



Case No. 48 of 2011

In Re:

M/s ESYS Information Technologies Pvt. Ltd.
SCO, 326, Sector 40 - D, Chandigarh – 36

Informant

And

Intel Corporation (Intel Inc.)
Santa Clara, California, USA

Intel Semiconductor Ltd.
32/F Two Pacific Place,
88 Queensway, Central, Hong Kong

Intel Technology India Pvt. Ltd
SCO, 19, Sector 17 - E, Chandigarh -17

Opposite Parties

CORAM

Mr. Ashok Chawla
Chairperson

Dr. Geeta Gouri
Member

Mr. Anurag Goel
Member

Mr. M. L. Tayal
Member

Mr. Justice (Retd.) S. N. Dhingra
Member

Mr. S. L. Bunker
Member



Present: Advocates Mr. H.S. Chandhioke, Mr. G.R. Bhatia, Mr. Karan Chandhioke and Ms. Nidhi Singh for the Opposite Party and advocate Mr. Deepak Sabharwal for the Informant.

ORDER UNDER SECTION 26(6) OF THE COMPETITION ACT, 2002

1. BACKGROUND

1.1 M/s ESYS Information Technologies Pvt. Ltd. (hereinafter referred to as '**the Informant**') has submitted the information in the present matter on 29.08.2011 and subsequently submitted the amended information on 15.11.2011 under Section 19(1)(a) of the Competition Act, 2002 (hereinafter referred to as '**the Act**') against Intel Corporation, Intel Semiconductor Ltd. and its subsidiary in India M/s Intel Technology India Pvt. Ltd. (hereinafter collectively referred to as '**the Opposite Parties**' or '**Intel**').

1.2 The present matter relates to the alleged abuse of dominant position by Intel in the market of microprocessors, an Information Technology (IT) component, in India and anti-competitive agreement entered into by Intel with the Informant which is allegedly in contravention of the provisions of Sections 4 and 3 of the Act.

2. BRIEF PROFILE OF THE PARTIES

2.1 The Informant is a registered company incorporated under the provisions of the Companies Act, 1956 and has been engaged in sale/distribution of IT components and other related products manufactured by companies such as Intel, Western Digital Components, Samsung Electronics Ltd, Hynix, Acer, Xerox, Fuji, *etc.* in India. Besides, it has also been engaged in the provision of Business Processing Outsourcing (BPO) services and manufacturing of personal computers, IT components and peripheral *etc* in India.



2.2 The Opposite Party is a leading IT company, having worldwide presence including in India. It was incorporated in California, USA in 1968 and re-incorporated in Delaware, USA in 1989. It has been engaged in the activities of designing and manufacturing of a wide range of IT components, peripherals, computer systems, *etc.* Besides, it has also been engaged in manufacturing and distribution of electronic devices relating to communications and computing such as microprocessors, chipsets, motherboard, integrated circuit, network interface controllers, flash memory, *etc.*

3. FACTS AND ALLEGATIONS

3.1 The Informant was appointed as an authorized distributor of Intel's products, *vide* distributor agreement(s) (hereinafter referred to as '**the Agreement**'), starting 2003. Owing to one year validity of such agreements, Intel used to renew it at the end of each year with necessary amendments. As per the Informant, till the last agreement was signed on 25.08.2009 (effective from 27.07.2009), the business relation between them was good.

3.2 The bone of contention of the present dispute between the Informant and the Opposite Parties relates to the Agreement. It is the case of the Informant that based on the terms and conditions of the Agreement, Intel appointed the Informant as a non-exclusive independent distributor for some of its designated IT products in India. In order to comply with the terms and conditions of the Agreement, the Informant employed sufficient number of trained staff including adequate sales and support personnel who are familiar with the products of Intel and its competitors and also made huge investment on infrastructure to provide marketing, distribution, maintenance and support for the products of Intel. The Informant also complied with the other mandatory terms and conditions of the Agreement so as to retain its business relations with Intel.

3.3 Not only did the Informant adhere to all the terms and conditions of the Agreement but also achieved the quarterly sales target set by Intel from time to time. The said achievement of the Informant was recognized by Intel in the Corrective Action Plan (CAP) sent to the Informant on 10.05.2010.



3.4 It is averred in the information that despite complying with all the terms and conditions of the Agreement and achieving more than the sales target, Intel terminated the Agreement with the Informant on 23.07.2010 without giving any cogent reason. As per the Informant, Intel was not able to provide any specific reason for the termination of the Agreement in the termination notice because the actual reasons are illegal and anti-competitive.

3.5 As per the Informant, Intel terminated the Agreement for the following reasons:

- i. Despite pressure from Intel not to deal with the products of its competitors, the Informant started dealing with the products of M/s Advance Micro Devices (AMD), a competitor of Intel, from late 2009 and launched its machines with AMD chips with wide publicity in February, 2010.
- ii. Intel intended to hurt the business interests of the Informant and to increase the profitability of its other distributors who were the competitors of the Informant. However, against Intel's wishes, the Informant refused to fix higher resale prices of its products.

3.6 Citing the submission of Intel before the Securities and Exchange Commission in US that based on revenue it is the largest semi-conduct chip marker in the world and market share of Intel in the world wide market (79.3 % in second quarter of 2011 as per IDC report, a market intelligence firm), the Informant submitted that in the relevant market of microprocessors for mobiles, desktops, laptops, and servers in India, Intel is enjoying a dominant position.

3.7 Being a dominant enterprise in the relevant market of microprocessors for mobiles, desktops, laptops, and servers in India, it is averred in the information that Intel has abused its dominant position by:



- i. Imposing unfair and discriminatory conditions such as prohibition on dealing with its competitors, reducing the credit period for the Informant when it dealt with the products of AMD, *etc.* in violation of provisions of Section 4(2)(a)(i) of the Act.
- ii. Indulging in unfair pricing by discriminating price between the distributors and Original Equipment Manufacturers (OEMs) in violation of provisions of Section 4(2)(a)(ii) of the Act.
- iii. Restricting and limiting the production by foreclosing the distribution network to its competitors in violation of provisions of Section 4(2)(b)(i) of the Act.
- iv. Denying access to the market of microprocessor to its competitors by not allowing its distributors to deal with their products and denying access to the market of personal computer and laptop to the Informant in violation of provisions of Section 4(2)(c) of the Act.
- v. Imposing supplementary conditions whereby distributors are obliged to notify Intel when they intend to deal with products of its competitors and tying high demand products with low demand products in violation of provisions of Section 4(2)(d) of the Act.
- vi. Leveraging its dominant position in the market for its high demand products for low demand products by compelling the distributor to sale its high demand product along with the low demand products in violation of provisions of Section 4(2)(e) of the Act

3.8 As per the Informant, Intel not only infringed the provisions of Section 4 of the Act but also the provisions of Section 3 of the Act. It is averred in the information that since the Informant and Intel are operating at different levels or stages of the same production chain, by compelling the Informant to sell its low demand products along with the high demand products Intel has contravened the provisions of Section 3(4)(a) of the Act which prohibits tie-in arrangements. It is also alleged that by denying the distributors not to deal



with the products of its competitors, Intel has contravened the provisions of Section 3(4)(b) of the Act which amounts to exclusive supply agreement. Further, it is averred in the information that by dictating the retail price of its products to the distributors, Intel has contravened the provisions of Section 3(4)(e) of the Act which prohibits re-sale price maintenance.

3.9 Based on the above submissions, the Informant prayed to the Commission to restrain Intel from abusing its dominant position, to declare the Agreement as null and void, restrain Intel from entering into such anti-competitive agreements in future and impose penalty on Intel in terms of Section 27 of the Act.

4. After considering the information and examining the facts and circumstances of the case and issues involved therein, the Commission formed a view that there exists a *prima facie* case in the matter and accordingly passed an order on 20.12.2011 under Section 26 (1) of the Act, directing the Director General (hereinafter referred to as the ‘DG’) to conduct an investigation into the matter and submit a report.

5. FINDINGS OF THE DG INVESTIGATION

In pursuance of the said order of the Commission, the DG investigated the matter and submitted his investigation report to the Commission on 14.06.2013. The findings in the DG report, in brief, are as under:

5.1 Two pertinent issues relating to this matter *viz.* the alleged abuse of dominant position by Intel and anti-competitive agreement of Intel with the Informant have been primarily addressed in the DG report.

5.2 To investigate the alleged abuse of dominant position by Intel, the DG delineated the relevant market as per the provisions of Section 2(r) of the Act and examined the position of dominance of Intel in the relevant market so defined.



5.3 With regard to the relevant product market, the Informant submitted before the DG that the market for microprocessor for mobiles, desktops, laptops, and servers should be considered as the relevant product market in this case whereas, Intel contended that relevant product should comprise of both microprocessors based on the X86 architecture and microprocessors based on alternatives architectures (such as ARM, SPARC, Itanium architectures).

5.4 It is observed in the DG report that a microprocessor is a highly specialized programmable device which accepts digital data and processes according to instructions stored in its memory and provides results as output. It acts as the brain of the products (computers, servers, home appliance, mobile phones, *etc.*) in which it is incorporated. A consumer can choose from the different range of microprocessors of various brands such as Intel, AMD, VIA, *etc.* which is suitable for the end product in which it is to be incorporated. There are no other products available which can perform the function of a microprocessor hence, it has no substitutes. However, it is observed by the DG that microprocessors of all brands manufactured based on X86 architecture use a common instruction set and are therefore software compatible with each other. Thus, there exists substitutability across different brands of microprocessors manufactured based on X86 architecture as they can be used interchangeably.

5.5 On the substitutability between X86 architecture based microprocessor and non-X86 based microprocessor, Intel made detailed submissions before the DG. It was stated that the two are not directly substitutable as there are differences in instruction sets which would merit a separate version of software programs. It was further submitted that, historically, the extent of substitutability has been limited primarily due to (a) inadequate computing power of ARM based micro-processors: and (b) X86 microprocessors were unsuitable for use in low power applications, where ARM processors have a dominant presence. However, Intel contended before the DG that the next version of Microsoft Windows operating system. Windows 8, would offer native support for ARM-based microprocessors, which indicates an increasing substitutability between ARM based



microprocessors and X86 microprocessors. It was argued that microprocessor based on other Reduced Instruction Set Computing (RISC)-type architectures, such as SPARC and POWER microprocessors, compete with X86-based microprocessors principally in server or workstation.

5.6 After considering all the submission made on the substitutability of microprocessors based on X86 and non X86 architecture, the DG concluded that microprocessors of X86 architecture and those belonging to other architecture, for a given end product, are in the same relevant market.

5.7 After concluding substitutability in terms of architecture, the DG further examined whether microprocessors across end products such as servers, desktops, laptops, mobile handsets, embedded products, *etc.* are substitutable. It was found that certain categories of microprocessors which are suitable for end products such as tablets and smart phones are normally not able to cater to the requirements of other end products like desktops, and portable personal computers (PCs) such as laptops, notebooks, *etc.* The technical characteristics of microprocessors in terms of processing power, computing power, consumption, memory accessibility used in tablets are distinct from those of desktop PCs, portable PCs and servers. Similarly, the microprocessors based on Power and SPARC architecture cater only to the servers market. Depending on the end product in which they are intended to be used, microprocessors are required to have distinct technical and physical characteristics and capabilities. Therefore, there is no substitutability or interchangeability of microprocessors across end products.

5.8 Therefore, according to the DG, depending on the end product in which it is used, the market of microprocessors can be clearly distinguished in to four categories such as the market of microprocessors for desktops PCs; the market of microprocessors for mobile/portable PCs such as laptops, notebooks, net-books, *etc.*; the market of microprocessors for servers; and the market of microprocessors for tablets. Thus, the DG has delineated four relevant product markets as stated above in the instant matter.



5.9 On the relevant geographic market, the Informant has submitted that the territory of India should be considered as the relevant geographic market in the present matter whereas, Intel contended that it should be the whole world because microprocessors are traded across the national boundaries due to their small size and lightweight.

5.10 During the course of investigation it was observed that the distribution agreement entered into between the Informant and Intel defined the territory of operation for the Informant as India. Also, the agreement entered by Intel with OEMs defined the territory of their operation as India. Further, it was observed by the DG that the conditions of supply and demand for microprocessor in India are different from those prevailing outside India. Accordingly, it was concluded in the DG report that the territory of India is the relevant geographic market in this case.

5.11 Thus, as per the DG report *"the markets of microprocessors for desktop PCs in India"*; *"the market for microprocessors of mobile/portable PCs such as laptops, notebooks, net-books, etc. in India"*; *"the market of microprocessors for servers in India"*; and *"the market of microprocessors for tablets in India"* are the relevant markets in the instant case.

5.12 Based on the market share data of IDC report, the Informant claimed that Intel is a dominant enterprise in the market for microprocessor for mobile, desktop, laptop, and servers in India. Intel on the other hand contended that in a market characterized by rapid innovation, as is the case for microprocessors, market share data only describes the static competitive position of a firm and it does not capture the growing competitive threat to Intel from of the other manufacturers. Thus, based on mere market share data it cannot be held as dominant.

5.13 To establish whether Intel is in a dominant position in any of the relevant markets defined *supra* or not, the DG has examined the factors enumerated under provisions of Section 19(4) of the Act in the following manner:-



5.13.1 Considering the information provided by the Intel with respect to its microprocessor distribution in India, it was observed in the DG report that Intel's cumulative market share in each year during 2009-11 is more than 80% and it was more than 85% during first three quarters of 2012. Based on IDC report data as submitted by Intel before the DG the market share of Intel during 2009-2011 in desktop PCs segment was around 85%, in portable PCs segment it was around 95% and in servers segment it was around 92%. No data in tablet segments has been provided by Intel. The combined market share of Intel in desktop PCs, portable PCs and servers market during the same period was around 85%. The worldwide market share (in term of number of units as per IDC data) of Intel during 2009-11 in each of the segment of microprocessor such as desktop PCs, portable PCs and servers were above 70%, 80% and 90% respectively. In microprocessors for tablets segment, Intel had negligible market share during 2009-11. However, when seen on cumulative basis (calculated as combinations of all four segments) its market share is found to be in the range of 68% to 80%. Thus, based on the above data the DG has reported that in desktop PCs, mobile PCs and server segments of the microprocessor market Intel has very large market share in India as well as throughout the world. Also, in the market for microprocessors as a whole, including tablets as well as various combinations thereof, Intel's market share is significant in India as well as throughout the world.

5.13.2 Based on the revenue data submitted by Intel it is stated in the DG report that Intel's revenues are huge and substantially more than its major competitors. In 2012, the revenue of Intel was 53,341 million dollar, whereas the revenue of the competitors AMD and ARM, were 5,422 and 913.1 million dollar respectively. The above data shows that position of economic strength in terms of size and resources of Intel is huge *vis-à-vis* its competitors. Thus, in terms of size and resources, size and importance of competitors, economic power and commercial advantages Intel is much ahead of its competitors such as AMD and ARM.



5.13.3 The DG has also reported that the demand for Intel microprocessors from manufactures of desktop PC, mobile PC and server is very high which indicates high dependence of consumers on Intel. The brand name of Intel makes its products ‘a must’ for the potential user.

5.13.4 It has been observed in the DG report that the business of manufacturing microprocessors is highly technology and innovation driven requiring heavy investment on account of R&D and setting up production facilities. Thus, there exist huge entry barriers into the market in terms of, heavy investment, cost and technology, *etc.*

5.14 Based on the stated data and analysis it has been concluded in the DG report that Intel enjoys a dominant position in markets of microprocessors for desktops PCs; market of microprocessors for mobile/portable PCs such as laptops, notebooks, *etc.*; and the market of microprocessors for servers in India.

5.15 In order to examine whether Intel has abused its dominant position in the relevant markets or not, the DG has examined the following issues which have been alleged to be abusive in terms of Section 4 of the Act:

5.15.1 The Informant alleged that though the distributor agreements are non-exclusive, but Intel executives in their verbal communications enforce exclusivity and threaten termination of distributorship in the event of commercial engagements with AMD. The DG undertook a detailed investigation on the aspect of alleged restrictions by Intel on distributors to deal with competing products.

5.15.2 On examination of the submissions of the parties and cross examination of witnesses, it has been found that distributors of Intel are also dealing with the products of its competitors. The DG has also reported that several OEMs in India are procuring and using microprocessors of both Intel and AMD. The allegations of Informant that Intel did not allow it to be a distributor of AMD is not supported by



any available facts. As regards termination of the Agreement, based on the examination of the submission of Intel, the DG notes that it was part of the review and restructuring exercise being undertaken by Intel of its distribution network in India as well as worldwide. Hence, as per the DG report, the alleged conduct of Intel that it restricts the distributors to deal with the products of its competitors is not substantiated.

5.15.3 As regards the allegations by the Informant that Intel fixes targets and gives incentives with a view to foreclose competition in the market, it has been observed in the DG report that fixing and allocating the worldwide target across various levels by Intel is based on feedback at each level, past performance, market conditions and there is no evidence of arbitrariness or unreasonableness in the level of targets set by Intel for its distributors. On the Informant's claim that the targets are set in such a manner that it leaves no surplus capacity with the distributor to deal in rival's products, Intel argued that the Informant was undercapitalized and has failed to show any connection between his buying capacity and targets set by Intel. On the issue of foreclosure, Intel further argued before the DG that their incentive schemes in India have no market share based discounts, and are based solely on distributor's purchase from Intel and do not make any reference to other manufacturers. In this connection, Intel submitted an Economic Analysis Report, which demonstrated that the prices offered by Intel to its distributors, even after the incremental incentives were well above its own incremental costs as well as that of an equally efficient competitor (say AMD) and hence is not predatory. In view of the submissions of Intel and examination and cross examination of executives, the DG has not found any merit in the allegation that the targets fixed by Intel are unfair (being unrealistic) and non-achievable and caused foreclosure of rivals.

5.15.4 As per the DG report, the allegation of the Informant that a distributor is necessarily required to procure focus products and also achieve the assigned targets to avail the



incentives does not appear to be correct. The DG analyzed the incentive schemes for unfairness on the dimensions of offering higher incentives for focus products, linking of incentives to credit norms, linearity norms and linking it to reach programs. Intel also made, submissions justifying the incentive policy. On the basis of detailed examination of Intel submissions, the DG concluded that the incentive and target scheme did not have any financial implication for the Informant and did not put it in a competitive disadvantage vis-à-vis its competitors. This, the DG concluded that the incentive schemes put in place by Intel can be regarded as reasonable business practices and therefore cannot be regarded as contravention of section 4(2)(a) (i) of the Act. Apart from the target and incentive scheme, the DG also examined the Exceptions to Consumer Authorized Price (hereinafter referred to as 'ECAP') scheme. This scheme was designed to allow Intel to meet lower price competition from competing microprocessor vendors, often in connection with specific tender or bids. Through this scheme Intel incentivized the end customers to bid aggressively in a specific tender and Intel in turn compensated the distributor in the form of ECAP discounts. The DG thus concluded that the discounts were offered to meet competition, were not predatory and hence cannot be regarded as unfair.

- 5.15.5 On the issue of price discrimination, it is noted in the DG report that the Informant has not been able to produce any instance or documentary evidence in this regard. It is stated in the DG report that microprocessors are supplied by Intel in two forms namely in boxes and in trays. Due to additional component of fan/ heat sinks box processors are priced higher than the tray processors. It is observed that OEMs usually purchase the tray processor for their assembly line/ manufacturing activities whereas distributors usually deal in boxed microprocessors for their distribution business. The DG further carried price analysis based on the price list submitted by Intel and noted that there is no substantial difference in the prices for the distributors and the OEMs customers. Hence, based on the analysis of the available information, the DG has reported that the allegations of the Informant regarding



charging of unfair and discriminatory prices by Intel in abuse of dominance in violation of section 4(2)(a)(ii) does not stand established.

- 5.16 On the basis of analysis of evidence gathered during the investigation, the DG has concluded that even though Intel is a dominant enterprise in three (desktop PCs, mobile/portable PCs and servers) of the four relevant markets identified its alleged conduct is not abusive in terms of any of the provisions of Section 4 of the Act.
- 5.17 The DG has also examined the allegations of the Informant pertaining to infraction of the provisions of Section 3(4) of the Act by Intel. As per the Informant, Intel is compelling the distributors to sell its low demand products along with the high demand products which is tantamount to tie-in arrangements, compelling the distributors to exclusively deal with its products which amounts exclusive supply agreement and maintaining resale price of the distributors. Having examined the clauses of the Agreement and the material available on record the DG has found that though the agreement between the Informant and Intel is a vertical agreement, there is no case of tie-in arrangements, exclusive dealings and resale price maintenance under the provisions of Section 3(4) of the Act which foreclose competition in the market.
- 5.18 The Informant had alleged that Intel indulges in resale price maintenance in contravention of section 3(4)(e) of the Act. On this issue, the DG analyzed the agreement and noted that the agreement talks of suggested prices but leaves the final prices to the sole discretion of the distributor. The DG gathered information from other distributors of Intel and examined the submissions made by the executives of Intel and Esys and concluded that there is no substance in the allegation.
- 5.19 On the issue of tying focus products with base products being in contravention of section 3(4) of the Act, then DG observed that Intel sets quarterly revenue targets for distributors. Under these targets, Intel communicated a product mix ratio under four to five broad categories of microprocessors. The incentive programme also links the incentives to the sales mix of focus and base products. However, these targets are not binding on the



distributors. The DG noted that Intel does not pre-condition the purchase of any particular microprocessor on the purchase of another microprocessor. The product mix ratio was not mandatory but was desirable for the purpose of availing incentives. On the basis of these facts and other parameters related to incentives and targets examined above for the purposes of section 4(2)(a)(i) analysis, the DG found that there is no contravention of section 3(4) of the Act.

6. Subsequent to the submission of the DG report a copy of the DG report was supplied to the informant and OP inviting their objections/ replies to the DG report. OP filed its objections to the DG report and also made oral submissions before the Commission. The Informant chose not to file any objections to the DG report or make oral submissions despite being given several opportunities for the same.

7. OBJECTIONS OF INTEL TO THE FINDINGS OF THE DG REPORT

7.1 Intel submitted its reply on the DG report to the Commission on 27.08.2013 wherein it has agreed with the DG's conclusion to the extent that it has not contravened any of the provisions of Sections 3 and 4 of the Act.

7.2 However, it disagreed with the DG's delineation of relevant product markets and submitted that relevant market should include all general purpose microprocessors used in computers including X86 architecture, ARM architecture, Itanium architecture (by Intel), Power architecture (by IBM) and SPARC (by Oracle and Fujitsu) architecture. As per Intel, for delineating the relevant product market the DG ought to have looked at the end-use of the product *i.e.*, the form in which it is used by the ultimate consumer.

7.3 On relevant geographic market, Intel contended that since all the participants in the microprocessor market are global suppliers whose production activities are distributed throughout the world and the price list are set on worldwide basis, the relevant



geographic market should not be limited to India rather, it should be the worldwide market.

- 7.4 Intel has not agreed with the DG's finding that it holds a dominant position in three of the four relevant markets in terms of its size and resources, both in absolute terms and relative to its competitors. It has been submitted by Intel that it is not in a dominant position because: its market share in the market of general purpose microprocessors has been declining over the last three years; its size is rivaled by its competitors and customers; it faces many well-established and emerging competitors; the market has featured many new entrants; it is dependent on its vertical partners like OEMs and distributors to reach the customers; it does not have economic power in relation to its competitors; the microprocessor market features decreasing prices and increasing output, buyers of microprocessors are large and powerful, its customers are not dependent on Intel, and its market position has been pro-competitive.
- 7.5 Based on the above submissions Intel has prayed to the Commission to pass an order holding and declaring that there is no contravention of Section 3 and Section 4 of the Act by it and requested the Commission to close the present investigation.

8. ANALYSIS AND FINDINGS OF THE COMMISSION

- 8.1 The Commission has carefully perused the entire material submitted by the Informant, the submissions made by the Informant and Intel before the DG, the investigation report of the DG, objections/ reply filed by Intel in response to the DG's findings and all other relevant material and evidences available on record.
- 8.2 It is observed by the Commission that the present matter pertains to the alleged infraction of the provisions of Sections 3 and 4 of the Act by the Opposite Parties. Accordingly, the Commission feels that the following issues need to be examined in order to arrive at a decision in the matter:



- i) **Issue No. I:** Whether there is contravention of the provisions of Section 3 of the Act by Intel?
- ii) **Issue No. II:** Whether there is contravention of provisions of Section 4 of the Act by Intel?

8.3 Determination of Issue No. I: Whether there is contravention of any of the provisions of Section 3 of the Act by Intel?

8.3.1 Informant has alleged that Intel has contravened provision of Section 3(4) of the Act by indulging into tie-in arrangement, exclusive supply agreement and resale price maintenance. Before proceeding to examine the alleged contravention of the provisions of Section 3(4) of the Act, it is necessary to note the relevant provisions of the Act which reads as:

“Any agreement amongst enterprises or persons at different stages or levels of the production chain in different markets, in respect of production, supply, distribution, storage, sale or price of, or trade in goods or provision of services, including-

- (a) Tie-in arrangement;*
- (b) Exclusive supply agreement;*
- (c) Exclusive distribution agreement;*
- (d) Refusal to deal;*
- (e) Resale price maintenance,*

shall be an agreement in contravention of sub-section (1) if such agreement causes or is likely to cause an appreciable adverse effect on competition in India”.

8.3.2 A plain reading of the above provisions of the Act reveals that it prohibits anti-competitive agreements (enterprises or persons operating at different stages or levels of the production chain in different markets) that includes tie-in arrangement, exclusive supply agreement, exclusive distribution agreement, refusal to deal, and resale price



maintenance which causes or is likely to cause an appreciable adverse effect on competition (AAEC) in India.

8.3.3 For an agreement to be considered under the provisions of Section 3(4) of the Act, the basic requirement is that the parties to the agreement must operate at different stages or levels of the production chain in different markets. The Commission noted that, in the instant case, the parties to the Agreement i.e., the Informant and Intel are operating at different stages or levels of the production chain in different markets as Intel is a manufacturer of a wide range of IT components, peripherals, computer systems, *etc.* and the Informant was one of the distributors of Intel.

8.3.4 The main contentions of the Informant in this regard are that: by fixing the targets and incentives of the high demand products along with the low demand products Intel has violated the provisions of Section 3(4)(a) *i.e.*, tie-in arrangement; by denying the distributors to deal with the products of its competitor Intel has violated the provisions of Section 3(4)(b) *i.e.*, exclusive supply agreement and, by determining the resale price for its distributors Intel has violated the provisions of Section 3(4)(e) of the Act *i.e.*, resale price maintenance.

8.3.5 In the context of the allegations in the present matter regarding tie-in arrangement it needs to be analysed as to whether the manner in which the targets and incentive structure of Intel have been designed to work, leads to a condition which requires distributor to necessarily purchase a low demand product along with high demand product. After analyzing the agreements, targets and incentive structure of Intel and examination of the Informant and Intel, the DG has not found any substance in allegations of tie-in arrangements as per Section 3(4)(a) of the Act. Also, no case of bundling, where the distributor gets low prices on purchasing two or more products together as compared to prices paid for purchasing them separately, is found by the DG.

8.3.6 Tie-in arrangement, as provided in the Act, includes any agreement requiring a purchaser of goods as a condition of such purchase, to purchase some other goods. In the instant



case, it is observed by the Commission that there is no evidence on record to hold that Intel is putting any condition before any distributor that it will provide its high demand products only if the distributor purchases its low demand products also. Rather, it has come in evidence that Intel provides more incentives to those distributors who achieve the targets with reference to its low demand products. This targets and incentive structure of Intel has plausible business justification. It may be a prudent business decision on the part of a manufacturer to provide more incentives to distributors for its low demand product with the intention to raise its market demand. Any allegation related to the aforementioned incentive schemes may raise antitrust concern, only if the same has an appreciable adverse effect on competition including the impact of causing foreclosure of the competitors of Intel or distort the competition in the downstream distribution business. In this case, investigation has pointed out that the incentive schemes are neither causing foreclosure of competitors of Intel nor placing the Informant at any competitive disadvantage. Thus, in the absence of any harm to competition the Commission finds no merit in the allegation of the Informant in this regard.

8.3.7 The next is the issue of exclusive supply agreement. As per the Act, exclusive supply agreement includes any agreement restricting in any manner the purchaser in the course of his trade from acquiring or otherwise dealing in any goods other than those of the seller or any other person. In the DG report, it is found that ‘the Agreement’ does not prohibit and rather provides for the distributors to deal in competing products of Intel subject to intimation. It is noted that OEMs and other distributors are dealing with the products of the competitors of Intel. No material or evidence was found by the DG during the course of investigation that Intel prevented the Informant from dealing with the products of its competing companies. In fact, the rival of Intel, AMD has also confirmed to the DG that they have not come across any instances of exclusivity insisted by Intel in India to its distributors. Since, neither the DG investigation nor the material available on record reveals that the Intel has compelled the Informant or any other distributors to exclusively deal with its products, the Commission, is of the view that the allegations of



the Informant in this regard do not get established. Hence, no case of contravention of the provisions of Section 3(4)(b) of the Act is made out against Intel.

8.3.8 On the issue of resale price maintenance, the Act provides that it includes any agreement to sell goods on condition that the prices to be charged on the resale by the purchaser shall be the prices stipulated by the seller unless it is clearly stated that prices lower than those prices may be charged. The Informant has alleged that Intel is dictating the resale price to the distributors. On the other hand Intel has submitted that the suggested retail price is only a guideline and that distributors have the sole discretion to determine its own resale price. The Commission notes that contrary to the allegation of the Informant, Clause 4(d) of distributor agreement expressly provides that distributors are free to sell the Intel products at a price suggested by the distributors. The information obtained by the DG from various parties revealed that the distributors themselves set the sale price of microprocessors. Therefore, the allegation that Intel is setting the resale prices for distributors is not found substantiated. It is further noted that the DG has found that Intel does track information about the prevailing market price of microprocessors. Intel has contended that it is natural and legitimate to be interested in downstream prices at which distributors sell their products. Intel has argued that this mechanism helps the manufacturer to plan and adjust capacity to satisfy end users' needs. The DG has also stated that monitoring of resale price by Intel is a macro level exercise and cannot be termed as resale price maintenance in terms of section 3(4)(e) of the Act. After due consideration, the Commission is of the view that monitoring the downstream market's price of its own products as in the present case cannot by itself be said to be anti-competitive. The Commission has not come across any evidence which suggests that the aforesaid act of Intel would in any manner create barriers to new entrants in the market, drive existing competitors out of the market or foreclose competition into market.

8.3.9 Thus, based on the facts gathered and analysed, the Commission finds no evidence of any anti-competitive act of Intel through price monitoring. Thus, the Commission is of



the view that there is nothing on record to substantiate the allegation that Intel is maintaining the resale price in terms of Section 3(4)(e) of the Act.

8.3.10 On the basis of the above analysis, the Commission is of the considered opinion that Intel has not contravened the provisions of Section 3(4) read with section 3(1) of the Act. Hence, the issue is decided accordingly.

8.4 Determination of Issue No. II: Whether there is contravention of any of the provisions of Section 4 of the Act by Intel?

8.4.1 Section 4(1) of the Act provides that no enterprise or group shall abuse its dominant position. Thus, prior to examining whether the conduct of the enterprise or group in question is abusive in nature in violation of the provisions of Section 4 of the Act, it is necessary to define the relevant market and to assess the dominance of the enterprise in the relevant market so defined.

8.4.2 As per Section 2(r) of the Act, 'relevant market' means the market which may be determined by the Commission with reference to the relevant product market or the relevant geographic market or with reference to both the markets.

8.4.3 The term 'relevant product market' has been defined in Section 2(t) of the Act as a market comprising all those products or services which are regarded as interchangeable or substitutable by the consumer, by reason of characteristics of the products, their prices and intended use. The Informant in its submission has contended that relevant product market to be considered in this case should be the market for microprocessor for mobile, desktop, laptop, and servers. On the other hand, Intel has submitted that for the purpose of delineating the relevant product market the form in which the product is used by its ultimate consumer should be considered. As per Intel, all computing devices used for general purpose computing are interchangeable and substitutable. Hence, the relevant market should include all general purpose microprocessors including X86



architecture, ARM architecture, Itanium architecture (by Intel), Power architecture (by IBM) and SPARC (by Oracle and Fujitsu) architecture.

8.4.4 The DG report states that depending on the form in which the microprocessor is used by its ultimate consumer, there are four relevant markets in this case. As per the DG, microprocessor used in desktops PCs, mobile/portable PCs, servers and tablets are different in many respect such as capacity, design, price, *etc.* and therefore they are not substitutable with each other. Accordingly, the DG has delineated four relevant product markets *i.e.*, ‘the markets of microprocessors for desktops PCs’; ‘the market for microprocessors of mobile/portable PCs such as laptops, notebooks, net-books, *etc.*’; ‘the market of microprocessors for servers’; and ‘the market of microprocessors for tablets’.

8.4.5 To determine the ‘relevant product market’, the Commission is required to give due regard to all or any of the factors such as physical characteristics or end-use of goods, price of goods or service, consumer preferences, exclusion of in-house production, existence of specialized producers and classification of industrial products. In view of the aforesaid factors and after examining the material on record on this aspect, the Commission finds that there is substitutability between microprocessors based on architecture, as detailed by the DG. Given the nature of the high technology industry, substitutability across evolving products may undergo a change and the relevant product definition itself may be dynamic. A few years back X86 could not be replaced by other architectures. However, the changing technological paradigm introduces the possibility of substitution. In view of the facts of the case, the Commission concurs with the DG that the appropriate approach would be to go by the end product classification, which will provide a better analysis of competitive constraints on Intel. Accordingly, the Commission concludes that there are four distinct relevant product markets, as identified by the DG, to be considered in this case.



8.4.6 The term ‘relevant geographic market’ has been defined in Section 2(s) of the Act to mean a market comprising the area in which the conditions of competition for supply of goods or provision of services or demand of goods or services are distinctly homogenous and can be distinguished from the conditions prevailing in the neighbouring areas. On this issue, the Informant submitted that it should be the territory of India whereas Intel, citing the reason of cross boundary transactions of microprocessor and presence of manufacturers and traders across the globe, has contended that the relevant geographic market should be the whole world. The DG in his investigation report has accepted the contention of the Informant on the basis of the argument that the conditions of demand and supply of microprocessor is homogenous throughout India and are distinct from the conditions prevailing outside India.

8.4.7 To determine the ‘relevant geographic market’, the Commission is to give due regard to all or any of the factors such as regulatory trade barriers, local specification requirements, national procurement policies, adequate distribution facilities, transport costs, language, consumer preferences and need for secure or regular supplies or rapid after-sales services. Looking at the facts of the case, it is observed by the Commission that as per the Agreement the territory of operation of the Informant and other distributors and OEMs is India. Accordingly, the distributors or OEMs in India cannot operate outside the territory of India. Further, the conditions of competition for supply of microprocessor in India can be distinguished from other parts of the world because of import duties, exchange rates, *etc.* The price of the microprocessor also varied across different countries due to the above said reasons. Therefore, the contention of Intel that the relevant geographic market should be whole world cannot be accepted. Thus, the Commission is of the view that the relevant geographic market to be considered in this case is the territory of India.

8.4.8 Accordingly, the Commission is also of the view that there are four relevant markets involved in the instant case as identified by the DG *viz.* ‘*the markets of microprocessors for desktops PCs in India*’; ‘*the market for microprocessors of mobile/portable PCs*



such as laptops, notebooks, net-books, etc. in India’; *‘the market of microprocessors for servers in India* ’; and *‘the market of microprocessors for tablets in India*’.

8.4.9 Having delineated the relevant markets, the next issue is whether Intel is in a dominant position in any of the said relevant markets. Dominant position means a position of strength enjoyed by an enterprise in the relevant market, in India, which enables it to - operate independently of competitive forces prevailing in the relevant market or affect its competitors or consumers or the relevant market in its favour. The Commission, while inquiring whether an enterprise enjoys a dominant position or not under Section 4 of the Act, is required to have due regard to all or any of the factors as enumerated under Section 19 (4) of the Act *viz.* market share of the enterprise; size and resources of the enterprise; size and importance of the competitors; economic power of the enterprise including commercial advantages over competitors; vertical integration of the enterprises or sale or service network of such enterprises; dependence of consumers on the enterprise; monopoly or dominant position whether acquired as a result of any statute or by virtue of being a Government company or a public sector undertaking or otherwise; entry barriers including barriers such as regulatory barriers, financial risk, high capital cost of entry, marketing entry barriers, technical entry barriers, economies of scale, high cost of substitutable goods or service for consumers; countervailing buying power; market structure and size of market; social obligations and social costs; relative advantage, by way of the contribution to the economic development, by the enterprise enjoying a dominant position having or likely to have an appreciable adverse effect on competition; and any other factor which the Commission may consider relevant for the inquiry.

8.4.10 Based on the market share data of IDC report, the Informant has submitted that Intel is dominant enterprise in microprocessor market in India. Whereas, Intel has contended that its market share has been declining over the last three years, it faces competition from many well-established and emerging companies, it does not have economic



power in relation to its competitors, buyers of microprocessors are large and powerful and customers are not dependent it and therefore, it is not a dominant enterprise.

8.4.11 Having analysed the data submitted by the Informant and Intel on market share, revenue, prices, volume of output, *etc.* the DG has reported that in ‘the markets of microprocessors for desktops PCs in India’; ‘the market of microprocessors of mobile/portable PCs such as laptops, notebooks, net-books, *etc.* in India’; and ‘the market of microprocessors for servers in India’; Intel enjoys a dominant position. It is noted in the DG report that in the said three relevant markets the cumulative market share of Intel in each year during 2009-11 was more than 80% and it was more than 85% during first three quarters of 2012. Further, based on IDC report data it was found by the DG that the market share of Intel during 2009-2011 in India in desktop PCs segment was around 85%, in portable PCs segment it was around 95% and in servers segment it was around 92%. Also, the combined market share of Intel in all three segments during the same period was around 85%. As per the DG report, in terms of revenue Intel is much ahead of any of its competitors. Also, it is observed by the Commission that because of its brand name consumers prefer the products of Intel over its competitors and it has a large network of OEMs and distributors chain in India. The Commission notes that Intel has not been able to negate the findings of the DG in this regard. Intel is consistently enjoying very high market share in each of the three markets as shown above.

8.4.12 It has been submitted by Intel that it is not in a dominant position because; its market share in the market of general purpose microprocessors has been declining over the last three year; its size is rivaled by its competitors and customers; it faces many well established and emerging competitors; the market has featured many new entrants; it is dependent on its vertical partners like OEMs and distributors to reach the customers; it does not have economic power in relation to its competitors; the microprocessor market features decreasing prices and increasing output, buyers of microprocessors are large and powerful and its customers are not dependent on Intel. Some constraints



exercised by AMD on Intel were also brought out in the DG report, in form of cheaper prices for functionally similar products, and requirement of quoting AMD based PCs in almost all government educational tenders. ECAP scheme can be taken as another example of pricing of Intel being constrained by AMD.

8.4.13 The Commission has considered the above submission. However, it is pertinent to note that there exist strong entry barriers in the relevant markets in the present case, on account of significant intellectual property rights of Intel. This combined with the scale and scope that Intel enjoy does accord it a position of dominance. Considering all the facts cumulatively, the Commission is of the opinion that Intel has economic strength and market power, which enables it to operate independently of competitive forces prevailing in the relevant market. Thus, the Commission holds the view that Intel enjoys a dominant position in three of the four relevant markets i.e. ‘the markets of microprocessors for desktops PC s in India’; ‘the market of microprocessors of mobile/portable PCs such as laptops, notebooks, net-books, etc. in India’; and ‘the market of microprocessors for servers in India.

8.4.14 On the abuse of dominant position, it is submitted by the Informant that the conduct of Intel in restricting the distributors to deal with the products of its competitors, fixing the unrealistic targets for the distributors and providing incentives to them on that basis, and indulging in price discrimination among the distributors and OEMs amounts to abuse of its dominant position.

8.4.15 On the issue of imposition of unfair conditions in the Agreement by Intel in the form of restricting the distributors not to deal with the products of the competitors and subsequent termination of the Agreement when the Informant launched its computers using AMD microprocessors, it was found by the DG during investigation that the Agreement does not prohibit and rather provides for distributors to deal in competing products subject to intimation to Intel. It was also found during investigation that



Intel's distributors are also distributing the products of Intel's competing companies in India. Also, several OEMs business partners of India are also procuring and using microprocessors of both Intel and AMD. It has also emerged from the DG investigation that no benefits offered by Intel to the distributors was linked to their dealing with the competing brand of microprocessors. On the basis of the submissions, available correspondence between the parties and other material documents available on record the DG concluded that the Informant was never prevented by Intel from dealing with its competing brands.

8.4.16 The Commission noted the above findings of the DG with regards to allegation of imposition of unfair conditions by Intel in the Agreement and otherwise. Based on the above findings of the DG and material available on record it is observed by the Commission that Intel has not imposed any conditions on the Informant in the Agreement which can be termed as unfair or discriminatory. The allegation of the Informant that Intel restricted it to deal with the products of its competitor or gives incentives in meeting the target of sale of its high demand product based on the targets set for its low demand products does not get substantiated from the available material on record. In the preceding paras it has been seen that the distributors of Intel products are not precluded from dealing in the products of its competitors and in fact they were found dealing in the competing products. Therefore, there is no question of foreclosure of market for the competitors of Intel. It has also been seen that the scheme of incentives and targets is not unfair or discriminatory. Under these circumstances it is evident that no clause in the Agreement is found to be unfair or discriminatory as alleged by the Informant. The DG also has not found that Intel was involved in activities which can be said to be unfair or discriminatory as per the provisions of Section 4(2)(a)(i) of the Act. Thus, the Commission comes to the conclusion that the allegations of contravention of provisions of Section 4(2)(a)(i) of the Act against Intel have not been established.

8.4.17 The Informant has alleged that the pricing policy of Intel is discriminatory as it has charged one price from the distributors and another price from the OEMs. As per the



Informant, the price difference between the distributors and OEMs is in the range of 15% to 20% in case of desktop PCs and 40% in case of portable PCs. However, no instance or documentary evidence has been provided by the Informant in support of this allegation. In this regard the DG, having analysed the price data submitted by Intel, found that there is hardly any price difference between boxed microprocessors (purchased by the distributors) and tray microprocessors (purchased by OEMs), though there exist cost difference between the two types of microprocessor. It is observed by the DG that OEMs are the business partners of Intel whereas, the distributors are not. Any lower price given to OEMs on account of volume discount or nature of their relationship is a reasonable business practice which cannot be said to be unfair and discriminatory.

8.4.18 The issue for the consideration of the Commission is whether Intel is charging different price to different customers i.e. the OEMs and the distributors for the sale of similar products with the same marginal costs. It is evident from the facts on record that the cost of packaging of microprocessor for the distributors is different from the cost of packaging microprocessor for OEMs, being higher for the former and lower for the latter. Thus, Intel has been charging different prices because of cost difference and the prices appear to be aligned to the costs. Further, from the DG findings, it is observed by the Commission that OEMs are the business partner of Intel and are bulk purchasers. It appears to be a common business practice to give better discount to the bulk purchase and unless it impedes the ability of the reseller to compete any competition concern may not probably arise. Further, the Informant has not been able to supply any cogent evidence or reason to support its allegations. The Commission, agreeing with the DG, concludes that the alleged pricing policy of Intel does not amount to secondary line price discrimination and has not resulted in foreclosure of any of its downstream customers. Thus, the allegation of the Informant regarding charging of unfair and discriminatory prices by Intel in abuse of dominance in violation of Section 4(2) (a)(ii) does not stand established.



8.4.19 After considering the information and evidence available on record, the Commission is of the opinion that Intel has also not restricted and limited the market by foreclosing the distribution network to its competitors or denied access to the market of microprocessor to its competitors or imposed supplementary conditions or leveraged its dominant position in the market of high demand products in the market for low demand products. Thus, the Commission is of the view no contravention of the provisions of Section 4(2) (b) (i), Section 4(2) (c), Section 4(2) (d) and Section 4(2) (e) of the Act by Intel has been established in the present case.

8.4.20 The Commission is of the considered view that even though Intel is found to be in a dominant position in first three of the four relevant markets as defined *supra*, no abuse of dominance, in any of the relevant markets, in contravention of the provisions of Section 4 of the Act has been established in the present case. Issue No. 2 is decided accordingly.

8.5 Since no case is made out against Intel, either under the provisions of Section 3 or Section 4 of the Act, the matter relating to this information is disposed off accordingly and the proceedings are closed forthwith.

8.6 The Secretary is directed to communicate this order to the Parties accordingly as per the relevant regulations.

New Delhi
Date: 16.1.2014

Sd/-
(Ashok Chawla)
Chairperson

Sd/-
(Geeta Gouri)
Member



Competition Commission of India



Sd/-
(Anurag Goel)
Member

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