testimony.

[73] The fact that these questions were posed orally to Dell by the Commission is confirmed by the fact that the follow up from Dell is not the result of a response to an " *Article 18 letter* " (Article 18 of Regulation 1/2003 empowers the Commission to pose questions in writing to third parties).

[74] See footnote 72.

[75] See paragraphs 56 to 60 above.

[76] Cited in footnote 2 above.

[77] Cited in footnote 24 above.

[78] The Ombudsman notes that access to the file is not an end in itself, but rather is intended to protect the rights of defence (Case C-51/92 P *Hercules Chemicals v Commission* [1999] ECR

I-4235 at paragraph 76) In particular, the purpose of access to the file is to enable the addressee of a statement of objections to acquaint itself with the evidence in the Commission's file, so that, on the basis of that information, it can express its views effectively on the conclusions reached by the Commission in its statement of objections. It follows that, with the exception of confidential documents, the Commission has an obligation to make available to the undertakings, to which a statement of objections has been addressed, all documents, whether in their favour or otherwise, which it has obtained during the course of the investigation (see Joined cases T-45/98 and T-47/98 *Krupp Thyssen Stainless and Acciai speciali Terni v Commission* [2001] ECR II-3757 at paragraphs 45 and 46). In this respect, the Ombudsman notes that, under Article 27(2) of Regulation No 1/2003, a party under investigation is entitled to have access to the Commission's file, subject to the legitimate interest of undertakings in the protection of their business secrets.

[79] See Case 90/74 *Deboeck v Commission* [1975] ECR 1123, Case 30/78, *Distillers Company v Commission* [1980] ECR 2229 at paragraph 26, and Case T-50/91 *De Persio v Commission* [1992] ECR II-2365 at paragraph 24.

[80] See for example, T-75/06 Judgment 9 September 2008 *Bayer Crop Science and Others v Commission* at paragraph 131 (not yet reported). A decision cannot be annulled, in whole or in part, on the grounds of a lack of proper access, unless it is found that that lack of proper access to the investigation file has prevented the undertakings, during the administrative procedure, from perusing documents which were likely to be of use in their defence (see 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 at paragraph 101).

[81] See Joined Cases T-109/02, T-118/02, T-122/02, T-125/02, T-126/02, T-128/02, T-129/02, T-132/02 and T-136/02 *Bolloré and Others v Commission* [2007] ECR II-947 at paragraphs 80-81. See also TACA, cited above at footnote 2, at paragraph 196; See also Case T-86/95 *Compagnie générale maritime and Others v Commission* [2002] ECR II-1011 at paragraph 447.

[82] See Case T-25/95 *Cimenteries CBR v Commission* [2000] ECR II-491 at paragraph 156.

[83] See Article 195 EC.

[84] See *TACA* , cited in footnote 2 above, at paragraph 351.

[85] See *TACA* , cited in footnote 2 above, at paragraph 352.

[86] In *TACA* (cited in footnote 2 above), the applicant argued that the Commission infringed its rights of defence by not making a record, for inclusion in the file, of the content of a telephone conversation between the complainant's lawyers and the Commission. The Court of First Instance noted that the purpose of the particular telephone call between the complainant's lawyers and the Commission was to discuss whether information contained in the statement of objections should be classified as "confidential information". The Court of First Instance noted that, given its purpose, such a telephone conversation manifestly does not infringe the rights of

defence of the applicant. (TACA 355) In effect, the Ombudsman understands, the information that was discussed in that telephone conversation was, necessarily, *already* in the file. The sole purpose of the call was the *categorisation* of that information as being either " *confidential* " or " *non-confidential* " information. As such, in those specific circumstances , the failure to make and include in the file, a record of that telephone conversation could not have had the effect of denying from the applicant information which would be relevant for the applicant's defence. As noted in Paragraph 87 above, a meeting which has as its aim and content the organisation of a procedural step in the context of the investigation, does not constitute an " *interview* " pursuant to Article 19 of Regulation 1/2003.

[87] The applicant in *TACA* also argued that the Commission infringed its rights of defence by not making a record of the meeting, in which the member of the Commission responsible for competition matters and a third party were present. However, the Court of First Instance observed that rights of defence cannot be infringed, if the Commission does not rely, in its decision, on any inculpatory evidence supplied in the meeting (see *TACA* , cited in footnote 2 above, at paragraph 387).

[88] Of course, access to any new inculpatory evidence would have to be provided before a party was required to respond to a Statement of Objections (see T-67/01, *JCB Service v Commission* [2004] ECR II-49, Paragraphs 50-52).

[89] The applicants in *TACA* did not even claim that that certain evidence relating to the meeting in question could have been used by them as exculpatory evidence.

[90] **[Redacted]**

[91] **[Redacted]**

[92] In his observations, the complainant raised the argument that the Commission's failure to record properly the meeting of 23 August 2006 was evidence of a lack of impartiality. The Ombudsman is of the view that, *if* the Commission were to receive exculpatory information in the course of an investigation, and failed to record that exculpatory information *somewhere* in the file, this failure would, even if it were not intentional on the part of the Commission's services, constitute an objective factor which might call into question the impartiality of an investigation. As noted in paragraph 133 below, the Ombudsman reaches no conclusion, in the context of the present inquiry, as regards whether there are in fact other documents in the Commission's file which would provide further information in relation to the precise content of the meeting of 23 August 2006.

[93] See footnote 68 above.

[94] See Question 6 of the written follow-up of Dell.

[95] **[Redacted]**

[96] See, by analogy, Case T-264/04 *WWF European Policy Programme v Council* ECR [2007] II-911 paragraphs 61 *et seq* .

[97] See Case T-30/91 *Solvay v Commission* [1995] ECJ II-1775 at paragraph 81. The Commission has stated that it is of the view that the testimony of Mr A before the FTC in 2003, on which Intel relies as being exculpatory, does not support Intel's claim that the rebates paid to Dell were not conditioned upon exclusivity. Even if this were eventually true, this would, in itself, still not justify depriving Intel of the *possibility* to consider invoking evidence in its defence which *may* have influenced, to its advantage, the course of the proceedings and the content of the eventual decision (see *Aalborg Portland A/S and others v. Commission* , cited in footnote 33 above, at paragraph 74; see also *Solvay v Commission* , cited above, at paragraph 89).

[98] In abstract, it could not be excluded that, *prior* to the adoption of a decision, allegations/inculpatory evidence set out in a Statement of Objections would not be included in the eventual decision. If it were the case that allegations/inculpatory evidence set out in a Statement of Objections were not included in an eventual decision, any deficiency in relation to access to the file concerning those allegations/inculpatory evidence would not affect the rights of defence of the party concerned. As such, a finding of the Ombudsman made prior to the adoption of a decision by the Commission, could at most be a finding that the error creates a *potential* for an infringement of the rights of defence. Any such finding would, of course, leave open the possibility for the Commission to remedy that breach, if that were still possible, before adopting a decision. The Ombudsman underlines that it falls within his mandate to examine allegations of procedural errors which create a risk or a potential for the rights of defence to be infringed (if not remedied before a final decision is adopted).

[99] The Commission has argued that the investigative measures following the note of 29 August 2006 triggered voluminous submissions by Dell that were, in its view, made fully available to Intel. The Commission specifically states that, between the meeting of 23 August 2006 and the sending of the first Statement of Objections to Intel on 26 July 2007, Dell made eight additional submissions to the Commission pertaining to the key issues of the investigation. These documents were not provided to the Ombudsman by the complainant and were not examined by the Ombudsman in the context of his inspection.

[100] The Ombudsman also notes, in this context, that no excuse based on technical and legal difficulties could be invoked for the failure to produce an exhaustive account of a meeting which *might* have resulted in a third party providing exculpatory information to the Commission. Indeed, as the Court of First Instance ruled in *Solvay* (see Case T-30/91 *Solvay v Commission* [1995] ECJ II-1775 at paragraph 102), " *respect for the rights of the defence should not be allowed to conflict with technical and legal difficulties which an efficient administration can and must overcome.* " Principles of good administration thus also require that the Commission take appropriate steps to record properly any meeting in which such information *might* be provided to it.

[101] Article 6 of Regulation 773/2004.

[102] The complainant in the present inquiry provided the Ombudsman with new evidence in relation to the second allegation during the course of the inquiry. This required the Ombudsmen to carry out further inquiries in order to seek the Commission's views on the new evidence. For the sake of clarity, the Ombudsman will, herein, consolidate the various facts and arguments of the complainant and the Commission.

[103] The complainant stated that AMD was permitted to make use of three of these documents at the Oral Hearing held by the Commission on 12 March 2008.

[104] This email was provided to the Ombudsman in the complainant's further observations of 16 April 2009. As this evidence was not available to the Commission when the latter submitted its opinion of 20 March 2009 to the Ombudsman, the Ombudsman provided the Commission with an opportunity to comment on this new evidence, which it did through its opinion of 10 June 2009.

[105] The complainant stated that Intel had, in total, written to the Commission on 16, 18, 19 and 25 October 2007, and to the Hearing Officer on 17 October 2007 and 28 November 2007 and 14 April 2008, seeking information about the Dell/AMD **[agreement]. [Redacted]**

[106] In her letter of 7 May, 2008, the Hearing Officer took the position that the **[agreement]** " *concluded by a party that as such has no rights of defence or right to access to file, is purely bilateral and neither empowers nor obliges the Commission.* "

[107] See Case 53/85 *AKZO Chemie BV v Commission* [1986] ECR 1965 at paragraph 28.

[108] According to the complainant, these OEMs wished to make un-redacted file documents available to Intel's outside counsel so as to avoid the expense and time that would have been involved in preparing redacted versions.

[109] The complainant's paraphrasing.

[110] The OEM in question was **[redacted]** .

[111] During the course of the inspection of 28 May, 29 May and 10 June 2009, the Ombudsman's services had sight of a letter of **[redacted]** dated 11 January 2007.

[112] This is confirmed by the emails that the Ombudsman inspected on 28 and 29 May 2009 and 10 June 2009.

[113] The agenda for the call was inspected by the Ombudsman on 28 and 29 May 2009 and 10 June 2009.

[114] Letter of the Commission to AMD of 2 June 2009, inspected by the Ombudsman on 10 June 2009.

[115] **[Redacted]**

[116] The Commission made reference to the hearing transcript provided by Intel as Annex 10 to its complaint to the Ombudsman of 10 July 2008.

[117] Article 28 of Regulation (EC) 1/2003 states:

" *Without prejudice to the exchange and to the use of information foreseen in Articles 11,12, 14, 15 and 27, the Commission and the competition authorities of the Member States, their officials, servants and other persons working under the supervision of these authorities as well as officials and civil servants of other authorities of the Member States shall not disclose information acquired or exchanged by them pursuant to this Regulation and of the kind covered by the obligation of professional secrecy.* "

[118] Commission Decision 2001/462 of 23 May 2001 on the terms of reference of hearing officers in certain competition proceedings OJ L 162, 19 June 2001, p. 21.

[119] The Ombudsman notes that this quotation is from Mr C's email dated of 3 September 2007.

[120] Article 6 of Regulation 773/2004 (Participation of complainants in proceedings) reads as follows:

" *1. Where the Commission issues a statement of objections relating to a matter in respect of which it has received a complaint, it shall provide the complainant with a copy of the non-confidential version of the statement of objections and set a time-limit within which the complainant may make known its views in writing.*

2. The Commission may, where appropriate, afford complainants the opportunity of expressing their views at the oral hearing of the parties to which a statement of objections has been issued, if complainants so request in their written comments. This obligation also applies to all representatives and experts of Member States attending meetings of the Advisory Committee pursuant to Article 14. "

[121] These parties include the party under investigation and any other third party that has a valid claim that the Commissions' file contains confidential information pertaining to it.

[122] Article 287 EC reads as follows:

" *The members of the institutions of the Community, the members of committees, and the officials and other servants of the Community shall be required, even after their duties have ceased, not to disclose information of the kind covered by the obligation of professional secrecy, in particular information about undertakings, their business relations or their cost components.* "

[123] Article 28 of Regulation 1/2003 (Professional secrecy) reads as follows:

" *1. Without prejudice to Articles 12 and 15, information collected pursuant to Articles 17 to 22 shall be used only for the purpose for which it was acquired.*

2. Without prejudice to the exchange and to the use of information foreseen in Articles 11, 12, 14, 15 and 27, the Commission and the competition authorities of the Member States, their officials, servants and other persons working under the supervision of these authorities as well as officials and civil servants of other authorities of the Member States shall not disclose information acquired or exchanged by them pursuant to this Regulation and of the kind covered by the obligation of professional secrecy. "

[124] Article 16 of Regulation 773/2004 sets out in detail the rules concerning the treatment of confidential information by the Commission.

[125] A party entitled to claim that information should be classified as confidential could be the party under investigation, or any other party (such as a party which provided the Commission with information in response to a request for information submitted pursuant to Article 18 of Regulation 1/2003). A party can also seek confidentiality in relation to information provided to the Commission by another party (See Case 53/85, *AKZO Chemie BV v Commission* [1986] ECR 1965 at paragraph 28 where the Court of Justice states that the Commission is required " *to have regard to the legitimate interest of undertakings in the protection of their business secrets. Business secrets are thus afforded very special protection. [* The applicable rules on access applying to complainants *] must be regarded as the expression of a general principle which applies during the course of the administrative procedure. It follows that a third party who has submitted a complaint may not in any circumstances be given access to documents containing business secrets.* ") It is also worth noting that the potential negative effects of such an erroneous transmission are not dependent on the use of this information in the Commission's proceedings, such as when a complainant makes written comments or a submission in the oral hearing. Rather, the negative impact of such a transmission of confidential information commences immediately upon the receipt, by the third party, of that information. In this respect, the Ombudsman is of the view that, should the Commission erroneously send confidential information to a complainant, it should, as soon as it becomes aware of its error, inform the complainant of the error and ask the complainant to return to it that version of the Statement of Objections.

[126] It is arguable, however, that the party under investigation should be made aware of the information that has been provided to a complainant by the Commission in order to allow the party under investigation to formulate properly its arguments during the administrative proceedings, including during the oral hearing. As such, the party under investigation should be allowed to obtain a copy of the redacted version of the Statement of Objections on request.

[127] As such, an erroneous transmission of confidential information to a complainant can at most, if it were shown the Commission were responsible for that transmission, constitute a relevant factor in an action for damages against the Commission.

[128] In contrast, the Ombudsman would not exclude the possibility that the rights of defence of a party under investigation could be infringed, if the Commission were to make efforts to prevent the party under investigation from obtaining from other sources, such as through information exchange agreements with third parties, information which the party under investigation would use in its defence.

[129] For example, when the complainant makes written comments in relation to the Statement of Objections or makes a presentation in the Oral hearing.

[130] However, the Commission may decide that a party that provides the Commission with information in relation to an application for leniency may lose, or diminish, its right to leniency under the Leniency Notice (see Article 12 of the Commission Notice on Immunity from fines and reduction of fines in cartel cases, OJ C 298, 8 December 2006, p. 17-22) if it discloses the fact, or any of the content, of its application for leniency before the Commission has issued a statement of objections in the case. See also pending action brought on 19 January 2006, *Deltafina v Commission* (Case T-12/06).

[131] Cited in footnote 125 above.

[132] Assuming that such information was initially classified as " *confidential information* ", such information would, if it is (again) included in the file as a result of declarations by the complainant in its written or oral submissions to the Commission continue to be classified, in the Commission's investigation file, as " *confidential information* ".

[133] See paragraph 136 above.

[134] See Article 41.1 of the Charter of Fundamental Rights of the European Union (Right to good administration) which states that " *[e]very person has the right to have his or her affairs handled impartially ...* " See also Articles 8 and 11 of the European Code of Good Administrative Behaviour.

[135] As noted above in paragraph 191, such actions would not infringe the rights of defence of a party under investigation. However, and notwithstanding this fact, the Commission should not actively seek to undermine the interests a party under investigation may have in protecting its confidential information.

[136] See paragraph 198 and footnote 134 above. This may be the case, if the Commission's intention was to reinforce the position of one party in the administrative proceedings which the Commission was in charge of.

[137] The agenda mentioned only issues relating to the redaction of the Statement of Objections.

[138] Mr B was a senior in-house counsel for Dell.

[139] The Ombudsman's services inspected the Agenda during the inspection which took place on 28 May 2009, 29 May 2009 and 10 June 2009.

[140] See Article 16(3) of Regulation 773/2004.

[141] The OEM in question was **[redacted]** .

[142] To recall, in his email, Mr C, a Dell outside counsel, informs a colleague that an official from the Commission (Mr D) had telephoned Mr C to ask whether Dell " *would consider using an [* information exchange agreement *] agreement with AMD similar the one [* Dell *] contracted with Intel for the [* Statement of Objections *] quotes* ".

[143] See Case T-59/02 *Archer Daniels Midland Co. v Commission* [2006] ECR II-3627 at paragraphs 275 to 277 and 290. See also Case T-151/94 *British Steel plc v Commission* [1999] ECR II-629 at paragraph 429.

[144] The Ombudsman also notes that the letter of Dell's outside counsel of 18 September 2008 reflects Dell's understanding as regards the meaning of the conversation held between Mr C and Mr D.

[145] Indeed, the fact that the complainant makes arguments relating to the relevance of discussions between the Commission and Dell in August 2007 (see paragraph 201 above) seems to indicate that the complainant was of the view that the Commission had the intention of encouraging an information exchange agreement between Dell and AMD by as early as 9 August 2007.

[146] It is noted in the file that Mr D is a case handler.

[147] The Ombudsman notes that a discussion on the issue of the modification of the draft information exchange agreement, designed to remove references of a right of AMD to have " *access to the file* ", is also contained in the Commission opinion sent to the Ombudsman.

[148] If drafted at the time, the internal note would, as well as being more accurate, have benefited from the principle of *in tempore non suspecto* .