

This Order may be found online at:

<http://curia.europa.eu/jurisp/cgi-bin/form.pl?lang=en&Submit=Rechercher&alldocs=alldocs&docj=docj&docop=docop&docor=docor&docjo=docjo&numaff=T-457/08&datefs=&datefe=&nomusuel=&domaine=&mots=&resmax=100>

IMPORTANT LEGAL NOTICE - The information on this site is subject to a [disclaimer and a copyright notice](#).

ORDER OF THE PRESIDENT OF THE COURT OF FIRST INSTANCE

27 January 2009(*)

(Application for interim measures – Competition – Application for suspension of operation and interim measures – Decision rejecting a request to defer the start of the period for the reply to a statement of objections – Decision rejecting a request to order the production of documents – Inadmissibility of the main action)

In Case T-457/08 R,

Intel Corp., established in Wilmington, Delaware (United States), represented by N. Green QC, K. Bacon, Barrister, and I. Vandenborre, Lawyer,

applicant,

v

Commission of the European Communities, represented by V. Di Bucci and M. Kellerbauer, acting as Agents,

defendant,

APPLICATION for interim measures in relation to certain measures taken in the context of the proceeding under Article 82 EC in Case COMP/3-37.990 Intel,

THE PRESIDENT OF THE COURT OF FIRST INSTANCE OF THE EUROPEAN COMMUNITIES,

makes the following

Order

Factual background

- 1 The applicant, Intel Corp., is a company that designs, develops, manufactures and markets microprocessors, chipsets and other semi-conductor components, as well as platform solutions for data processing and communications devices.
- 2 Advanced Micro Devices ('AMD'), a competitor of the applicant, submitted a first complaint to the Commission on 18 October 2000 under Article 3 of Council Regulation No 17 of 6 February 1962, First Regulation implementing Articles [81] and [82] of the Treaty (OJ, English Special Edition 1959-62, p. 87), followed by a second complaint in November 2003, on the basis of Article 7 of 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 2003 L 1, p. 1), with both complaints alleging that Intel had engaged in practices contrary to Article 82 EC.
- 3 In May 2004, the Commission commenced an investigation into AMD's allegations, at the end of which it sent a statement of objections to the applicant on 26 July 2007 in which it alleged that certain marketing arrangements in respect of Acer, Dell, Hewlett Packard, IBM and NEC, and certain of Intel's pricing practices infringed Article 82 EC. The Commission preliminarily concluded that Intel had implemented an anti-competitive strategy to exclude AMD from, or limit its access to, the market for 86 microprocessors.
- 4 In addition to submitting its complaints to the Commission, in June 2005 AMD commenced a civil action for damages against Intel in the United States District Court for the District of Delaware, alleging, in particular, that Intel's pricing and marketing practices infringed the relevant competition rules in the United States.
- 5 In the context of those proceedings, Intel and AMD submitted numerous documents, including, in particular, their preliminary pretrial statements, which each provided a list of the other party's documents that were considered relevant and to which access was requested.
- 6 On 21 May 2008, the Commission issued a request for further information, by which it requested, first, Intel to produce all the documents AMD listed in its preliminary pretrial statement and, second, AMD to produce all the documents Intel listed in its preliminary pretrial statement.
- 7 On 16 July 2008, the Commission issued a supplementary statement of objections ('the SSO'), in which it purported to submit new evidence in respect of the allegations concerning Acer, Dell, IBM and NEC, and made new allegations in relation to two other companies, namely Media-Saturn-Holding and Lenovo.
- 8 Taking the view that AMD's documents showed that certain other documents from the file AMD compiled in the context of the case pending before the United States Federal District Court in Delaware were exculpatory of Intel as regards the claims made in the SSO, Intel wrote to the relevant Head of Unit at DG Competition on 6 August 2008, demanding that the Commission request from AMD all documents that were directly relevant to the SSO.
- 9 After that request was refused by letter of 12 August 2008, Intel stated in an exchange of letters with the Hearing Officer and the relevant Head of Unit at DG Competition that it considered the file to be incomplete and that, if it was required to submit a reply to the SSO within the eight-week deadline that it had been given, it would be unable to exercise its rights of defence in a meaningful manner.
- 10 By letter of 4 September 2008, Intel wrote to the Hearing Officer pursuant to Article 10 of Commission Decision 2001/462/EC, ECSC of 23 May 2001 on the terms of reference of hearing officers in certain competition proceedings (OJ 2001 L 162, p. 21), formally requesting an initial extension of the time-limit for its reply to the SSO until 15 December 2008. Intel added that that request was without prejudice to the issue of principle concerning the incompleteness of the file, and in this respect annexed a list of documents and categories of documents which

were likely to exist and which were relevant to the allegations made in the statement of objections and the SSO ('list of AMD documents').

- 11 By decision of 15 September 2008, the Hearing Officer granted an extension of the time-limit for Intel's reply to the SSO until 17 October 2008, but rejected Intel's argument that the incompleteness of the file meant that the time for its reply to the SSO had not started to run.
- 12 By letter of 17 September 2008, Intel again wrote to the Hearing Officer in order to request, first, access to the unredacted version of certain documents of AMD and Media-Saturn-Holding to which it had already requested access in its earlier letters and, second, adoption of a decision pursuant to Article 10 of Decision 2001/462 extending the deadline for Intel's reply to the SSO to eight weeks from the date that the Commission made available to Intel all AMD documents relevant to the allegations in the statement of objections and the SSO.
- 13 By letter of 29 September 2008, Intel specified that, as a result of a meeting with the Competition Commissioner during which it emerged that the Commissioner was willing to examine Intel's request for additional documents, it requested an extension of the time-limit for its reply to the SSO for a period of 10 days from the date of the decision taken by the Commissioner, in the event that that decision was negative, or for 30 days from the day on which Intel was given access to the additional documents, in the event that that decision was positive.
- 14 By letter of 6 October 2008, the Director-General of DG Competition informed Intel that the Commission had decided to ask AMD to produce the documents on the list of AMD documents, but only in so far as those documents were specified in a way that allowed them to be precisely identified. Consequently, AMD submitted seven documents, which were forwarded to Intel on 8 October 2008.
- 15 By letter of 6 October 2008, the Competition Commissioner also informed the chief executive officer of Intel of the follow up to the request for additional AMD documents, by referring to the letter from the Director-General of DG Competition of 6 October 2008.
- 16 On the same day, Intel replied to the Director-General of DG Competition that the seven documents at issue, while useful, were not sufficient in the light of the 87 documents or categories of documents of AMD which Intel had listed. Intel likewise expressed its intention to enter into discussions with the Commission with a view to obtaining access to those documents and, in order to do so, requested that the deadline for its reply to the SSO be extended until 17 November 2008.
- 17 By letter of 7 October 2008, the Hearing Officer informed Intel that the deadline for submission of the reply to the SSO remained 17 October 2008 and that Intel's request for access to confidential AMD documents was rejected. As regards the decision to forward to Intel the seven AMD documents referred to in the letter of the Director-General of DG Competition of 6 October 2008, the Hearing Officer took the view that their number and content, as it appeared from their title, allowed her to assume that it would not take Intel very long to take those documents into account as part of its analysis, and to use them in its reply, while stating that she could not decide, as of that day, whether the review of those documents justified an extension of the deadline.
- 18 By letter of 13 October 2008, the Hearing Officer requested Intel to inform her, by the next day, whether the seven documents Intel received on 8 October 2008 required an extension of the time-limit for the reply to the SSO. She added that, on the basis of information available to her, an extension of that deadline was not justified, but that she would decide in the light of Intel's comments whether such an extension was required.

- 19 By a letter sent the same day, Intel replied to the Hearing Officer that it had no choice but to bring an action before the Court of First Instance and that the question of an extension of the deadline to allow the seven AMD documents to be taken into consideration did not arise.

Procedure and forms of order sought by the parties

- 20 By application lodged at the Registry of the Court of First Instance on 10 October 2008, Intel brought an action seeking, by its first head of claim, the annulment of (i) the decision of the Hearing Officer of 15 September 2008 and (ii) the Commission's decision of 6 October 2008 communicated to the applicant in the form of letters from the Competition Commissioner and the Director-General of DG Competition. By its second head of claim, Intel requests further that the Court of First Instance extend the deadline for the reply to the SSO to 30 days from the date on which Intel is given access to the AMD documents.
- 21 By a separate document lodged at the Registry of the Court of First Instance on the same day, Intel brought this application for interim measures, in which it claims that the President of the Court of First Instance should:
- order suspension of the procedure in Case COMP/3-37.990 Intel, pending a determination of Intel's main application for annulment;
 - order suspension of the timetable for service of a reply to the SSO;
 - in the alternative, in the event that the Court of First Instance rejects the application for interim measures or the application in the main action, order that Intel be granted 30 days from the date of delivery of the Court of First Instance's judgment to submit its reply to the SSO;
 - order the Commission to pay the costs;
 - make any further order as is deemed appropriate.
- 22 By application of 21 October 2008, AMD sought leave to intervene in the present proceedings in support of the form of order sought by the Commission.
- 23 The Commission lodged its observations on the present application for interim measures on 27 October 2008, claiming that the President of the Court of First Instance should:
- exclude Mr Venit, signatory of the application for interim measures, from the proceedings;
 - dismiss the application for interim relief;
 - order Intel to pay the costs.
- 24 By letter lodged at the Registry of the Court of First Instance on 5 November 2008, the Commission applied for confidential treatment as against AMD of some information in its observations and in Intel's application for interim measures.
- 25 Given that the Commission pleaded, primarily, that the application for interim measures was inadmissible, the President of the Court of First Instance invited Intel to submit its observations in that respect, which it lodged on 11 November 2008.

Law

Arguments of the parties

- 26 The Commission submits that the application for interim measures is inadmissible since the main action is itself manifestly inadmissible in so far as it is directed against preparatory measures which cannot be the subject of an action.
- 27 As regards the decision of 15 September 2008, the Commission submits, in addition, that by that decision, the Hearing Officer granted an extension of the deadline and did not rule out granting a further extension, which was indeed envisaged in her letters of 7 and 13 October 2008. Therefore, Intel has no legal interest in bringing proceedings against that positive decision which does not directly or adversely affect it.
- 28 As regards the decision of 6 October 2008, the Commission adds that the letters of the Director-General of DG Competition and of the Competition Commissioner do not produce binding and final legal effects and therefore do not have decisional character.
- 29 Therefore, according to the Commission, the first head of claim in the main action, which seeks the annulment of the decisions of 15 September and 6 October 2008, is inadmissible.
- 30 Moreover, the second head of claim in the main action, which asks the Court of First Instance to extend the deadline for submission of the reply to the SSO, exceeds the powers conferred on the Court of First Instance by Articles 230 EC and 233 EC.
- 31 Intel recalls that, as a rule, the admissibility of the main action is not examined in the context of interim proceedings, in order not to prejudice the main action. It is only by way of exception, in cases of obvious inadmissibility, that an application for interim measures can be rejected on this ground.
- 32 Accordingly, Intel submits that an application for interim measures cannot be dismissed as inadmissible unless admissibility of the main action can be wholly excluded (order of the President of the Court of First Instance of 18 June 2008 in Case T-475/07 R *Dow AgroSciences and Others v Commission*, paragraph 28). On the contrary, an application for interim measures cannot be dismissed as inadmissible where there exist certain factors which justify the prima facie conclusion that the main action may be admissible (order of the President of the Court of First Instance in Joined Cases T-195/01 R and T-207/01 R *Government of Gibraltar v Commission* [2001] ECR II-3915, paragraphs 55 and 60).
- 33 The present case is not one of the very rare cases in which the admissibility of the main action can be wholly excluded without any detailed analysis of the facts and the law.
- 34 Intel submits that several factors lead to the prima facie conclusion that the main action is admissible.
- 35 As regards the effects of the contested decisions on its legal position, first, Intel submits that they compel Intel to choose between asserting its rights of defence by refusing to reply on the basis of an incomplete file and submitting a reply to the SSO without being able to rely on a significant body of evidence that is likely to be both relevant and exculpatory. In either case, Intel's legal position would be altered.
- 36 If Intel refuses to submit a reply, it might forfeit the right to reply to the SSO and to defend itself at an oral hearing. Conversely, if Intel replies without being able to exercise fully its rights of defence, the Commission is more likely to adopt a final, wrong decision establishing that Intel infringed Article 82 EC.

- 37 An action against that decision could not undo the irreversible consequences that would ensue from it. Intel submits in this respect that a decision establishing that it infringed Article 82 EC would affect investigations by other competition authorities at national level. Likewise, such a decision would result in immediate commercial harm, due to a change in market conditions which would make it impossible for Intel to restore its previous practices. Finally, Intel's reputation would be affected irreversibly by a decision finding it guilty of infringing competition law.
- 38 Second, Intel submits that the case-law of the Court of First Instance does not make it possible to determine whether decisions concerning the completeness of a file in the context of Article 82 EC infringement proceedings are merely preparatory procedural steps or distinct contestable legal measures, such as the ones at issue in Joined Cases T-213/01 and T-214/01 *Österreichische Postsparkasse and Bank für Arbeit und Wirtschaft v Commission* [2006] ECR II-1601 ('the *Postsparkasse* judgment') and in Joined Cases T-125/03 and T-253/03 *Akzo Nobel Chemicals and Akcros Chemicals v Commission* [2007] ECR II-3523 ('the *Akzo* judgment'). In particular, Intel submits that the orders of the President of the Court in Joined Cases T-10/92 R to T-12/92 R, T-14/92 R and T-15/92 R *Cimenteries CBR and Others v Commission* [1992] ECR II-1571 ('the *Cimenteries CBR* order') and in Case T-219/01 R *Commerzbank v Commission* [2001] ECR II-3501 ('the *Commerzbank* order') are not comparable to the present case, since they concerned decisions regarding access to the file.
- 39 In contrast, Intel submits that the position taken in the *Postsparkasse* judgment applies by analogy to the present case. Intel would also suffer irreparable harm, independent of any decision the Commission might adopt at the end of the proceedings against Intel and the outcome of an action that Intel might bring for the annulment of such a decision. That harm consists in denying Intel the opportunity to present arguments which could result in the Commission closing its investigation immediately. In addition, even if the Commission were finally to close its investigation, Intel would have incurred huge and irrecoverable costs as a result of the proceedings.
- 40 Similarly, there is no significant difference between the contested decision that was the subject of the *Akzo* judgment and the contested decisions in the present case. It is difficult to discern any distinction in principle between procedural steps leading to the procurement of evidence following the rejection of a claim to legal professional privilege for communications between lawyer and client, and procedural steps leading to a decision refusing access to relevant information held by the complainant. The legal and commercial consequences in both cases are the same, namely the undertaking being subjected to an investigation which, had its rights of defence not been infringed, might have been put promptly to an end. Finally, in both cases, the undertaking is equally exposed to the risk of an adverse decision which might not have been adopted had its rights of defence not been infringed.
- 41 Third, Intel submits that an analogy may also be drawn between the contested decision in the main action and Commission decisions to open the Article 88(2) EC formal investigation procedure, involving the provisional classification of a measure as new aid. As the Court has repeatedly confirmed, such an assessment, even provisional, has independent legal effects in so far as it entails legal and commercial uncertainty for the aid beneficiaries and persons dealing with those undertakings, and exposes them to the risk of actions before national courts. Those are irreversible consequences which render admissible an action brought against a decision of that nature.
- 42 Fourth, it must be borne in mind that any action brought before the Court of First Instance against a decision establishing an infringement would be complex and the proceedings would probably take several years. If Intel is required to await the outcome of an action brought against a final Commission decision before the issues raised in its applications are determined, such a determination would likely be made beyond the time at which it could represent an effective remedy for the purposes of Article 6(1) of the European Convention on Human Rights (ECHR).

- 43 Fifth, Intel submits that if the Court of First Instance were to annul a Commission decision establishing an infringement on the grounds of failure to procure relevant and probably exculpatory evidence, the matter would likely be remitted to the Commission. The Commission would then be required, pursuant to Article 233 EC, to take the necessary measures to comply with the judgment, which would require the Commission to procure and evaluate that missing evidence before reaching a new decision. But by that stage there would be no guarantee that the evidence requested by Intel would still exist. In addition, Intel submits that, once it received the documents at issue, it would have to examine their content, which would include interviews of witnesses, something that would be rendered more difficult by having to await the outcome of the main action against the decision establishing an infringement. Therefore, if the evidence is not obtained now, it might never be possible to obtain it, whatever decision may ultimately be taken by the Court of First Instance. Consequently, the harm of which Intel complains would be irreversible, just like, inter alia, the harm resulting from the release of confidential information in the *Akzo* case.
- 44 Finally, Intel submits that, in accordance with the case-law, in exceptional circumstances an action for annulment can be declared admissible even if it is brought against a measure which does not produce binding legal effects, where the contested measure lacks even the appearance of legality, as in the present case.

Findings of the President of the Court of First Instance

- 45 In accordance with the provisions of Article 104(1) of the Rules of Procedure of the Court of First Instance, an application for interim measures is admissible only if it is made by a party to a case before the Court of First Instance. That rule means that the main action from which the application for interim measures is derived can actually be examined by the Court of First Instance.
- 46 It is settled case-law that the admissibility of the main action should not, as a rule, be examined in proceedings relating to an application for interim measures so as not to prejudice the case in the main proceedings. However, where it is contended that the main action from which the application for interim measures is derived is manifestly inadmissible, it may be necessary to establish certain grounds for the conclusion that such an action is prima facie admissible (order of the President of the Court of Justice in Case C-300/00 P(R) *Federación de Cofradías de Pescadores de Guipúzcoa and Others v Council* [2000] ECR I-8797, paragraph 34; orders of the President of the Court of First Instance in Case T-236/00 R *Stauner and Others v Parliament and Commission* [2001] ECR II-15, paragraph 42, and in Case T-155/02 R *VVG International and Others v Commission* [2002] ECR II-3239, paragraph 18).
- 47 Such an examination of the admissibility of the main action is necessarily brief, because the proceedings for interim relief are by nature urgent, and the question of admissibility can be considered only on the basis of the facts adduced by the applicant. The decision of the judge hearing an application for interim relief does not, however, prejudice the decision to be made by the Court of First Instance on hearing the main action (order in *Federación de Cofradías de Pescadores de Guipúzcoa and Others v Council*, paragraph 35).
- 48 Indeed, in the context of proceedings for interim relief, the admissibility of the main action can only be assessed on a prima facie basis, the aim being to examine whether the applicant has adduced sufficient elements which justify the prima facie conclusion that the admissibility of the main action cannot be excluded. The judge hearing the interim measures application should only declare it inadmissible where the admissibility of the main action can be wholly excluded. To rule, at the stage of the proceedings for interim relief, on the admissibility of the main action, when its admissibility is not prima facie wholly excluded, would be tantamount to prejudging the Court of First Instance's decision in respect of that action (orders of the President of the Court of First Instance in Case T-342/00 R *Petrolessence and SG2R v Commission* [2001] ECR II-67, paragraph 17; *Government of Gibraltar v Commission*, paragraph 47; and Case T-37/04 R *Região autónoma dos Açores v Council* [2004] ECR II-2153, paragraph 110).

- 49 In the present case, it must first be held that the second head of claim in the main action, which asks the Court of First Instance to grant an extension of the deadline for submission of the reply to the SSO to 30 days from the date on which Intel is given access to the AMD documents, is *prima facie* manifestly inadmissible. In accordance with settled case-law, it is not for the Community judicature, in an action for annulment of a decision taken by an institution, to issue directions to that institution. Pursuant to Article 233 EC, it is solely for the institution whose decision was annulled to adopt measures to comply with the judgment annulling that decision (see Case T-126/99 *Graphischer Maschinenbau v Commission* [2002] ECR II-2427, paragraph 17 and the case-law cited).
- 50 The first head of claim in the main action seeks the annulment, first, of the decision of the Hearing Officer of 15 September 2008 in so far as that decision extends the deadline for submission of a reply to the SSO to 17 October 2008 whilst rejecting the applicant's arguments aimed at obtaining that the time for submission of a reply to the SSO run only from the day on which all the documents appearing on the list of AMD documents have been made available to the applicant and, second, of the Commission decision of 6 October 2008 requesting AMD to produce seven documents and rejecting the remainder of Intel's request for all documents on the list of AMD documents.
- 51 Those two acts are intermediate procedural measures taken in the context of the proceeding under Article 82 EC against Intel for the purpose of preparing the Commission file, that proceeding being liable to lead, ultimately, to the adoption of a decision establishing an infringement.
- 52 In this respect, it must be stated that, according to consistent case-law, only a measure whose legal effects are binding on the applicant and are capable of affecting his interests, by bringing about a distinct change in his legal position, is an act or decision which may be the subject of an action for annulment. In the case of acts or decisions adopted by a procedure involving several stages, in particular where they are the culmination of an internal procedure, it is in principle only those measures which definitively determine the position of the Commission upon the conclusion of that procedure which are open to challenge and not intermediate measures whose purpose is to prepare for the final decision (Case 60/81 *IBM v Commission* ECR 2639, paragraphs 9 and 10; Case C-147/96 *Netherlands v Commission* [2000] ECR I-4723, paragraphs 25 and 26; Case T-37/92 *BEUC and NCC v Commission* [1994] ECR II-285, paragraph 27, and Case T-277/94 *AITEC v Commission* [1996] ECR II-351, paragraph 51).
- 53 It has been held, in particular in the context of interlocutory proceedings, in respect of Commission measures refusing access to the file to a party to the administrative procedure, that even though they may constitute an infringement of the rights of the defence, as a general rule such measures produce only limited effects, characteristic of a preparatory measure forming part of a preliminary administrative procedure (Joined Cases T-10/92 to T-12/92 and T-15/92 *Cimenteries CBR and Others v Commission* [1992] ECR II-2667, 'the *Cimenteries CBR* judgment', paragraph 42). Only measures immediately and irreversibly affecting the legal situation of the undertakings concerned would be of such a nature as to justify, before completion of the administrative procedure, the admissibility of an action for annulment (order of the President of the Court of First Instance in Case T-216/01 R *Reisebank v Commission* [2001] ECR II-3481, 'the *Reisebank* order', paragraph 46, and the *Commerzbank* order, paragraph 36).
- 54 However, Intel claims that that case-law does not apply by analogy to the decisions of 15 September and 6 October 2008, since those decisions do not constitute decisions regarding access to the file.
- 55 That claim is not convincing. In the cases that gave rise to the *Reisebank* order and the *Commerzbank* order, the applicants requested, in the main action, the annulment of Commission decisions refusing access to certain documents in the context of proceedings under

Article 81 EC and claimed, in particular, that those documents probably contained exculpatory evidence.

- 56 In the present case, although Intel does not request access to documents already in the file which the Commission considers to be confidential, but requests the Commission to order the production of documents not in the file, and, secondarily, to delay the beginning of the period for submission of the reply to the SSO until the date those documents have been submitted, the fact remains that, in both cases, the objective is to compel the Commission to make available to the applicant, in the context of an administrative procedure that may lead to a decision finding that there has been an infringement of competition rules, documents that the applicant believes might affect the final decision. Whether those documents are in the file but not accessible for reasons of confidentiality, or whether they are not in the file because the Commission has not included them, is immaterial in respect of the finding that – as stated in paragraph 53 above – the decisions refusing to grant access to those documents and, subsequently, to extend the deadline for service of the reply to the SSO, even though they may constitute an infringement of the rights of the defence, are merely preparatory measures whose negative effects will be felt only in the event of any final decision finding that there has been an infringement. As such, they therefore have no independent and immediate legal effect and cannot be the subject of an action.
- 57 It was held, in the *Reisebank* and *Commerzbank* orders, that any infringement of the right of an addressee of a statement of objections effectively to put forward its views on the objections made by the Commission and on the evidence intended to support those objections is capable of producing binding legal effects of such a nature as to affect the applicant's interests only if and when the Commission has adopted a decision finding the existence of the infringement of which it accuses the applicant. In reality, until a final decision has been adopted, the Commission may, in view, for instance, of the written and oral observations of the applicant, abandon some or even all of the objections initially raised against it. It may also rectify any procedural irregularities by subsequently granting access to the file after initially declining to do so, so that the applicant has a further opportunity to express its views, in full knowledge of the facts, on the objections notified to it (*Reisebank* order, paragraph 48, and *Commerzbank* order, paragraph 38).
- 58 In the same way, in the present case, it is perfectly possible that, following Intel's reply to the SSO and the hearing, the Commission will consider it necessary to request the production of all or some AMD documents not yet obtained and grant Intel additional time to submit its observations, or even abandon the procedure in respect of Intel. As the Commission has stated in the observations it submitted in the context of these interlocutory proceedings, the decision of 6 October 2008 does not definitively exclude the possibility that AMD will be asked to produce other documents, given that the Commission stated in that decision that it agreed to order the production of AMD documents, to the extent that those documents were specified in a way that allowed them to be precisely identified. Similarly, in its letters of 7 and 13 October 2008, the Hearing Officer did not exclude the possibility of a further extension of the deadline, but requested that Intel provide reasons why this would be necessary.
- 59 The situation in the present case is thus very different from that which gave rise to the *Akzo* and *Postsparkasse* judgments. Whereas the contested decisions in the main action would harm Intel's rights only if the Commission were definitively to adopt a decision at the end of the investigation procedure finding that Article 82 EC had been infringed, in the *Akzo* and *Postsparkasse* judgments, the Court of First Instance expressly based the admissibility of the actions on the finding that the Commission decisions rejecting a request for the protection of a given document on grounds of confidentiality had the effect of withholding from the undertakings that had made the request for confidentiality the benefit of the protection provided by Community law and were definitive in nature and independent of the final decision establishing an infringement of the rules on competition (*Postsparkasse* judgment, paragraph 66, and *Akzo* judgment, paragraph 46).

- 60 Therefore, those judgments concern the particular case of decisions rejecting requests for the confidential treatment of documents – either pursuant to the principle of respect for business secrets laid down both in Regulation No 1/2003 and in Article 287 EC, or pursuant to the confidentiality of lawyer-client communication –, having regard to the irreversible nature of the infringement of the protected right resulting from it (see, to that effect, Case T-219/01 *Commerzbank v Commission* [2003] ECR p. II-2843, paragraphs 69 to 72). The confidential nature of a document is, by its very nature, irrevocably changed when it is disclosed to an unauthorised person, so that the decision which leads to that disclosure produces independent, immediate and irreversible legal effects in respect of the person who has a right to be protected by the confidentiality of the document at issue.
- 61 Moreover, it must be noted that the Court of First Instance has already underlined that specific nature, by holding that decisions on the disclosure of certain documents to third parties were different from decisions refusing access to the file in so far as they were independent from the decision to be taken on conclusion of the procedure initiated by the Commission and, for that very reason, sufficiently severable from that final decision (*Cimenteries CBR* judgment, paragraphs 42 and 43).
- 62 Therefore, as regards decisions on the disclosure of certain documents to third parties, the opportunity which the undertaking had to bring an action against a final decision establishing that the rules of competition had been infringed was not of such a nature as to ensure an adequate degree of protection of its rights. On the one hand, it was possible that the administrative procedure would not result in a decision finding that an infringement had been committed. On the other hand, if such a decision were made, an action brought against it would not in any event provide the applicant with the means of preventing the irreversible consequences which would result from improper disclosure of certain of its documents (*Postsparkasse* judgment, paragraph 66, and *Akzo* judgment, paragraph 47).
- 63 In the present case, on the contrary, it is clear that, if, for the sake of argument, the Court were to recognise, in proceedings against a decision bringing to a close the procedure initiated against the applicant, that the Commission had failed to fulfil its obligation to examine the case with diligence and impartiality in so far as it failed to request the submission of exculpatory documents and to extend the deadline for the reply to the SSO, and were therefore to annul the Commission's final decision on the ground of infringement of the rights of the defence, the entire procedure would be vitiated by illegality. In such circumstances, the Commission would be obliged either to abandon all proceedings against the applicant, or to resume the procedure, giving the applicant a further opportunity to present its views on the objections made against it in the light of all the new information to which it should have been granted access. In the latter situation, a properly conducted *inter-partes* procedure would be sufficient to restore fully the rights and privileges of the applicant (see, by analogy, *Cimenteries CBR* judgment, paragraph 47, *Commerzbank* order, paragraph 39, and *Reisebank* order, paragraph 49).
- 64 Accordingly, it must be held that the reasoning in the *Commerzbank* order and the *Reisebank* order likewise applies, by analogy, to the contested decisions in the main action.
- 65 None of the applicant's arguments can cast doubt on that finding.
- 66 As regards, first, the argument that the contested decisions force Intel to choose between asserting its rights of defence by refusing to reply to the SSO and submitting a reply to the SSO based on an incomplete file, it suffices to state that, in accordance with the *Commerzbank* order and the *Reisebank* order, Intel's legal position is neither immediately nor irreversibly affected, since any infringement of Intel's rights would produce effects only upon the adoption of a final decision, against which an action for annulment lies to restore Intel's rights. As for the possibility that Intel might not serve a reply to the SSO within the time-limit imposed, it must be noted that Intel would merely be exercising its right to choose, of which it would have to bear the foreseeable consequences.

- 67 As regards, second, the claim that Intel suffers harm due to the contested decisions in the main action because it is denied the opportunity to submit arguments that could result in the Commission ending its investigation immediately, thus sparing Intel costs that it will not be able to recover, it must be held that that is mere conjecture and unsubstantiated by evidence. On the contrary, the above shows (see paragraph 58 above) that the applicant may still submit arguments to demonstrate that there is a need to procure the documents at issue. In addition, if it were apparent that any final decision was vitiated by an infringement of its rights of the defence and the Commission's obligation to examine all relevant information carefully and impartially, Intel could obtain the annulment of the decision and, if the conditions were fulfilled, obtain damages for the harm suffered as a result of the Commission's unlawful conduct. Finally, the situation in the present case is in no way different, in this respect, from the cases that led to the *Cimenteries CBR* judgment and the *Reisebank* and *Commerzbank* orders, in which it was held that decisions refusing access to the file constituted preparatory procedural acts adopted as part of the prior administrative procedure which, as such, could not be the subject of an action.
- 68 As regards, third, the arguments alleging, first, that the adoption of a final decision establishing an infringement would influence investigations by other national competition authorities, in particular in Asia, cause the applicant commercial harm due to a change in market conditions and harm its reputation and, second, that Intel would encounter difficulties in collecting evidence at the end of the action brought against the final decision and that there is a need to avoid drawing out the procedure, it is clear that those arguments concern the effects of a possible decision establishing an infringement, and not the effects of the contested decisions in the main action.
- 69 Rather than showing that those decisions affect the legal situation of Intel in a manner that is immediate and irreversible, those arguments instead further illustrate the finding that their effect depends on any final decision that the Commission will adopt at the end of the prior administrative procedure. In that case, effective legal remedies will be available to Intel, in particular proceedings for interim measures in respect of that final decision, in order to assert its rights and, where necessary, have recourse to interim measures to stop it causing any harm. Moreover, even constructing Intel's written submissions, for the sake of argument, as claiming that the Commission's intermediate procedural decisions risk having an impact on the way in which the other competition authorities will conduct their ongoing investigations, claim which is not formulated as such by the applicant, suffice it to state that, in addition to it being hypothetical, such circumstance would not concern the capacity of such decisions to have a legal effect, but their potential factual consequences. Furthermore, should any final infringement decision be adopted by the Commission in this matter, and subsequently be annulled by the Court of First Instance for the reasons mentioned at paragraph 67 above, it would be a possibility open to the applicant to rely on this development before the relevant non-EC jurisdictions, to challenge any decision adopted by the applicable competition authorities allegedly influenced by the above mentioned Commission decisions.
- 70 With respect to the claim that it would be more difficult to gather evidence because of the length of the proceedings, it must be pointed out, first, that Intel has failed to adduce any concrete evidence showing that, notwithstanding the advanced stage of the administrative procedure, the Commission is unlikely to adopt a final decision within a reasonably short delay and, second, that under the Rules of Procedure the Court of First Instance can request the production of any document that it considers to be relevant, including from third parties, and that it may do so also in the event of any proceedings for interim measures brought in connection with an action for the annulment of that decision. Finally, Intel's arguments concerning the likelihood of having to interview witnesses once AMD's documents have been obtained, quite apart from the fact that they do not relate to the legal effects of the contested decisions in the main action, are merely unsubstantiated factual allegations.
- 71 As regards, fourth, the argument concerning the case-law of the Court of Justice relating to decisions to open the formal investigation procedure for State aid under Article 88(2) EC, it must be recalled that that case-law states precisely that whether a measure can be contested

depends on whether it is a mere preparatory measure whose effect depends on the adoption of another measure or a decision which in itself produces independent legal effects.

- 72 The Court of Justice held that only a decision to open the formal investigation procedure classifying a measure as new aid entails independent legal effects, as opposed to a decision classifying a measure as existing aid. In respect of a decision to open the formal investigation procedure classifying the measure being implemented as new aid, the Court has stressed that such a decision expresses the Commission's position that the aid at issue has been unlawfully implemented, in disregard of the suspensory effect, in relation to new aid, which follows from the last sentence of Article 88(3) EC (Case C-400/99 *Italy v Commission* [2001] ECR I-7303, paragraphs 56 to 58).
- 73 Therefore, according to the Court of Justice, that decision, which can also be invoked before a national court, necessarily alters the legal position of the measure under consideration, as well as that of the undertakings which are its beneficiaries, particularly as regards its implementation, which must, as a rule, be suspended, because of the classification as new aid, and that at least until the procedure has been closed (*Italy v Commission*, paragraph 59, and Cases T-195/01 and T-207/01 *Government of Gibraltar v Commission* [2001] ECR II-2309, paragraphs 82 and 83).
- 74 The contested decisions in the main action clearly do not produce similar effects. In contrast to decisions to open the formal investigation procedure classifying the measure being implemented as new aid, which implies that implementation of that aid must be suspended until the procedure has come to an end, regardless of the outcome of that procedure, the contested decisions, in their own right, have no effect whatsoever on the applicant's legal position as long as no final decision unfavourable to the applicant has been adopted.
- 75 It follows from the foregoing that the contested decisions in the main action, by which the Commission refuses to request from AMD all the documents appearing on the list of AMD documents and to consider that the period for a reply to the SSO will commence only when those documents are produced, are not capable of producing legal effects of such a nature as to affect its interests immediately, before any decision finding an infringement of Article 82 EC and possibly imposing a penalty on it is adopted (see, to that effect, *Cimenteries CBR* judgment, paragraph 48; *Reisebank* order, paragraph 51; and *Commerzbank* order, paragraph 41).
- 76 However, Intel submits that, in accordance with the case-law, an action for annulment brought against a measure which does not produce definitive legal effects may be declared admissible in exceptional circumstances, where the contested measure lacks even the appearance of legality.
- 77 In this respect, without it being necessary to rule on whether, in exceptional circumstances, actions for annulment of measures that lack even the appearance of legality must be declared admissible, it must be stated that, in any event, that is obviously not the case here (see, to that effect, Case C-131/03 P *Reynolds Tobacco and Others v Commission* [2006] ECR I-7795, paragraph 93).
- 78 In order to establish that the contested decisions in the main action lack even the appearance of legality, Intel claims, in essence, that the Commission infringed its obligation to be diligent and impartial, in so far as it cited, in the SSO, a large number of Intel documents from the case pending before the United States District Court for the District of Delaware, described as incriminating, but disregarded AMD documents from that case which would be exculpatory, and refused to request the production of those documents.
- 79 The file shows that, first, the Commission issued a request for further information on 21 May 2008, requesting AMD inter alia to produce all the documents mentioned by Intel in its preliminary pretrial statement, which, according to Intel's description, is a document designed to focus, frame and define the boundaries of the deposition discovery process. Next, the Commission did not reject Intel's request that it procure from AMD the documents on the list of

AMD documents in its entirety, but granted that request in so far as those documents were specified in a way that allowed them to be precisely identified, and consequently ordered AMD to submit seven documents. Finally, the Hearing Officer, by letter of 13 October 2008, asked Intel to let her know, by the next day, whether the seven documents which Intel received on 8 October 2008 required an extension of the deadline for replying to the SSO, adding that although, on the basis of information available to her, an extension of that deadline was not justified, she would nevertheless examine that question in the light of Intel's comments on the need for such an extension.

- 80 Therefore, there is no basis for a finding that the Commission's conduct was so negligent and biased that the contested decisions in the main action could be considered to be lacking even the appearance of legality and accordingly form the subject of an action for annulment despite their preparatory nature, even if it were acknowledged that such a possibility exists in principle. In this respect, it must moreover be noted that the applicant itself admits in its observations in response to the Commission's observations, in a manner that is contradictory, that the question whether that conduct was manifestly unlawful cannot be summarily assessed since it is inextricably linked to the facts of the case.
- 81 It follows from the foregoing that the first head of claim in the main action is *prima facie* manifestly inadmissible and that the applicant has not been able to provide evidence calling in question that finding.
- 82 For the sake of completeness, and taking into account the foregoing, it must be held that the condition of urgency laid down in Article 104(2) of the Rules of Procedure is not fulfilled in the present case.
- 83 In this respect, it must be recalled that it is settled case-law that the urgency of an application for interim measures must be assessed in relation to the necessity for an interim order in order to prevent serious and irreparable damage to the party applying for those measures. It is for that party to prove that it cannot wait for the outcome of the main proceedings without suffering damage of that kind (see order of the President of the Court of First Instance in Case T-151/01 R *Duales System Deutschland v Commission* [2001] ECR II-3295, paragraph 187, and the case-law cited). Consequently, the application for suspension of operation cannot be upheld where the damage alleged is entirely hypothetical and based on the unpredictable probability of future and uncertain events (orders of the President of the Court of First Instance in Case T-239/94 R *EISA v Commission* [1994] ECR II-703, paragraph 19, and in Case T-322/94 R *Union Carbide v Commission* [1994] ECR II-1159, paragraph 31).
- 84 In the present case, the harm, described at paragraph 68 above, which the applicant claims it wants to avoid in the first place – namely, in essence, the various consequences of a final decision under Article 82 EC taken in breach of its rights of defence – depends on a future and hypothetical event, namely, precisely, the adoption of a final Commission decision that is unfavourable to the applicant.
- 85 The adoption of such a decision – prior to the reply to the SSO and the hearing –, is not certain either in respect of its content or even its outcome. But what is more, any harmful consequences would not be irreparable, since the applicant would be able to apply for that decision to be annulled or suspended. The applicant could, where appropriate, submit as part of an application for suspension of the operation of the final decision that there is a risk of it suffering the damage which it has prematurely – and, moreover, in a manner that was not sufficiently substantiated – asserted in the context of the present proceedings.
- 86 Second, the applicant submits that it could suffer harm because, without the interim measures it has requested, given that the deadline for submission of the reply to the SSO was 17 October 2008, the Commission might consider that Intel no longer wishes to exercise its right of defence and that it may accordingly take a decision establishing that there has been an infringement.

That harm would be irreparable since the applicant would thus lose the right to respond to the SSO.

- 87 In this respect, it suffices to note that the applicant was in no way prevented – either by the contested decisions in the main action or by bringing its action for annulment and this application for interim measures – from preparing and submitting, in good time, its reply to the SSO on the basis of the information available to it, at least as a precaution, and that all the more so since the Hearing Officer had granted an extension of the deadline by four weeks.
- 88 Accordingly, and in the light of settled case-law, which states that urgency in ordering an interim measure must result from the effects produced by the contested measure and not from a lack of diligence on the part of the applicant (see order of the President of the Court of First Instance in Case T-350/00 R *Free Trade Foods v Commission* [2001] ECR II-493, paragraph 59 and the case-law cited), it is obvious that the harm that the applicant might suffer as a result of its own choice not to submit a reply to the SSO within the time-limit imposed by the Commission cannot justify allowing its application for interim measures.
- 89 For the same reasons, it is not appropriate for the judge hearing the application for interim measures to order, exceptionally, on the basis of the broad powers entrusted to him by article 243 EC, and taking into account the particular circumstances of the case at hand, an extension of the deadline for the reply to the SSO until the 30th day from the date of the present order. However, in order to have access to all the information it needs to properly conduct the administrative procedure, it is a possibility available to the Commission to grant such an extension in order to allow Intel to serve a reply to the SSO, even though Intel has not complied with the time-limit initially laid down, or to take into account written submissions in response to the SSO received after that time-limit.
- 90 It follows from all of the foregoing that the present application for interim measures must be dismissed, without there being any need to rule on AMD's application to intervene and the Commission's application for confidential treatment of certain information. Likewise, there is no need to rule on the Commission's application to exclude one of the signatories of the present application for interim measures from the proceedings.

On those grounds,

THE PRESIDENT OF THE COURT OF FIRST INSTANCE

hereby orders:

- 1. The application for interim relief is dismissed.**
- 2. The costs are reserved.**

Luxembourg, 27 January 2009.

E. Coulon

M. Jaeger

Registrar

President

* Language of the case: English.