Reports of Cases

Case T-286/09
(publication by extracts)

Intel Corp.
v
European Commission

(Competition — Abuse of dominant position — Microprocessors market — Decision finding an infringement of Article 82 EC and Article 54 of the EEA Agreement — Loyalty rebates — 'Naked' restrictions — Classification as abuse — As-efficient-competitor analysis — Commission's international jurisdiction — Obligation on the Commission to investigate — Limits — Rights of the defence — Principle of sound administration — Overall strategy — Fines — Single and continuous infringement — 2006 Guidelines on the method of setting fines)

Summary — Judgment of the General Court (Seventh Chamber, extended composition), 12 June 2014

1. *Judicial proceedings — Application initiating proceedings — Formal requirements — Documents annexed to the application — Volume of a document — Partial production by extracts — Lawfulness — Requirement to lodge a complete document at the registry — Scope — Failure to comply — Possibility of regularisation*

   (Statute of the Court of Justice, Art. 21; Rules of Procedure of the General Court, Art. 43(5))

2. *Fundamental rights — Presumption of innocence — Procedures in competition matters — Applicability*

   (Art. 6(2) EU; Art. 82 EC; Charter of Fundamental Rights of the European Union, Arts 47 and 48(1))

3. *Competition — Administrative procedure — Commission decision finding an infringement — Means of proof — Reliance on a body of evidence — Applicability to the procedure concerning abuse of a dominant position*

   (Arts 81 EC and 82 EC; Council Regulation No 1/2003)

4. *Competition — Administrative procedure — Commission decision finding an infringement — Means of proof — Reliance on a body of evidence — Degree of evidential value necessary as regards items of evidence viewed in isolation — Evidential obligations of undertakings disputing the reality of the infringement*

   (Arts 81 EC and 82 EC; Council Regulation No 1/2003, Art. 2)

5. *Dominant position — Grant of a rebate by an undertaking in a dominant position — Three categories of rebate — Quantity rebate — Exclusivity or fidelity rebates — Rebates with a partially fidelity-building effect — Whether abusive — Criteria for assessment*

   (Art. 82 EC)

6. *Dominant position — Abuse — Exclusivity or fidelity rebates — Whether that system of rebates abusive by nature — Likelihood of restricting competition and foreclosure effect — Role of unavoidable commercial partner — Assessment — No obligation to analyse the circumstances of the case — Irrelevant circumstances*

   (Art. 82 EC)

7. *Dominant position — Abuse — Exclusivity or fidelity rebates — Whether that system of rebates abusive by nature — Likelihood of restricting competition and foreclosure effect — Analysis of an as-efficient competitor*

   (Art. 82 EC)

8. *Dominant position — Abuse — Undisguised restrictions — Grant of payments in consideration of restrictions imposed on the marketing of a product of a competitor — Abusive character by subject-matter — Likelihood of restricting competition*

   (Art. 82 EC)

9. *Competition — Union rules — Territorial scope — Competence of the Commission — Conformity with public international law — Implementation or qualified effects of abusive practices in the EEA — Alternative methods — Criterion of the immediate, substantial and foreseeable effect — Assessment — Implementation of the said practices taken into account by the customer of the undertaking in a dominant position — Lawfulness*

   (Art. 82 EC)

10. *Competition — Administrative procedure — Statement of objections — Time-limit laid down for the lodging of written observations — Late request for a hearing — Claim barred by lapse of time — No obligation to grant a hearing*

    (Council Regulation No 1/2003, Arts 27(1) and (2), and 33(1)(c); Commission Regulation No 773/2004, Arts 10(2), and 12)

11. *Competition — Administrative procedure — Observance of the rights of the defence — Access to the file — Purpose — Documents of use in the defence — Assessment by the Commission alone — Not permissible — Obligation to make the whole file accessible — Scope in relation to internal or confidential documents*

    (Council Regulation No 1/2003, Art. 27(2); Commission Regulation No 773/2004, Art. 15(2))

12. *Competition — Administrative procedure — Principle of sound administration — Obligation of diligence and impartiality — Obligation on the Commission to obtain certain documents at the request of an undertaking concerned by an investigation — Conditions*

    (Charter of Fundamental Rights of the European Union, Art. 41(1); Council Regulation No 1/2003; Commission Regulation No 773/2004)

13. *Dominant position — Abuse — Exclusivity or fidelity rebate — No formal condition of exclusivity — Means of proof — Internal projections of a customer — Lawfulness — Condition*

(Art. 82 EC; Council Regulation No 1/2003, Art. 2)

14. *Competition — Administrative procedure — Powers of the Commission — Power to gather statements — Statements relating to the subject-matter of an investigation — Distinction between formal interrogation and informal conversations — Consequences — Obligation to record statements received during meetings or telephone conversations — Conditions*

(Charter of Fundamental Rights of the European Union, Art. 41; Council Regulation No 1/2003, Art. 19(1); Commission Regulation No 773/2004, Art. 3(1) and (3))

15. *Competition — Administrative procedure — Commission decision finding an infringement — Abuse of dominant position — Means of proof — Statement by a third undertaking, customer of an undertaking in a dominant position — Probative value*

(Arts 81 EC and 82 EC; Council Regulation No 1/2003, Art. 2)

16. *Competition — Fines — Several infringements — Imposition of a single fine — Lawfulness — No obligation on the Commission to take account individually of the various abusive elements*

(Council Regulation No 1/2003, Art. 23(2); Commission Notice 2006/C 210/02)

17. *Competition — Fines — Amount — Determination — Legal context — Article 23(2) and (3) of Regulation No 1/2003 — Discretion conferred on the Commission by that article — Introduction by the Commission of new guidelines for the calculation of fines — No infringement of the principle that penalties should have a legal basis or of the principle of legal certainty*

(Charter of Fundamental Rights of the European Union, Art. 49(1); Council Regulation No 1/2003, Art. 23(2) and (3); Commission Notice 2006/C 210/02)

18. *Competition — Union rules — Infringements — Committed intentionally or negligently — Concept — Undertaking in a dominant position implementing abusive practices consisting in the grant of exclusivity rebates and undisguised restrictions — Included*

(Art. 82 EC; Council Regulation No 1/2003, Art. 23(2))

19. *EU law — Principles — Right to effective judicial protection — Judicial review of Commission decisions in competition matters — Review of legality and unlimited jurisdiction, in law and in fact — Infringement — None*

(Arts 261 TFEU and 263 TFEU; Charter of Fundamental Rights of the European Union, Arts 47 and 52(3); Council Regulation No 1/2003, Art. 31)

20. *Competition — Fines — Amount — Determination — Principle of equal treatment — Commission's decision-making practice — Indicative nature*

(Council Regulation No 1/2003, Art. 23(2) and (3))

21. Competition — Fines — Amount — Determination — Criteria — Gravity of the infringement — No binding or exhaustive list of criteria — Commission's margin of discretion — Account taken of the actual impact of an infringement on the market — Scope

(Council Regulation No 1/2003, Art. 23(2) and (3); Commission Notice 2006/C 210/02, point 22)

1. Under Article 43(5) of the Rules of Procedure of the General Court, where in view of the length of a document only extracts from it are annexed to the pleading, the whole document or a full copy of it shall be lodged at the Registry.

That article does not require that all the other documents to which a document annexed to a pleading refers also be lodged at the Registry.

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

(see paras 53, 55, 57)

2. See the text of the decision.

(see paras 62, 63)

3. In a procedure for infringements of the competition rules, although the Commission must produce sufficiently precise and consistent evidence to support the firm conviction that the alleged infringement took place, it is not necessary for every item of evidence produced by the Commission to satisfy those criteria in relation to every aspect of the infringement. It is sufficient if the body of evidence relied on by the institution, viewed as a whole, meets that requirement, as held by the case-law concerning the implementation of Article 81 EC. That principle also applies in cases concerning the implementation of Article 82 EC.

(see para. 64)

4. See the text of the decision.

(see paras 65-67, 542, 1525, 1528, 1529, 1547)

5. In competition matters, an undertaking which is in a dominant position on a market and ties purchasers — even if it does so at their request — by an obligation or promise on their part to obtain all or most of their requirements exclusively from that undertaking abuses its dominant position within the meaning of Article 82 EC, whether the obligation in question is stipulated without further qualification or whether it is undertaken in consideration of the grant of a rebate. The same applies where that undertaking, without tying the purchasers by a formal obligation, applies, either under the terms of agreements concluded with these purchasers or unilaterally, a system of loyalty rebates, that is to say, discounts conditional on the customer's obtaining — whether the quantity of its purchases is large or small — all or most of its requirements from the undertaking in a dominant position.

As to whether the grant of a rebate by an undertaking in a dominant position can be characterised as abusive, a distinction should be drawn between three categories of rebates.

First, quantity rebate systems ('quantity rebates') linked solely to the volume of purchases made from an undertaking occupying a dominant position are generally considered not to have the foreclosure effect prohibited by Article 82 EC. If increasing the quantity supplied results in lower costs for the

supplier, the latter is entitled to pass on that reduction to the customer in the form of a more favourable tariff. Quantity rebates are therefore deemed to reflect gains in efficiency and economies of scale made by the undertaking in a dominant position.

Second, there are rebates the grant of which is conditional on the customer's obtaining all or most of its requirements from the undertaking in a dominant position. These are 'fidelity rebates within the meaning of *Hoffmann-La Roche*', otherwise known as 'exclusivity rebates'. That expression is not limited to rebates linked to an exclusive supply condition, but includes rebates which are conditional on the customer's obtaining most of its requirements from the undertaking in a dominant position. Such exclusivity rebates, when applied by an undertaking in a dominant position, are incompatible with the objective of undistorted competition within the common market, because they are not based — save in exceptional circumstances — on an economic transaction which justifies this burden or benefit but are designed to remove or restrict the purchaser's freedom to choose his sources of supply and to deny other producers access to the market. Such rebates are designed, through the grant of a financial advantage, to prevent customers from obtaining their supplies from competing producers.

Third, there are other rebate systems where the grant of a financial incentive is not directly linked to a condition of exclusive or quasi-exclusive supply from the undertaking in a dominant position, but where the mechanism for granting the rebate may also have a fidelity-building effect. That category of rebates includes inter alia rebate systems depending on the attainment of individual sales objectives which do not constitute exclusivity rebates, since those systems do not contain any obligation to obtain all or a given proportion of supplies from the dominant undertaking. In examining whether the application of such a rebate constitutes an abuse of dominant position, it is necessary to consider all the circumstances, particularly the criteria and rules governing the grant of the rebate, and to investigate whether, in providing an advantage not based on any economic service justifying it, that rebate tends to remove or restrict the buyer's freedom to choose his sources of supply, to bar competitors from access to the market, or to strengthen the dominant position by distorting competition.

(see paras 72-78)

6. In competition matters, the question whether an exclusivity rebate can be categorised as abusive does not depend on an analysis of the circumstances of the case aimed at establishing a potential foreclosure effect.

The case-law thus shows that it is only in the case of rebates falling within the third category that it is necessary to assess all the circumstances, and not in the case of exclusivity rebates falling within the second category. That approach can be justified by the fact that exclusivity rebates granted by an undertaking in a dominant position are by their very nature capable of restricting competition.

The capability of tying customers to the undertaking in a dominant position is inherent in exclusivity rebates. The grant by an undertaking in a dominant position of a rebate in consideration of a customer's obtaining all or most of its requirements implies that the undertaking in a dominant position grants a financial advantage designed to prevent customers from obtaining their supplies from competing producers. It is therefore not necessary to examine the circumstances of the case in order to determine whether that rebate is designed to prevent customers from obtaining their supplies from competitors. A foreclosure effect is produced not only where competitors' access to the market is made impossible but also where it is made more difficult. A financial incentive granted by an undertaking in a dominant position in order to induce a customer not to obtain, in respect of the part of its requirements concerned by the exclusivity condition, supplies from its competitors is by its very nature capable of making access to the market more difficult for those competitors. The existence of such an incentive does not depend on whether the rebate is actually reduced or annulled if the requirement of exclusivity on which it is conditional is not satisfied. It is sufficient, in that regard, that

the dominant undertaking gives the impression to the customer that that would be the case. What counts are the circumstances which the customer could expect when making its orders — on the basis of what it was told by the dominant undertaking — and not the actual reaction of that undertaking to the customer's decision to change supplier.

Moreover, it is inherent in a strong dominant position, for a substantial part of the demand, there are no proper substitutes for the product supplied by the dominant undertaking. The supplier in a dominant position is thus, to a large extent, an unavoidable trading partner. It follows from the position of unavoidable trading partner that customers will in any event obtain part of their requirements from the undertaking in a dominant position ('the non-contestable share'). The competitor of an undertaking in a dominant position is not therefore in a position to compete for the full supply of a customer, but only for the portion of the demand exceeding the non-contestable share ('the contestable share'). The contestable share is thus the portion of a customer's requirements which can realistically be switched to a competitor of the undertaking in a dominant position in any given period. The grant of exclusivity rebates by an undertaking in a dominant position makes it more difficult for a competitor to supply its own goods to customers of that dominant undertaking. If a customer of the undertaking in a dominant position obtains supplies from a competitor by failing to comply with the exclusivity or quasi-exclusivity condition, it risks losing not only the rebates for the units that it switched to that competitor, but the entire exclusivity rebate.

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

When such a trading instrument exists, it is unnecessary to undertake an analysis of the actual effects of the rebates on competition or to prove a causal link between the practices complained of and actual effects on the market.

Finally, the possible smallness of the pArts of the market which are concerned by the exclusivity rebates granted by an undertaking in a dominant position is not capable of excluding their illegality, since an 'appreciable effect' criterion or a *de minimis* threshold is not taken into account for the purposes of applying Article 82 EC. Furthermore, the customers on the foreclosed part of the market should have the opportunity to benefit from whatever degree of competition is possible on the market and competitors should be able to compete on the merits for the entire market and not just for a part of. A dominant undertaking may not therefore justify the grant of exclusivity rebates to certain customers by the fact that competitors remain free to supply other customers. Similarly, an undertaking in a dominant position may not justify the grant of a rebate subject to a quasi-exclusive purchase condition by a customer in a certain segment of a market by the fact that that customer remains free to obtain supplies from competitors in other segments.

(see paras 80, 84-86, 88, 91-93, 103, 104, 116, 117, 132, 527)

7. The economic analysis concerning the 'as-efficient-competitor test' or 'the AEC test' carried out in the contested decision takes as a starting point the circumstance that an as-efficient competitor, which seeks to obtain the contestable share of the orders hitherto satisfied by a dominant undertaking which is an unavoidable trading partner, must compensate the customer for the exclusivity rebate that it

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

Even if an assessment of the circumstances of the case were necessary to demonstrate the potential anti-competitive effects of the exclusivity rebates, it would still not be necessary to demonstrate those effects by means of an AEC test. An AEC test only makes it possible to verify the hypothesis that access to the market has been made impossible and not to rule out the possibility that it has been made more difficult. It is true that a negative result means that it is economically impossible for an as-efficient competitor to secure the contestable share of a customer's demand. In order to offer a customer compensation for the loss of the exclusivity rebate, that competitor would be forced to sell its products at a price which would not allow it even to cover its costs. However, a positive result means only that an as-efficient competitor is able to cover its costs. That does not however mean that there is no foreclosure effect. The mechanism of the exclusivity rebates is still capable of making access to the market more difficult for competitors of the undertaking in a dominant position, even if that access is not economically impossible.

(see paras 141, 146, 150)

8. In competition matters, practices called 'naked restrictions' consisting in the conditional granting of payments to customers of the undertaking in a dominant position in order that they delay, cancel or in some other way restrict the marketing of a competitor's product are likely to make market access more difficult for that competitor and undermine the structure of competition. The implementation of each of those practices amounts to an abuse of a dominant position within the meaning of Article 82 EC.

First of all, a foreclosure effect occurs not only where access to the market is made impossible for competitors, but also where that access is made more difficult. For the purposes of applying Article 82 EC, showing an anti-competitive object and an anti-competitive effect may, in some cases, be one and the same thing. If it is shown that the object pursued by the conduct of an undertaking in a dominant position is to restrict competition, that conduct will also be liable to have such an effect. An undertaking in a dominant position pursues an anti-competitive objective where, in a targeted manner, it prevents the marketing of products equipped with a product of a specific competitor, since the only object it can have in doing that is to harm that competitor.

Finally, an undertaking in a dominant position has a special responsibility not to impair, by conduct falling outside the scope of competition on the merits, genuine undistorted competition in the common market. The grant of payments to customers in consideration of restrictions on the marketing of products equipped with a product of a specific competitor clearly falls outside the scope of competition on the merits.

Characterisation of a naked restriction as abusive depends solely on the capability to restrict competition, and that characterisation does not therefore require proof of an actual effect on the market or of a causal link.

(see paras 198, 201-207, 212)

9. In competition matters, for the purposes of establishing that the Commission's jurisdiction is justified under the rules of public international law, it is sufficient to demonstrate either the effects qualified as abusive practices (namely immediate, substantial and foreseeable) or that they have been implemented in the European Economic Area (EEA). They are thus alternative and not cumulative approaches.

The Commission is not obliged to establish the existence of actual effects in order to justify its jurisdiction under public international law. The Commission cannot be expected to adopt a passive position where there is a threat to the effective competition structure in the common market and may therefore intervene also in cases in which the threat did not materialise or has not yet materialised.

In order to examine whether the effects are substantial, the various instances of conduct forming part of a single and continuous infringement must not be considered in isolation. It is on the contrary sufficient that the single infringement as a whole be capable of having substantial effects. Undertakings cannot be allowed to escape application of the competition rules by combining several practices pursuing the same objective, when each practice viewed in isolation is not liable to produce a substantial effect in the European Union but the practices, taken together, are liable to produce such an effect.

Moreover, changes to the structure of the market must also be taken into consideration when it comes to determining whether there are substantial effects within the EEA. In that context, not only the elimination of a competitor is likely to have repercussions on the structure of competition in the internal market, but conduct likely to weaken the only significant competitor of the undertaking in a dominant position at world level is also likely to have such effects. Therefore, the potential effects of the conduct of the undertaking in a dominant position, consisting in barring at world level access by its competitor to the major sales channels, must be regarded as substantial by reason of the potential effects on the structure of effective competition in the internal market.

Moreover, the implementation of the practices in question in the European Union is sufficient to justify the Commission's jurisdiction under public international law. Where the abuse of a dominant position consists in the grant of a financial incentive in order to encourage a customer of the undertaking in a dominant position to postpone the launch, worldwide, of a certain product equipped with a product of the competitor of that undertaking and where that condition to which the payments granted were subject was thus intended to be implemented by its customer worldwide, including in the EEA, it would be artificial to confine oneself to taking into consideration implementation of the practices in question by the undertaking in a dominant position itself. On the contrary, account should also be taken of their implementation by its customer. In that context, the customer's abstaining from selling a certain product in the EEA for a certain time must be regarded as an undisguised implementation of the restriction.

(see paras 236, 243, 244, 251, 252, 268, 270, 273-275, 301, 305-307)

10. In the context of an administrative proceeding in competition matters in accordance with Article 12 of Regulation No 773/2004 relating to the conduct of proceedings by the Commission pursuant to Articles 81 EC and 82 EC, an undertaking to which the Commission has sent a statement of objections is time-barred from its right to a hearing where it does not request the same within the time-limit specified for the submission of its written observations.

(see paras 323-326)

11. See the text of the decision.

(see paras 350-357, 623)

12. In competition matters, it is for the Commission to decide how it wishes to conduct the investigation in a competition case and to decide what documents it must collect in order to have a sufficiently complete picture of the case. It is not therefore appropriate to impose on the Commission an obligation to obtain as many documents as possible in order to ensure that it obtain all potentially exculpatory evidence.

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

In certain circumstances, there may be an obligation on the Commission to obtain certain documents at the request of an undertaking which is the subject of an investigation. Such an obligation on the Commission must however be limited to exceptional circumstances.

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

An obligation on the Commission to obtain certain documents at the request of an undertaking must therefore be subject, in addition to the condition of a request to that effect during the administrative procedure, at least to the four following cumulative conditions.

Such an obligation is, first of all, subject to the condition that it in fact be impossible for the undertaking concerned to obtain itself the documents in question or to disclose them to the Commission. It is therefore for the undertaking concerned to establish that it took all steps to obtain the documents at issue and/or obtain permission to use them in the Commission's investigation.

Secondly, it is for the undertaking concerned to identify the documents that it requests the Commission to obtain as precisely as it can, which presupposes cooperation by that undertaking.

Thirdly, an obligation for the Commission to obtain certain documents at the request of an undertaking which is the subject of an investigation is conditional upon the relevant documents' probably being of considerable importance for the defence of the undertaking concerned. The Commission has a margin of discretion in deciding whether the significance of alleged exculpatory evidence justifies its obtaining that evidence and it may, for example, reject a request on the ground that the potentially exculpatory material concerns issues which are not central to the findings necessary to establish an infringement.

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

(see paras 360-362, 371, 373-378, 380, 382)

13. In competition matters, in a system of exclusivity rebates and in the absence of a formal exclusivity requirement, the Commission does not infringe the principle of legal certainty where it takes account of the projections of a customer of the dominant undertaking in order to establish the said undertaking's own conduct, provided those projections are not unreasonable.

(see paras 521-523, 525)

14. In the context of an administrative proceeding in competition matters. Article 19(1) of Regulation No 1/2003 provides that the Commission may interview any natural or legal person who consents to be interviewed for the purpose of collecting information relating to the subject-matter of an investigation. Article 3 of Regulation No 773/2004, relating to the conduct of proceedings by the Commission pursuant to Articles 81 EC and 82 EC makes questioning on the basis of that provision subject to certain formalities. In accordance with Article 3(1) of Regulation No 773/2004, makes questioning on the basis of that provision subject to certain formalities.

However, the scope of those provisions does not extend to all interviews relating to the subject-matter of the Commission's investigation. A distinction must be made between formal questioning made by the Commission in accordance with those provisions and informal interviews.

The Commission enjoys discretionary power in deciding whether to make an interview subject to the formal requirements of Article 3 of Regulation No 773/2004. Thus, those provisions do not apply to any interview relating to the subject-matter of an investigation, but only to the cases for which the Commission pursues the objective of collecting both incriminating and exculpatory information, on which it will be able to rely as evidence in its decision bringing a given investigation to an end.

If the Commission intends to use in its decision inculpatory evidence provided to it during an informal interview, it must make it available to the undertakings to which the statement of objections was addressed, and where necessary, it must create a written document to be placed in the file.

However, that provision does not seek to restrict the Commission's use of informal practices by imposing on it a general obligation to make all interviews relating to the subject-matter of an investigation subject to the formal requirements in Article 3 of Regulation No 773/2004 and to make a record available to the incriminated undertaking.

The principle of sound administration may, depending on the circumstances of the particular case, impose a duty on the Commission to establish records of the discussion which it has had with the complainants or other parties during the meetings or telephone conversations held with them. In that regard, the existence of a duty on the Commission to record the information which it receives during meetings or telephone conversations and the nature and extent of such an obligation depend on the content of that information. The Commission is required to establish adequate documentation, in the file to which the undertakings concerned have access, on the essential aspects relating to the subject-matter of an investigation. That conclusion is valid for all information of a certain importance and which bears an objective link with the subject-matter of an investigation, irrespective of whether it is incriminating or exculpatory.

(see paras 613-617, 619, 620)

15. In competition matters, it is not appropriate to establish a general rule according to which the statement of a third-party undertaking indicating that an undertaking in a dominant position has adopted a certain type of conduct can never suffice on its own to prove the facts constituting an infringement of Article 82 EC. Establishing a general rule constitutes an exception to the principle of the unfettered evaluation of evidence. In the case of an undertaking which admits to having participated in a cartel contrary to Article 81 EC, such a rule is justified, since an undertaking which is the subject of an investigation, or which applies to the Commission in order to benefit from immunity from fines or a fine reduction, may have a tendency to play down its own responsibility in an infringement and highlight the responsibility of other undertakings.

The situation is different with respect to the statements of a third-party undertaking which is, in essence, a witness. In cases in which it is not apparent that the third-party undertaking has any interest in incriminating wrongly the undertaking in a dominant position, the statement of the third-party undertaking may, in principle, be sufficient on its own to demonstrate the existence of an infringement.

(see paras 722-725)

16. See the text of the decision.

(see paras 1564-1591)

17. See the text of the decision.

(see para. 1598)

18. With regard to the question whether infringements of the completion rules have been committed intentionally or negligently, and can therefore be punished by a fine under Article 23(2) of Regulation No 1/2003, that condition is satisfied where the undertaking concerned cannot be unaware of the anti-competitive nature of its conduct, whether or not it was aware that it was infringing the competition rules of the Treaty.

An undertaking is aware of the anti-competitive nature of its conduct where it is aware of the essential facts justifying both the finding of a dominant position on the relevant market and the finding by the Commission of an abuse of that position.

Since the European Union Courts have censured on several occasions the implementation, by an undertaking in a dominant position, of practices consisting in the grant of financial incentives conditional upon exclusivity, and since the characterisation of naked restrictions as abusive cannot be regarded as novel, an undertaking in a dominant position which implements such practices cannot be unaware of the anti-competitive nature of its conduct.

Where it is established that an undertaking in a dominant position has implemented a comprehensive anti-competitive strategy and has attempted to conceal the anti-competitive nature of its conduct as regards its relationships with certain undertakings, it is permissible to conclude that the infringement was committed at least negligently.

(see paras 1601-1603)

19. See the text of the decision.

(see paras 1609-1612, 1643)

20. See the text of the decision.

(see paras 1614, 1615, 1619)

21. Pursuant to Article 23(3) of Regulation No 1/2003, in fixing the amount of the fine, regard is to be had both to the gravity and to the duration of the infringement. In that context, the actual impact of the infringement on the market is not as a rule a factor which must be taken into account, but just one among a number of other factors to be taken into account in evaluating the gravity of the infringement and setting the amount of the fine. In addition, factors relating to the object of a course of conduct may be more significant for the purposes of setting the amount of the fine than those relating to its effects.

Where it determines the proportion of the value of sales to be taken into consideration by reference to gravity, in accordance with point 22 of the 2006 Guidelines, the Commission is not required to take account of a lack of actual impact as a mitigating factor, if that proportion is justified by other factors capable of influencing the determination of gravity.

However, if the Commission considers it appropriate to take into account the actual impact of the infringement on the market in order to increase that proportion, it must provide specific, credible and adequate evidence with which to assess what actual influence the infringement may have had on competition in that market.

(see paras 1622, 1624, 1625)