— breach of the principle that there should be no unjust enrichment since, if the sum claimed by the Commission were to be refunded in full, the Commission would be unjustly enriched in that the work and research carried out by CEVA would be available to the Commission without it having to pay for it;

— failure on the part of the Commission to make proper use of its powers of control during the performance of the contract.

Action brought on 22 July 2009 — Intel v Commission

(Case T-286/09)

(2009/C 220/86)

Language of the case: English

Parties

Applicant: Intel Corp. (Wilmington, United States of America) (represented by: N. Green, I. Forrester, QC, M. Hoskins, K. Bacon, S. Singla, Barristers, A. Parr and R. MacKenzie, Solicitors)

Defendant: Commission of the European communities

Form of order sought

— Annul in whole or in part Commission Decision C(2009) 3726 final of 13 May 2009 in Case COMP/C-3/37.990 — Intel;

— Alternatively, annul or reduce substantially the level of the fine imposed;

— Order the Commission to pay Intel's costs.

Pleas in law and main arguments

By means of this application, the applicant seeks annulment, pursuant to Article 230 EC, of Commission Decision C(2009) 3726 final of 13 May 2009 in Case COMP/C-3/37.990 — Intel finding that it committed a single and continuous infringement of Article 82 EC and Article 54 of EEA Agreement from October 2002 until December 2007 by implementing a strategy aimed at foreclosing competitors form the market of x86 central processing units ('CPUs'). Further, the applicant seeks the annulment or the reduction of the fine imposed on it.

The applicant puts forward the following pleas in law in support of its claims.

First, it contends that the Commission errs in law by:

(a) finding that the conditional discounts granted by Intel to its customers were abusive *per se* by virtue of them being conditional without establishing that they had an actual capability to foreclose competition;

(b) relying on a form of exclusionary abuse, termed 'naked restrictions', and failing to conduct any analysis of foreclosure (even a capability or likelihood to foreclose) in respect thereof;

(c) failing to analyse whether Intel's rebate arrangements with its customers were implemented in the territory of the European Community and/or had immediate, substantial, direct and foreseeable effects within the European Community.

Secondly, the applicant claims that the Commission fails to meet the required standard of proof in its analysis of the evidence. Thus, the Commission fails to prove that Intel's rebate arrangements were conditional upon its customers purchasing all or almost all of their x86 CPU requirements from Intel. In addition, the Commission uses an 'as efficient competitor' ('AEC') test to determine whether Intel's rebates were capable of restricting competition but it commits numerous errors in the analysis and assessment of the evidence relating to the application of that test. The Commission also fails to address other categories of evidence relevant to the effects of Intel's discounts. In particular, the Commission fails:

(a) to address the evidence which shows that during the period of the alleged infringement, one of Intel's competitors substantially increased its market share and its profitability but that its lack of success in certain market segments and/or with certain original equipment manufacturers ('OEMs') was the result of its own shortcomings;

(b) to establish a causal link between what it finds to be conditional discounts and the decisions of Intel's customers not to purchase from that competitor;

(c) to analyse the evidence of the impact of Intel's discounts upon consumers.

Thirdly, the applicant argues that the Commission fails to prove that Intel engaged in a long-term strategy to foreclose the competitors. Such a finding is not supported by the evidence and is impossible to reconcile with the fragmented nature of the Commission's allegations (in relation to both products covered and time period) in respect of each Intel customer.

The applicant also submits that all or part of the Decision should be annulled on the basis that the Commission infringed essential procedural requirements during the administrative procedure, which materially infringed Intel's rights of defence. In particular, the Commission failed:

(a) to grant Intel an oral hearing in relation to the Supplementary Statement of Objections and Letter of Facts, even though they raised entirely new allegations and referred to new evidence which feature prominently in the contested decision;

(b) to procure certain internal documents from the competitor for the case file, when requested to do so by the applicant notwithstanding that, in the applicant's opinion, the documents:

(i) were directly relevant to the Commission's allegations against Intel,

(ii) were potentially exculpatory of Intel and

(iii) had been identified by Intel with precision;

(c) to make a proper note of its meeting with a key witness from one of Intel's customers, who was highly likely to have given exculpatory evidence.

Pursuant to Article 229 EC, the applicant also challenges the level of the fine imposed upon it on three main grounds.

First, it claims that the fine of EUR 1 060 000 000 (the largest ever fine imposed upon a single firm by the Commission) is manifestly disproportionate given that the Commission fails to establish any consumer harm or foreclosure of the comeptitors.

Secondly, the applicant submits that it did not intentionally or negligently infringe Article 82 EC: the Commission's AEC analysis is based on information that it could not know at the time it was granting discounts to its customers.

Thirdly, the applicant contends that in setting the fine the Commission fails to apply its 2006 fining guidelines correctly, and takes into account irrelevant or inappropriate considerations.

Action brought on 27 July 2009 — Carrols v OHIM — Gambettola (Pollo Tropical CHICKEN ON THE GRILL)

(Case T-291/09)

(2009/C 220/87)

Language in which the application was lodged: Spanish

Parties

Applicant: Carrols Corp. (New York, United States) (represented by: I. Temiño Ceniceros, lawyer)

Defendant: Office for Harmonisation in the Internal Market (Trade Marks and Designs)

Other party to the proceedings before the Board of Appeal: Giulio Gambettola (Los Realejos, Spain)

Form of order sought

— declare the present action and its annexes admissible;

— annul the decision of the Board of Appeal in so far as it relates to the grounds for invalidity under Article 52(1)(b) of Council Regulation (EC) No 207/2009 of 26 February 2009;

— order OHIM to pay the costs.

Pleas in law and main arguments

Registered Community trade mark in respect of which a declaration of invalidity has been sought: Figurative mark containing the word element 'Pollo Tropical CHICKEN ON THE GRILL' (Application No. 002938801) for goods and services in Classes 25, 41 and 43.

Proprietor of the Community trade mark: Giulio Gambettola.

Applicant for the declaration of invalidity: The applicant.

Trade mark right of applicant for the declaration: National figurative mark (No 2 201 552) containing the word element 'Pollo Tropical CHICKEN ON THE GRILL' and the national word mark 'POLLO TROPICAL' (No 2 201 543) for services in Class 43 ('restaurant services').

Decision of the Cancellation Division: Application for a declaration of invalidity dismissed.

Decision of the Board of Appeal: Appeal dismissed.

Pleas in law: Misinterpretation of Articles 52(1)(b) and 53(1)(a) of Regulation (EC) No 207/2009 on the Community trade mark.

Order of the Court of First Instance of 14 July 2009 — Mepos Electronics v OHIM (MEPOS)

(Case T-297/08) [1]

(2009/C 220/88)

Language of the case: English

The President of the Eighth Chamber has ordered that the case be removed from the register.

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[1] OJ C 247, 27.9.2008.