

EXHIBIT A

2.4 HP

2.4.1. Introduction

(325) In 2005, Intel specified that “*Hewlett Packard (“HP”) is one of Intel’s ten largest direct customers based on overall CPU purchase volumes.*”¹ HP and Compaq merged in 2002.² Between 2002 and 2005, HP’s overall computer market shares - including desktops, notebooks and servers - varied between [...] % and [...] % annually.³

(326) This section will first describe HP’s consideration of AMD products in 2002 (section 2.4.2). It will then detail the amount and duration of Intel’s rebates to HP under the HPA1 and HPA2 agreements (section 2.4.3). Section 2.4.4 describes the conditions attached to the HPA1 and HPA2 agreements, and includes an assessment of Intel’s arguments concerning the conditionality of the rebates. Section 2.4.5 provides conclusions on these issues.

2.4.2. HP’s consideration of AMD

(327) HP states that on 19 August 2002, it launched an AMD-based business desktop in the United States - the Compaq D315.⁴ HP was the first large OEM to offer a business desktop with an AMD x86 CPU. The launch of this product by HP derived from a demand from IT managers from the United States for an AMD-based desktop from a top tier OEM. According to an HP internal memo, 343 IT managers from the United States had petitioned for an AMD-based desktop from a top tier OEM. In addition, AMD-based corporate desktops had already won several big tenders (EDF, Siemens AG, City of Berlin) in the EMEA region.^{5 6}

(328) Whilst the D315 was “*targeted at SMB [Small and Medium Business segment]*”, it was also deemed “*suitable for enterprise deployments*”⁷ and “*ready to launch in all regions summer 2002*” including “*Americas, EMEA and Asia Pacific*”.⁸ HP was committed “*to ship [REDACTED] units in the first 12 months with potential [REDACTED] additional upside*”.⁹

¹ Intel submission of 30 June 2005, p. 1.

² The merger was approved by the Commission on 31 January 2002, SG (2002) D/228300, Case No. COMP/M.2609 — HP/COMPAQ. HP stated that “*HP and Compaq agreed to merge in September 2001 and the merger eventually completed in May 2002.*” HP submission of 23 December 2005, answer 2.10(b).

³ Gartner data, Top 10 OEMs’ Market Shares. Extracted on 27 May 2008.

⁴ HP submission of 23 December 2005, answer 2.12 and Appendix 12.

⁵ HP submission of 23 December 2005, [REDACTED] deposition, Exhibit 14, pp. 11-12.

⁶ The Commission uses the reference terms HP used to distinguish between the annexes to its submission of 23 December 2005 (Appendices) and the annexes to the [REDACTED] deposition (Exhibits) submitted together with HP submission of 23 December 2005.

⁷ In HP’s vocabulary, non SMB corporate customers are known as “enterprise” customers. The corporate desktop segment is therefore divided in two subsegments: SMB and enterprise.

⁸ HP submission of 23 December 2005, [REDACTED] deposition, Exhibit 14, p. 14.

⁹ HP submission of 23 December 2005, [REDACTED] deposition, Exhibit 14, p. 14.

(329) To coincide with its release of the D315, HP published a press release on 19 August 2002 that was also referred to in the Wall Street Journal. In this press release, [REDACTED] announced that [REDACTED] company had received “inquiries from large companies about Athlon based machines” and stated that HP “didn’t rule out the possibility that H-P might use Hammer, too [the next generation of AMD x86 CPUs] in some machines.”¹⁰ The press release also stated that HP considered that AMD’s new architecture for PCs and servers (“Hammer”) had “very interesting performance and cost attributes”¹¹ and was considered to be “a disruptive product to Intel”.¹²

(330) HP specifies that prior to the launch of the D315 in August 2002, it “had been in negotiations with Intel to secure a block rebate agreement.”¹³ HP then highlights the fact that “[s]hortly after HP’s 19 August 2002 launch of the AMD-based D315, Intel ceased negotiations on a rebate deal for HP BPC [HP’s business desktop business unit].”¹⁴

(331) In addition, HP states that following the launch of the D315, “Intel made a request of a senior HP executive to have [REDACTED]”¹⁵ HP goes on to state that it “believes that this request was made in the days immediately following 19 August 2002 - the date on which HP launched its D315 business desktop product (...) To the best of HP’s knowledge and belief, this request was made by [REDACTED] of Intel; it is possible that [REDACTED] was also on the call when this request was made. Again to the best of its knowledge, it believes that the request was made of [REDACTED].”¹⁶ As regards the reasons for the request, HP states that it “[REDACTED]”¹⁷ (see recital [REDACTED] above).

(332) As regards what Intel refers to as the ‘[...] incident’,¹⁸ Intel states that [...], [...],¹⁹ and that the incident merely reflected the strain in the personal relationship between [...]and [...]. According to Intel, “the [...] incident reflects the fact that in the business world, as in other walks of life, some individuals do not get along well. Such friction is a matter for human resources managers, and not for the competition laws.”²⁰

(333) It is noted that Intel’s request to [REDACTED]

¹⁰ HP submission of 23 December 2005, Appendix 12.

¹¹ HP submission of 23 December 2005, [REDACTED] deposition, p. 67 and Exhibit 10, p. 2.

¹² HP submission of 23 December 2005, [REDACTED] deposition, p. 70 and Exhibit 10, p. 9.

¹³ HP submission of 23 December 2005, answer 2.13.

¹⁴ HP submission of 23 December 2005, answer 2.15.

¹⁵ HP submission of 23 December 2005, answer 2.16.

¹⁶ HP submission of 24 April 2006, pp. 1-2.

¹⁷ HP submission of 24 April 2006, p. 2.

¹⁸ Intel Reply to the 26 July 2007 SO, p. 130, paragraph 341.

¹⁹ Intel Reply to the 26 July 2007 SO, p. 129, paragraph 339.

²⁰ Intel Reply to the 26 July 2007 SO, p. 130, paragraph 341.

is not in itself part of the abusive conduct identified in this Decision. Nevertheless, the incident provides a revealing insight into the nature of Intel's relationship with HP as well as Intel's reaction to HP's launch announcement of 19 August 2002. Furthermore, the timing of the event shows the extent of Intel's sensitivity to HP entertaining more than occasional business transactions with AMD. The strength of Intel's reaction, as well as the fact that it was initiated at the highest level in Intel's hierarchy also give relevant background information as to Intel's readiness to put pressure on HP. It is noted that Intel did not deny the event in its Reply to the 26 July 2007 SO.

(334) HP highlights that following the cessation of negotiations on a HP-Intel business desktop rebate deal (see recital (330)), “[n]egotiations ([REDACTED]) were subsequently resumed ([REDACTED]) which resulted in the HPA1 agreement”.²¹

(335) Section 2.4.3 describes Intel's HPA1 and HPA2 agreements with HP.

2.4.3 Intel rebates to HP

(336) This section describes the HP Alliance Agreement (HPA), and in particular the first two generations of this agreement, referred to as HPA1 and HPA2 (see sections 2.4.3.1- 2.4.3.2). It should be noted that HP highlights that “*these bPC [business PC] block rebates obviate the need for HP's bPC unit to negotiate individual ECAP deals for business desktops products covered by the block rebate during every cycle of the period covered*”,²² and that “*the bPC block rebate agreement [HPA agreements] only relate to rebates, HP purchase volumes and marketing but do not otherwise govern the terms on which Intel supplies x86 microprocessors to HP.*”²³ In this regard, HP specifies that “[REDACTED]”,²⁴ and that “[REDACTED]”.²⁵

(337) [HP specifies that its commercial discussions with Intel should be viewed in the context of the financial position of its desktop business at the time] and (ii) HP's merger with Compaq, which was completed in May 2002²⁶ - at this time, HP states that it “*was giving much thought to how the merger would impact its relations with its partners, including Intel and AMD.*”²⁷

²¹ HP submission of 23 December 2005, answer 2.18.

²² HP submission of 6 August 2004, p. 10, answer 11.8.

²³ HP submission of 6 August 2004, p. 10, answer 11.9.

²⁴ HP submission of 6 August 2004, p. 9, answer 11.1.

²⁵ HP submission of 6 August 2004, p. 10, answer 11.9.

²⁶ HP submission of 23 December 2005, answer 2.10.b.

²⁷ HP submission of 23 December 2005, answer 2.10.b.

2.4.3.1. HPA1

(338) HP outlines that HPA1²⁸ was “*primarily negotiated by [REDACTED], [REDACTED] and [REDACTED], for HP, and by [REDACTED], for Intel. [REDACTED], and [REDACTED], at the time Intel’s [REDACTED], were also directly involved in the negotiations.*”²⁹ HPA1 was concluded at the end of 2002, for a year, starting on 1 November 2002, which is the start of HP’s fiscal year.³⁰ Intel outlines that “*HPA had a term of twelve months*” but that “*either party to the agreement was free to withdraw from the agreement on 30 days notice.*”³¹

(339) Under the agreement, Intel paid HP USD [...] rebate per quarter [...]³² Intel confirms that “*HP received its [...] [...] rebate in each of its [HP’s] fiscal quarters in 2002.*”³³ Therefore, over the period 1 November 2002 to 31 October 2003, Intel paid HP [...] under HPA1.

(340) Upon the expiry of HPA 1 on 31 October 2003, HP and Intel had to decide whether to [...], or remain in the framework of an alliance agreement, that is to say, extend HPA1.

(341) Intel and HP continued HPA1 on a [...] for seven months and then signed a new one-year alliance agreement: HPA2. Intel submitted that “[a]t the end of the 12 month term of HPA [HPA1], the parties, by mutual agreement, continued the agreement on a [...] basis. HP received rebates [...], from November 2003 until May 2004.”³⁴ Over the period November 2003 to May 2004, Intel therefore provided HP with USD [...] in rebate payments under HPA1.

2.4.3.2. HPA2

(342) The HPA1 business desktop alliance agreement and its six-month extension on a monthly basis until May 2004 were followed by a similar alliance agreement between Intel and HP, called HPA2.³⁵ In this regard, Intel specifies that “*in June 2004, HP approached Intel about entering into a new alliance agreement, again, requesting meet comp discounts for its commercial desktop business, based on competitive pricing that it received from AMD. After a series of negotiations, the parties*

²⁸ Intel/HP Commercial Desktop Initiative [HPA1 agreement], HP submission of 6 August 2004, Annex 3, pp. 3 and 4.

²⁹ HP submission of 23 December 2005, answer 2.1.

³⁰ Intel submission of 30 June 2005, pp. 1-2 and footnote 1.

³¹ Intel submission of 30 June 2005, p. 2.

³² HP submission of 4 June 2004, p. 2, footnote 1 explains that “*HP’s fiscal quarters are. 1 November – 31 January (Q1); 1 February – 30 April (Q2); 1 May – 31 July (Q3); and 1 August – 31 October (Q4).*”

³³ Intel submission of 30 June 2005, p. 2.

³⁴ Intel submission of 30 June 2005, p. 2.

³⁵ HPA2 agreement, HP submission of 6 August 2004, Annex 3, pp. 1 and 2. Note that the agreement has no title, and only mentioned ‘*Intel/HP Confidential*’ is specified on the top of the first page.

entered into the HP Alliance Agreement 2 (“HPA2”).”³⁶

(343) HP specified that HPA2 was negotiated by the same HP and Intel executives who negotiated HPA1 and that similar to HPA1, it was also for a one-year term.³⁷

(344) The payments made by Intel to HP under HPA2 were higher than those received under HPA1. Intel confirmed that: “*Intel committed to provide HP, based on volume estimate information provided by HP, with [...]per quarter.*”³⁸ Intel also specified that “[a]dditionally, the parties agreed, based on estimated volume targets and growth projections in emerging markets provided by HP, that Intel would grant to HP an additional credit of [...]if HP shipped a total volume of [...]units for business desktop systems, in accordance with HP’s own volume target by the close of the fourth quarter (defined as 3/1/05-5/31/05). Intel could grant the [...]in quarterly increments [...] per quarter), if HP achieved a quarterly run rate, on a linear basis, that corresponded to that unit figure.”³⁹

(345) Intel confirmed that “*HP received its USD [...] rebate for the first portion of the agreement (June 2004-August 2004) in September 2004. HP also received USD [...], representing an accrual of half of the USD [...] payment, as well as its USD [...] rebate for September – November 2004, in December 2004.*”⁴⁰ HP similarly confirmed that it received USD [...] of rebates for each corresponding quarter of HPA2.⁴¹

2.4.3.3. Summary of Intel payments to HP under HPA1 and HPA2

(346) The following tables provide a quarterly overview of Intel HPA payments to HP in USD million.⁴²

Table 8 - HPA payments received from Intel by HP during HPA1

Period	Nov 02- Jan 03	Feb 03- Apr 03	May 03- Jul 03	Aug 03- Oct 03	Nov 03- Jan 04	Feb 04- Apr 04	May 04
Payments	[...]	[...]	[...]	[...]	[...]	[...]	[...]

Table 9 - HPA payments received from Intel by HP during HPA2

³⁶ Intel submission of 30 June 2005, p. 2.

³⁷ HP submission of 23 December 2005, answer 3.1.

³⁸ Intel submission of 30 June 2005, pp. 2-3.

³⁹ Intel submission of 30 June 2005, p. 3.

⁴⁰ Intel submission of 30 June 2005, p. 3, footnote 6.

⁴¹ HP submission of 11 August 2006, p. 9, answer 12 and HP submission of 6 August 2004, answer 11.4.

⁴² It should be noted that while rebates under HPA1 were given for each HP fiscal quarter, as explained in footnote 404 above, rebates under HPA2 were paid for HPA2 quarters that were not linked to HP’s fiscal quarters. The month of May 20004 appears alone because it is a bridge between the last full fiscal quarter of application of HPA1 and the first quarter of application of HPA2.

Period	Jun 04- Aug 04	Sept 04- Nov 04	Dec 04- Feb 05	Mar 05- May 05
Payments	[...]	[...]	[...]	[...]

Source: HPA1 and HPA2 and evidence outlined in recitals (344) to (345) above.

(347) While this Decision is limited to HPA1 and HPA2 with regard to HP, it should be noted that subsequent to HPA2, Intel and HP have already entered into HPA3,⁴³ the third generation of the alliance agreements for business desktops.

2.4.4. Conditionality of Intel rebates to HP

2.4.4.1. Evidence from HP

(348) In a reply to a request for information pursuant to Article 18 of Regulation (EC) No 1/2003 concerning the operation of the HPA1 rebates, HP stated that: “*HPA1 was subject to a number of conditions, only some of which appear in the HPA1 agreement.*”⁴⁴ HP specified that “*Intel granted the credits subject to the following unwritten requirements:*

- a) *that HP should purchase at least 95% of its business desktop system from Intel;*
- b) *that HP’s distribution (...)model for AMD-based business desktops should:*
 - (i) *direct HP’s AMD-based business desktops to SMB [Small and Medium Business] and government, educational and medical (GEM) customers rather than to mainstream (or “enterprise”) business customers; and*
 - (ii) *preclude HP’s channel partners from stocking the AMD-based business desktops, so that these desktops would only be available to customers by ordering them from HP (either directly or via HP channel partners acting as sales agent). This is known within HP as a direct/”top config” go-to-market model;*
- c) *that HP would defer the launch of its AMD-based business desktop in the EMEA [Europe, Middle East and Africa] region by six months.”⁴⁵*

(349) HP indicated that despite the fact that the conditions mentioned in recital (348) were unwritten, Intel had made it clear to HP, including at the highest level of the two companies, that they were integral conditions to the HPA1 agreement: “*unwritten conditions (...) were stated to be part of the HPA1 agreement by [REDACTED] and*

⁴³ HPA3 agreement, Intel/HP Confidential, HP submission of 23 December 2005, Appendix 5.

⁴⁴ HP submission of 23 December 2005, answer 2.1.

⁴⁵ HP submission of 23 December 2005, answer 2.5.

*review and discuss this disagreement. If the HP and Intel executives agree that HP has not met its requirements, HP will be given a reasonable time period to cure the problem. If HP fails to remedy the problem then Intel has the option to terminate the agreement. If this termination occurs, no further payment will be due to HP beyond the quarter prior to which the unremedied problem occurred. Payments made to HP for quarters after this point will be refunded to Intel.”*⁵¹

(353) Although the e-mail quoted in recital (352) is dated a few months before the conclusion of HPA1, HP explained that the correspondence that had taken place in summer 2002 related to the same agreement. According to HP, the 95% alignment requirement and the AMD distribution model were expected to be a requirement of a block rebate deal that was to be negotiated between Intel and HP early in the summer of 2002 and while that agreement was in itself not signed, these conditions were carried over into HPA1.⁵²

(354) HP also refers to a subsequent internal e-mail from [REDACTED] to [REDACTED] and other HP executives, in which [REDACTED] wrote: “PLEASE DO NOT... communicate to the regions, your team members or AMD that we are constrained to 5% AMD by pursuing the Intel agreement.”⁵³

(355) Intel outlines that “[t]he agreement provided for the parties to hold meetings to discuss opportunities and issues arising from the agreement at the end of each quarter. At these meetings, the parties would review HP sales out information and Intel sales data”.⁵⁴ HP also outlined that there were “monthly senior management meetings” to discuss the HPA1 agreement and that “during these meetings [REDACTED] and [REDACTED] discussed HP’s fulfilment of the 95% Intel-alignment requirement.”⁵⁵

(356) An internal HP presentation of 24 October 2002 relating to the terms and conditions of HPA1 states that HP will put “restrictions on the D315 product”, and specifies a “[d]elay in regional launches (from August 2002) - LA/AP [Latin America/Asia Pacific] 2-3 months - Europe 6 months”.⁵⁶

(357) In December 2002, a few days after the signature of HPA1, [REDACTED] of HP announced to [REDACTED] [HP] team: “D315 launch date in EMEA is

⁵¹ HP submission of 23 December 2005, answer 2.7. E-mail from [REDACTED] to [REDACTED] of 14 July 2002 entitled “Intel Deal Summary”: HP submission of 23 December 2005, Appendix 10, pp. 2 and 3.

⁵² HP submission of 23 December 2005, answer 2.7. E-mail from [REDACTED] to [REDACTED] of 14 July 2002 entitled “Intel Deal Summary”: HP submission of 23 December 2005, Appendix 10, pp. 2 and 3.

⁵³ E-mail from [REDACTED] to [REDACTED] and others of 15 July 2002 entitled “Negotiations Update”. HP submission of 23 December 2005, Appendix 11. See also Intel Reply to the 26 July 2007 SO, Annex 150.

⁵⁴ Intel submission of 30 June 2005, p. 2.

⁵⁵ HP submission of 23 December 2005, answer 2.8.

⁵⁶ HP submission of 23 December 2005, [REDACTED] deposition, Exhibit 19, p. 1.

TBD [to be determined], not in 1H'03 [first semester 2003] for sure. ([REDACTED]) Request AMD to discontinue proactive sales to enterprise customers until then.”⁵⁷

(358) An internal HP presentation from 2004 also relates to the D315 launch. It specifies a “[d]irect-only delayed EMEA launch despite being [an important AMD market/[REDACTED]]”, and “AMD -[REDACTED] forecasted - direct only terms ([REDACTED] had been forecasted by regions if direct & indirect).”⁵⁸

(359) On 3 September 2004, [REDACTED] asked [REDACTED] about the manner in which AMD-based commercial desktops could be commercialised in the EMEA: “[REDACTED], Quick question. Instead of asking [REDACTED] to add localized pavilion for some ISE countries (Poland, Turkey. . .), can we consider using the commercial AMD line up inside the channel in those countries or do you believe we at least need to change the Bezel and call it Presario (Which will mean additional complexity and therefore resources?) Alternatively I could let 2/3 countries to try (To see if it works at least), and let Intel react if they discover it? [REDACTED].”⁵⁹

(360) On the same day, [REDACTED] replied: “You can NOT use the commercial AMD line in the channel in any country, it must be done direct. If you do and we get caught (and we will) the Intel moneys (each month) is gone (they would terminate the deal). The risk is too high. [REDACTED] [REDACTED].”⁶⁰ [REDACTED] then informed [REDACTED] of his sales team that HP EMEA could not make available its AMD-based Presario through its channel partner: “Cannot do what we talked about [...]”⁶¹

2.4.4.2. Intel’s arguments on the alleged absence of conditionality

(361) Intel alleges that the HPA agreements were not subject to any of the binding conditions described in sub-section 2.4.4.1.

(362) Intel’s arguments to this effect are described in this section. Section a) addresses Intel’s horizontal argument concerning the relevance of evidence preceding the

⁵⁷ E-mail from [REDACTED] to [REDACTED] and others dated 28 December 2002 entitled ‘D315 Launch in EMEA’. HP submission of 23 December 2005, Appendix 14.

⁵⁸ HP internal presentation entitled ‘Managing Intel and AMD to maximize value to BPC’, Final draft, slide 6, HP submission of 23 December 2005, Appendix 15, p. 6. It should be noted that although the exact date of this presentation is not certain, on the basis of its content - in particular that HP was considering its strategy for the second half of 2004 and beyond - it can be established that it was prepared sometime during the first half of 2004 and before the conclusion of HPA2 in July 2004.

⁵⁹ E-mail of 3 September 2004 from [REDACTED] to [REDACTED] entitled ‘AMD’, HP submission of 23 December 2005, Appendix 19.

⁶⁰ E-mail of 3 September 2004 from [REDACTED] to [REDACTED] entitled ‘AMD’, HP submission of 23 December 2005, Appendix 19.

⁶¹ E-mail of 3 September 2004 from [REDACTED] to [REDACTED] entitled ‘AMD’, HP submission of 23 December 2005, Appendix 19.

signature of HPA1. Sections b) and c) address, respectively, the market share condition on AMD-based HP products (condition a) in recital (348)) and the conditions restricting the sales and marketing conditions of AMD-based HP products (conditions b) and c) in recital (348)).

(363) Intel also asserts that the Commission alleged that the HPA agreement[s] were conditional upon HP not selling AMD-based desktop PCs under the Evo brand.⁶² This characterisation of the Commission's preliminary conclusions in the 26 July 2007 is incorrect. The Commission presented its preliminary conclusions on the conditionality of Intel's rebates to HP in paragraph 195 of the 26 July 2007 SO. These conclusions, and in any event the conclusions drawn in this Decision, do not refer to any condition regarding branding.

(364) Before addressing Intel's arguments about the alleged absence of conditionality in the HPA agreements, it is noted that Intel did not provide any specific comment on or explanation of HP's submission quoted in recital (348). In its Reply to the 26 July 2007 SO, Intel ignored the fact that HP had submitted clear statements on the conditionality of the HPA rebates.

(365) When the Commission questioned Intel on this matter in the Oral Hearing, after HP had again confirmed the accuracy of all statements it had submitted to the Commission, Intel stated that the discrepancy between its views and HP's statements was likely to be due to a lack of common understanding of the actual conditions of the agreements.

(366) This position is unconvincing. Indeed, it is not plausible that large, multinational companies such as Intel and HP would enter into agreements worth at least USD [...] per year without knowing exactly what the conditions associated with such agreements were. In this regard, HP's explanations of the unwritten conditions are credible, not least because of the contemporaneous evidence adduced. Furthermore, Intel's interpretation is not consistent with HP's statement that Intel's highest executives had specified to HP in person that the unwritten conditions formed part of the agreements.⁶³

a) Intel's horizontal argument on the relevance of evidence preceding the signature of HPA1

(367) In several instances, Intel has made the argument that evidence which predates the conclusion of HPA1, in particular evidence preceding 19 August 2002 is irrelevant for the assessment of the actual provisions of HPA1.⁶⁴ Intel argues that HPA1 was a different arrangement from the one in negotiation during the months of July-August 2002. This is because in August 2002, Intel rejected the arrangement which was

⁶² Intel Reply to the 26 July 2007 SO, paragraph 331.

⁶³ See recital (349).

⁶⁴ See in particular Intel Reply to the 26 July 2007 SO, paragraphs 319, 321, 332, 352-354.

then in negotiations.⁶⁵

(368) This argument by Intel is contradicted by several pieces of evidence in the Commission's file. It is noted that HP made it clear that the HPA1 agreement was the natural successor of the rebate agreement which was in negotiations in July-August 2002 (see recital (353)). Moreover, it carried over all the relevant conditions thereof: "*the 95% alignment requirement and the AMD distribution model were to have been a requirement of a three year block rebate deal negotiated between Intel and HP early in the Summer of 2002* ([REDACTED]). [REDACTED]

[REDACTED]⁶⁶ HP also submitted that "[t]hese negotiations [with Intel] resulted in the HPA1 [HP Alliance 1]⁶⁷ agreement, containing the restrictions described above [restrictions that would have been part of the failed agreement negotiated over summer 2002]"⁶⁸.

(369) HP's depiction of the events is supported by several pieces of contemporaneous evidence, as illustrated in recitals (370) and (371).

(370) In an e-mail dated 14 July 2002, [REDACTED], a senior HP executive, described the conditions of the summer 2002 agreement in detail.⁶⁹ The conditions concerning Intel's market share and the distribution model for AMD-based products were almost identical to the unwritten condition of the HPA agreement as described by HP (see recital (348)). As the two sets of conditions are essentially the same, they confirm that the negotiated summer 2002 agreement and the formally concluded HPA1 agreement are the same in this respect.

(371) A contemporaneous HP presentation of 17 October 2002 entitled '*intel update*' is also relevant. That presentation explains the link between the negotiations over summer 2002 and autumn 2002 eventually ending with the conclusion of the HPA1 agreement, and also demonstrates that they relate to the same agreement. Slide 10 of the presentation describes: "*History: 1. HP reached agreement at the term-sheet level in mid July with Intel and AMD (- [REDACTED]); 2. Intel stalled contract negotiations until HP-AMD launch; 3. Intel reacted very negatively to HP-AMD launch and terminated negotiations.*"⁷⁰ 'History' in this context refers back to the negotiations over summer 2002 and explains why those negotiations were terminated: because of HP launching an AMD-based product. Slide 11 explains the status at the time of the

⁶⁵ Intel Reply to the 26 July 2007 SO, paragraph 319.

⁶⁶ HP submission of 23 December 2005, answer 2.7.

⁶⁷ It should be noted that the first HP-Intel commercial desktop alliance agreement was originally abbreviated to HPA and it was only subsequent to the conclusion of the second generation of these alliance agreements, HPA2, that HPA began to be referred to as HPA1.

⁶⁸ HP submission of 23 December 2005, answer 2.18.

⁶⁹ See recital (352).

⁷⁰ HP presentation of 17 October 2002 entitled '*intel update*', slide 10. Exhibit 12 to [REDACTED] Deposition, submitted with HP submission of 23 December 2005.

presentation, that is to say mid-October 2002: “*Status: Intel negotiations have resumed.*” and “*Key Messages:* ([REDACTED]

[REDACTED]) *Some tensions may have been created between the two companies around the HP-AMD launch – HP may have “pushed the envelope” with the launch, but at the same time Intel had stalled closing on an agreement when HP launched the product.*”⁷¹ This shows that a few months after the negotiations were stalled (“History”), HP and Intel resumed the same negotiations from the point they were interrupted. In other words, the presentation bridges the two negotiations in time by demonstrating their identical content and why there was a break.

(372) On the basis of the elements set forth in recitals (367) to (371), it is concluded that HP’s submissions and contemporaneous documents demonstrate that HPA1 was essentially the same block rebate agreement as the agreement negotiated during the summer of 2002 between Intel and HP, but which was not formally agreed until HPA1 was signed at the end of 2002.⁷² In particular, it included the same conditions on the percentage and marketing conditions of HP AMD-based corporate desktops as the ones that were already agreed in mid July 2002.

b) Intel’s arguments on the alleged absence of a 95% MSS condition

(373) Intel claims that the HPA agreements contain no binding MSS [Market Segment Share] condition (of 95%).⁷³ According to Intel, HP spontaneously offered to Intel that it would fulfil the MSS condition in order to extract higher rebates from Intel,⁷⁴ but Intel rejected such conditions from the outset⁷⁵ because of business and antitrust concerns.⁷⁶

(374) The relevance from a legal point of view of whether HP or Intel first came up with the suggestion of the 95% MSS condition for the finding of an abuse of a dominant position according to EC law will be discussed in section VII.4.2.2.3.b) below. This section deals with the question of whether the HPA negotiation process, and in particular the discussions on MSS conditions between the parties, support Intel’s factual argument that it rejected such conditions.

(375) The case file, including the documents quoted by Intel, does not contain definitive evidence as to whether HP or Intel first came up with the suggestion of the 95% MSS condition. Intel has not provided any evidence to support its argument apart from stating that HP “*sent Intel a draft contract proposing a three-year HPA1 agreement under which Intel was to provide HP rebates totalling approximately [...], and HP was to*

⁷¹ HP presentation of 17 October 2002 entitled ‘intel update’, slide 11. [REDACTED] Deposition, Exhibit 12, submitted with HP submission of 23 December 2005.

⁷² Intel submission of 30 June 2005, pp. 1-2.

⁷³ Intel Reply to the 26 July 2007 SO, paragraph 46.

⁷⁴ Intel Reply to the 26 July 2007 SO, paragraph 293.

⁷⁵ Intel Reply to the 26 July 2007 SO, paragraph 293.

⁷⁶ Intel Reply to the 26 July 2007 SO, paragraph 306.

*commit to buy 95% of its microprocessors for its corporate desktops PCs from Intel.*⁷⁷ Intel did not provide the Commission with a copy of this draft contract, nor of any contemporaneous evidence which would support the notion that this draft contract was the first instance when the 95% MSS condition was introduced by the negotiating parties.

(376) Even if Intel's assertion that the 95% MSS condition appeared for the first time in this contract (that is to say that it was originally HP's idea) were correct, for the argument to have any merit, Intel would still have to demonstrate that it genuinely and effectively rejected this condition and that, as a consequence, the condition was eventually not implemented in any manner (written or unwritten). Intel has failed to demonstrate this. In fact, none of the documents in the file, including those provided by Intel, support Intel's assertion that it rejected a 95% MSS condition, whichever party first introduced it in the HPA I negotiations.

(377) The documents provided by Intel, as well as all other contemporaneous evidence, show that Intel's only concern about the arrangement was the extent (in terms of time and volume) of the rebates to be granted to HP in order to get the deal. As is described in an internal HP email dated 15 July 2002, that is to say (about 5 months before the final signature of the agreement), the only open question before the signature of the agreement was a specific pricing arrangement: "*We are closed with Intel on all but one term [REDACTED]*"⁷⁸

(378) The same email also makes clear that the Intel agreement, which was settled apart from the question of the specific pricing arrangement referred to in recital (377), included a 95% MSS condition for Intel: "*PLEASE DO NOT ... communicate to the regions, your team members or AMD that we are constrained to 5% AMD by pursuing the Intel agreement.*"⁷⁹

(379) The Commission takes note of Intel's argument that the message mentioned in recital (378) "*could only reflect HP's internal decision to hold AMD to the 5% level because of HP's preference to focus its corporate desktop product line on Intel-based platforms so long as it could extract a favourable price from Intel.*"⁸⁰ However, this argument is unconvincing. Indeed, the language used in the message, in particular the words "*constrained (REDACTED) by pursuing the Intel agreement*" make no sense if it concerned only an internal HP preference. It is also further noted that HP itself, which is the best placed to interpret language used in its own documents, presented this

⁷⁷ Intel Reply to the 26 July 2007 SO, paragraph 293.

⁷⁸ Email from [REDACTED] to [REDACTED] and others of 15 July 2002 entitled "*Negotiations Update*". HP submission of 23 December 2005, Appendix 11. See also Annex 150 to Intel Reply to the 26 July 2007 SO.

⁷⁹ *Idem*.

⁸⁰ Intel Reply to the 26 July 2007 SO, paragraph 321.

document as evidence of the existence of the 95% MSS condition.⁸¹

(380) In support of the argument that it rejected an unsolicited 95% MSS condition offer, Intel provided the Commission with contemporaneous documents in which it allegedly expressed “*antitrust concerns*” over the agreement “*from the outset*”.⁸² Intel suggests that these “*antitrust concerns*” were the reason for Intel’s rejection of the conditions offered by HP, which eventually led to the signature of a different agreement which contained no written or unwritten 95% MSS condition.⁸³

(381) However, the “*antitrust concerns*”, as they appear from the documents in question,⁸⁴ do not relate to the potential unlawfulness of the conditionality of the rebates. Rather, they relate to Intel’s alleged concern that its rebates may be construed as pricing below the offer of a competitor.⁸⁵ An e-mail dated 15 October 2002 from Intel’s lawyers to HP’s lawyers summarises this very clearly: “*it may be useful to provide some explanation of the principal legal concerns, in order to enable HP to provide the additional information that may support the financial commitment that it is seeking. Because HP has been unable to disclose the prices, products, and volumes that AMD has offered (even within ranges), Intel has had to extrapolate the potential magnitude of AMD’s offer, taking into account some reasonable estimate of the relevant processors, prices, and volumes. Based on reasonable estimates regarding the contestable volume of microprocessors over the relevant period and the known differences between Intel’s and AMD’s prices and processors, it appears that the financial support that HP is seeking from Intel would creates (sic - create) a substantial risk that Intel would beat AMD’s offering rather than simply meeting it.*”⁸⁶

(382) It is further noted that Intel’s assertion in paragraph 309 of the Reply to the 26 July 2007 SO that: “*It is not seriously subject to dispute that Intel sought information from HP to ensure that Intel did not price below cost*” is a misrepresentation of facts. The documents Intel provided only show that Intel was seeking information that would help it represent that it was not pricing below AMD’s offer, that is, the competitive offer. This is different from not pricing below costs because AMD’s price offer was zero, which is well below any cost benchmark.

⁸¹ HP submission of 23 December 2005, answer 2.7.a and Appendix 11.

⁸² Intel Reply to the 26 July 2007 SO, paragraphs 305 and 306.

⁸³ Intel Reply to the 26 July 2007 SO, paragraphs 306 and 319.

⁸⁴ The Commission notes that Intel redacted many of the documents in question (for instance annexes 138, 139, 140, 143 and 146 of the Reply to the 26 July 2007 SO) and claimed Legal Professional Privilege over the redacted parts. It seems that at least part of the sections redacted would not be covered by the Legal Professional Privilege under Community Law, as they were written by in-house counsels or lawyers that are not admitted to practise in the EU. Intel did not provide any specific justifications for its claims. Because of the magnitude of the redacted sections, the Commission lacks important parts of the documents in question, which are critical to understand their precise scope.

⁸⁵ In certain instances in the law of the United States of America, pricing below costs is possible for a company with market power, to the extent that the company’s offer only matches the offer of a competitor, but does not beat it. The Robinson Patman Act is an example of such a legal provision.

⁸⁶ Email from [REDACTED] to [REDACTED] of 15 October 2002 entitled “*Meet Comp*” Issues”. Annex 145 to Intel Reply to the 26 July 2007 SO.

(383) Accordingly, Intel's "*antitrust concerns over the deal*", if they were genuine, had nothing to do with the conditionality of the rebates. For this reason, they are of no avail to the assertion that they led Intel to abandon suggested rebate conditions in the final version of the agreement. Intel's argument in this respect is further weakened by HP's submission that the conditions were carried over into the final version of the agreement.⁸⁷

(384) In fact, contemporaneous evidence shows that Intel was satisfied with the 95% MSS condition and was even pushing for a 100% MSS condition, in exchange for granting HP even more rebates (see recital (386)).

(385) On 9 July 2002, an Intel executive summarised the status of the negotiations of the agreement with HP, as well as Intel's preferred options for the future of the negotiations in view of an Intel-HP meeting scheduled for 11 July 2002. The document first describes the status of the negotiations, which was based on a 95% MSS condition: "*Latest hp proposal giving Intel the opportunity to compete for 95% of hp's total corporate desktop business (including smb + large biz). (...) Intel gets: 95% of hp's commercial desktop business (smb + large biz)*".⁸⁸ It then goes on to review the three options that Intel was considering for the negotiation:

(386) Option 1 was: "*Provide best offer (given hp agreement to maintain corporate dt. alignment)*".⁸⁹ In other words, this means that higher Intel rebates should be offered if HP were to agree to stay 100% aligned with Intel in the corporate desktop PC segment, as it had always been historically at the time of the negotiation of HPA1. This would equate to a 100% MSS condition in that segment.

(387) Option 2 was: "*Provide some assistance (per hp's suggestion on maintaining 95% Intel alignment)*".⁹⁰ In other words, this means that Intel rebates would be offered if HP were to agree to a 95% MSS condition (which was HP's position at that time of the negotiation), but at a lower level compared to the 100% MSS situation;

(388) Option 3 was to not pursue the agreement.

(389) The brief then recommends: "*If we get [HP executive]/[HP executive] agreement that we have the opportunity to maintain alignment in smb & large biz, then offer Option #1. If hp maintains current position, then offer Option #2*".⁹¹ This shows that Intel was fully ready to enter into the agreement with the 95% MSS condition (option 2), and was even offering an agreement with 100% MSS condition (option 1), in exchange for higher conditional rebates.

⁸⁷ See recital (353).

⁸⁸ Email from [Intel executive] to [Intel senior executive] and others of 9 July 2002 entitled "[...]". Annex 137 to Intel Reply to the 26 July 2007 SO.

⁸⁹ Idem.

⁹⁰ Idem.

⁹¹ Idem.

(390) In view of the above, it is concluded that Intel has not provided arguments that would disprove the existence of the 95% MSS condition.

c) Intel's arguments on restrictions on the marketing and commercialisation of HP's AMD-based desktops

(a) Intel's argument that HP unilaterally self-imposed the channel restrictions

(391) Intel claims that the channel limitations were self-imposed by HP and that the HPA agreements did not contain any unwritten restrictions on the marketing and commercialisation of HP's AMD-based desktops.⁹²

(392) According to Intel, [REDACTED] testified before the US FTC⁹³ that HP intended to commercialise its AMD-based desktops from the outset, including the D315 model, under terms that equate to the restrictions mentioned in recital (348).⁹⁴ For instance, [REDACTED] described the restrictions accepted by HP as "*basically part of our fundamental plan for the product to begin with*" and "*sleeves out of our [HP's] vest*".⁹⁵ Therefore, Intel argues that giving them up in the negotiations with Intel was no sacrifice to HP because HP would have chosen this course of action anyway.⁹⁶

(393) However, this passage from the testimony by [REDACTED] is contradicted by other passages from the same testimony. Indeed, another fragment of the testimony reads: "*Q: Were these all restrictions [sic] [the restrictions mentioned in recital (348)] that Intel was insisting on in the negotiations or were these restrictions that HP affirmatively offered up? A: Well, we wouldn't have voluntarily done these unless it was part of a negotiation for where we would receive something else in return. Q: What was that that you were going to receive in return? A: We were hoping some advantaged pricing and potentially ECAP funds.*"⁹⁷ These contradictions in [REDACTED] testimony alter the probative value of [REDACTED] assertions in this context. In view of this, the Commission considers that it is well-founded to rely on HP's corporate statement to the Commission, as well as the contemporaneous documents on the file, which all point to the fact that the restrictions in question were unwritten conditions in the HPA agreements.

(394) Intel further argues that in July 2002, four months before the conclusion of HPA1, HP had already communicated to AMD that it would distribute the AMD products only in the direct channel. According to Intel, this would prove that HP would have

⁹² Intel Reply to the 26 July 2007 SO, paragraph 348.

⁹³ HP submission of 23 December 2005, [REDACTED] deposition, pp. 5-6. [REDACTED] testified that between spring 2002 to December 2002 he was [...].

⁹⁴ Intel Reply to the 26 July 2007 SO, paragraphs 334-335.

⁹⁵ HP submission of 23 December 2005, [REDACTED] deposition, pp. 108-109.

⁹⁶ Intel Reply to the 26 July 2007 SO, paragraph 335.

⁹⁷ HP submission of 23 December 2005, [HP executive] deposition, p. 107.

decided unilaterally to limit the distribution of AMD-based systems, in advance of any agreement with Intel.⁹⁸ Intel alleges that, also in July 2002, AMD itself understood that HP had independently decided on these restrictions.⁹⁹

(395) However, contemporaneous evidence on the file does not demonstrate that HP unilaterally decided to limit the distribution of AMD-based systems, but rather the opposite, that is to say that these were restrictions which were conditions agreed in exchange for the Intel rebates. This conclusion is reinforced by the fact that the 15 July 2002 e-mail, on which Intel relies, mentions that HP had nearly closed a deal with Intel (“*We are closed with Intel on all but one term*”¹⁰⁰), and makes explicit references to the fact that the Intel agreement already puts constraints on HP (“*PLEASE DO NOT ... communicate to the regions, your team members or AMD that we are constrained to 5% AMD by pursuing the Intel agreement*”¹⁰¹). As was described in section a), the agreement negotiated over summer 2002, already fixed the restrictive conditions under which HP would distribute its AMD-based corporate desktop PCs. HP itself stated that “*Shortly after HP’s 19 August 2002 launch of the AMD-based D315, Intel ceased negotiations on a rebate deal for HP BPC (...) Negotiations between HP and Intel for a block rebate, for HP BPC were subsequently resumed (...). These negotiations resulted in the HPA1 agreement, containing the restrictions described above.*”¹⁰² This indicates that even after the cessation of the negotiations with Intel, HP conducted its business with regard to AMD as if the agreement with Intel, including the restrictive conditions, had been formally agreed to. This was the way HP hoped to ensure that Intel would eventually resume the negotiations and conclude the same agreement as that being finalised in summer 2002.

(396) Contrary to its assertion, Intel did not present any convincing element which would prove that AMD understood that the HP sales restrictions were decided unilaterally. The evidence put forward by Intel shows nothing more than the fact that AMD was aware, as of 30 July 2002, of some of the restrictions which HP had agreed with Intel in mid July 2002 - presumably without knowing that these were conditions resulting from the Intel/HP deal.

(397) The notion that HP would have unilaterally decided to limit the distribution of the AMD-based systems, in advance of any agreement with Intel is further disproved by an e-mail from [HP executive] to [HP executive] dated 29 October 2002. This email presented the alternatives HP was considering with respect to its AMD-based commercial desktop. One of the alternatives says “*offer to allow reseller inventory. (...)*”

⁹⁸ Intel Reply to the 26 July 2007 SO, paragraph 332.

⁹⁹ Intel Reply to the 26 July 2007 SO, paragraph 336.

¹⁰⁰ Email from [redacted] to [redacted] and others of 15 July 2002 entitled “*Negotiations Update*”. HP submission of 23 December 2005, Appendix 11. See also Annex 150 to Intel Reply to the 26 July 2007 SO.

¹⁰¹ Email from [redacted] to [redacted] and others of 15 July 2002 entitled “*Negotiations Update*”. (Intel Reply to the 26 July 2007 SO, Annex 150).

¹⁰² HP submission of 23 December 2005, answers 2.15 and 2.18, p. 7.

only if no Intel deal.”¹⁰³ With this e-mail, HP also submitted a one-page handwritten note written by [HP executive] concerning the AMD desktop alternatives described in that e-mail. The note mentions: “*If GTM [go-to-market] restrictions aren’t going to be lifted, doesn’t make good business sense to pursue at all.*”¹⁰⁴ This sentence is self-explanatory: [HP executive] considered that the imposition of channel restrictions on HP’s AMD desktop would most likely result in low sales.

(398) An internal HP presentation of 2004 also disproves Intel’s contention. After the expiry of HPA1 on 31 October 2003 and its continuation on a monthly basis until May 2004 as described in section 2.4.3.1, HP was considering whether to extend the term of HPA1 with Intel or break away from the HPA alliance. An HP presentation of 2004 entitled ‘*Managing Intel and AMD to maximize value to BPC [Business PC]*’¹⁰⁵ shows the pros and cons HP was evaluating before that decision. The presentation captures the scenarios in front of HP: “*Today’s decision: • Should we widen distribution for BPC [Business PC] AMD? When? • Should we continue long-term agreements like HPA with Intel?*”¹⁰⁶ It provides the following recommendation: “[HP considered expanding distribution of the AMD-based product to the indirect channel/

_____]”¹⁰⁷ In other words, HP thought that one of the advantages of breaking away from the Intel alliance would be that it could do away with the channel restrictions (direct only distribution) and widen the distribution of the AMD-based desktops to indirect distribution. HP considered a middle-way strategy: continuing the HPA agreement containing the HPA restrictions only for the [enterprise] segment and breaking away from the distribution restriction and going back to transactional relation in the [small and medium business] segment, with the possibility of selling the AMD-desktops via the traditional channels as well.

(399) Commenting on the exchange of emails between [_____] and [_____] mentioned in recitals (359) and (360), Intel again argues that “*the channel limitation had been self-imposed by HP*”, and that “*a concern that Intel could terminate the agreement going forward does not establish that the agreement included unwritten binding conditions.*”¹⁰⁸

¹⁰³ [_____] deposition, p. 116, submitted with HP submission of 23 December 2005.

¹⁰⁴ Handwritten notes by [HP executive] on the e-mail from [HP executive] to [HP executive] of 29 October 2002 entitled ‘Hammer Product’. [_____] deposition, p. 117, submitted with HP submission of 23 December 2005. It should be noted that there is no name indicated on the handwritten notes. However, Mr [HP executive] Deposition before the FTC confirms that. “*Q: Your counsel has told us that these – that the handwritten notes are from [_____].*” [_____] deposition, p. 117.

¹⁰⁵ Internal HP presentation of 2004 entitled ‘Managing Intel and AMD to maximize value to BPC — Final draft’. HP submission of 23 December 2005, Appendix 15.

¹⁰⁶ *Idem*, slide 3.

¹⁰⁷ *Idem*, slide 4.

¹⁰⁸ Intel Reply to the 26 July 2007 SO, paragraph 348.

(400) However, there is no doubt about the content of the e-mails. The wording used (“*You can NOT*”, “*if (...) we get caught*”)¹⁰⁹ is wholly inconsistent with the notion of self-imposed limitations. Rather, it demonstrates that the agreement was conditional.

(b) Intel’s argument that there was insufficient demand for AMD-based PCs

(401) Intel further argues that the reason why HP did not sell AMD-based PCs to enterprise customers was because of “*Insufficient market demand*” and “*Roadmap complexity*” as described in an HP internal presentation.¹¹⁰ Those arguments cannot be accepted for several reasons:

(402) Firstly, Intel’s interpretation of the HP document mentioning the “*Insufficient market demand*” and “*Roadmap complexity*” associated with the sale of the D315 to enterprise customers is incorrect. These HP considerations have to be considered in the context of the document they are extracted from. In that document, drawn up during the negotiation of HPA2, HP was analysing whether HP had an interest in prolonging the HPA agreement with Intel, and keeping the associated rebates, or to break free of the HPA constraints, but lose the rebates. All HP assertions concerning the interest of pursuing the option of selling more AMD-based products have to be understood in the context of a comparison with the option of staying with Intel and keeping the rebates. The HP document therefore should not be understood as meaning that there is an “*Insufficient market demand*” or a too big “*Roadmap complexity*” for the D315 in the absolute, but rather than there is too little demand and too big roadmap complexity to outweigh the loss of Intel rebates.

(403) Secondly, an internal HP presentation of June 2002, that is to say before HP agreed with Intel on any marketing restriction and shortly before the launch of the D315, referred to the model as “*targeted at SMB but suitable for enterprise deployments*”.¹¹¹ This shows that, absent the conditions in the Intel agreements, HP considered that the D315 model could meet the requirements of enterprise customers.

(404) Thirdly, when claiming that HP did not sell the D315 to enterprise customers because of “*Insufficient market demand*” and “*Roadmap complexity*” (see recital (401)), Intel quotes from an HP presentation prepared in 2004, therefore well after the conclusion of the HPA1 agreement. As explained in recital (398), at that time, HP was considering the business strategy to pursue after the expiry of HPA1. The exact text on the same slide reads as follows: “*Offer AMD in enterprise “dc” [direct channel only]*

¹⁰⁹ See recital (360). E-mail of 3 September 2004 from [REDACTED] to [REDACTED] entitled ‘AMD’, HP submission of 23 December 2005, Appendix 19.

¹¹⁰ Intel Reply to the 26 July 2007 SO, paragraph 332, quoting from an HP presentation of 2004 entitled ‘Managing Intel and AMD to maximize value to PBC’, slide 5, Intel Reply to the 26 July 2007 SO, Annex 8. See also HP submission of 23 December 2005, Appendix 15, p. 5.

¹¹¹ HP submission of 23 December 2005, [REDACTED] deposition, Exhibit 14, HP presentation of 13 June 2002 entitled ‘Commercial AMD desktop — strategic rationale’.

line? – No – Insufficient market demand. Roadmap complexity.”¹¹² In other words, the question before HP was not whether to offer AMD-based desktops to enterprise customers as such, but about the best sales methods to reach that customer segment.

(405) Finally, Intel’s assertions on the alleged insufficient demand for HP AMD-based computers in the enterprise subsegment are contradicted by Intel itself. Indeed, in the part of its Reply to the 26 July 2007 SO concerning the contestable share of HP’s supply needs, in the context of [...], Intel has provided documents in which it allegedly estimated that during HPA1, [...] units per year could be switched by HP to AMD in the enterprise subsegment,¹¹³ and up to [...] per year during HPA2.¹¹⁴ Without prejudice to the exact correctness of these figures, it demonstrates at a general level that Intel believed that AMD — HP cooperation would have been a credible threat to Intel.

(c) Intel’s argument that the EMEA region was not ready for the launch

(406) Intel further argues that the delay in the launch of the D315 in EMEA was not due to conditions from Intel to that effect, but to HP’s internal decisions for its own business reasons. According to Intel, HP’s go-to-market strategy for the EMEA was not finalised in time.¹¹⁵ Intel also argues that the delay was a consequence of the limited volumes HP was ready to sell via its go-to-market strategy and lack of customer interest for AMD-based desktops.¹¹⁶

(407) These Intel arguments are not meritorious. Intel wishes to create the impression that HP decided to delay the launch of the D315 in Europe because of its unpreparedness, for reasons not linked to Intel’s restrictive conditions. However, the precise analysis of the documents quoted by Intel in support of its claim, as well as their time context disprove Intel’s assertion.

(408) The HP documents quoted by Intel¹¹⁷ date from after HP reached an agreement with Intel on the limits to be put to the sale of HP AMD-based business desktops, and the agreement was ready to be signed. The HP decisions described in those documents do not therefore represent the decisions which HP would have taken of its own will absent any constraints resulting from the agreements with Intel.

(409) The documents indeed outline that the EMEA branch of HP had difficulties to in launching the D315 product because of HP’s “*go-to-market strategy*”

¹¹² HP presentation of 2004 entitled ‘Managing Intel and AMD to maximize value to PBC’, slide 5, Intel Reply to the 26 July 2007 SO, Annex 8. See also HP submission of 23 December 2005, Appendix 15, p. 5.

¹¹³ [...].

¹¹⁴ [...].

¹¹⁵ Intel Reply to the 26 July 2007 SO, paragraph 333.

¹¹⁶ Intel Reply to the 26 July 2007 SO, footnote 609.

¹¹⁷ Intel refers to the HP presentation entitled “*EMEA Q4 focus*” of August 2002, p. 7 (Intel Reply to the 26 July 2007 SO, Annex 153) and an email from [HP executive] to [HP executive] and others of 28 December 2002, entitled “D315 launch in EMEA” (Intel Reply to the 26 July 2007 SO, Annex 155).

(that is, the strategy adopted to distribute the product). [REDACTED] wrote in an email of 28 December 2002: “*EMEA launch of D315 — open questions are: 1) When will EMEA be ready to launch consistent with the go-to-market direction that has been set within PSG [Product Systems Group]¹¹⁸ (direct fulfillment only for SMB customers)*”.¹¹⁹ However, this go-to-market strategy was precisely the consequence of the conditions on HP’s distribution policy negotiated with Intel, that is, a “*direct fulfillment only for SMB customer*”. As [REDACTED] explained, HP EMEA is “*focused on Major Account [major accounts means the largest HP customers] Direct as it’s top priority.*”¹²⁰ This is also confirmed by the HP EMEA presentation which outlines the same go to market restrictions as an issue: “*EMEA not ready for D315/SMB/Direct*”.¹²¹ Another HP presentation from the first half of 2004 reads: “*Direct-only delayed EMEA launch despite being [an important AMD market [REDACTED]]*”.¹²² The delays faced by the EMEA division of HP were therefore a direct consequence of Intel’s restrictive conditions, which were in conflict with the distribution model it would have normally adopted.

(410) HP submissions confirm this analysis by the Commission on restrictions on the sales of the D315 in EMEA: “*HP confirms that [REDACTED], in charge of HP [REDACTED], may, absent the direct-only distribution model, have distributed the D315 through HP’s channel partners, at least in some countries in the EMEA and to some customer segments. The decision to accept the written and unwritten conditions in the HPA1 agreement and therefore not to distribute the D315 through HP’s channel partners anywhere in the world (including the EMEA) was taken by HP’s management in the US, in particular [REDACTED]. Once that decision was taken, HP EMEA PSG implemented this policy.*”¹²³

(411) Finally, Intel’s arguments on the reasons for the delay in launching the D315 in EMEA do not explain the reason why the successor product to the D315, the D325, was not launched in EMEA either.

(d) Conclusion

(412) In view of the above, it is concluded that Intel did not provide arguments that would disprove the existence of restrictions on the marketing and commercialisation of HP’s AMD-based desktops.

¹¹⁸ HP submission of 6 August 2004, p. 4. HP describes that HP’s Personal System Group (PSG) contains the following business units: consumer PCs (cPC), business PCs (bPC), notebooks and workstations.

¹¹⁹ Email from [REDACTED] to [REDACTED] and others of 28 December 2002, entitled “D315 launch in EMEA”. Intel Reply to the 26 July 2007 SO, Annex 155.

¹²⁰ Idem.

¹²¹ Presentation entitled “*EMEA Q4 focus*”, from August 2002, p. 7. Intel Reply to the 26 July 2007 SO, Annex 153.

¹²² Internal HP presentation of the first half of 2004 entitled ‘Managing Intel and AMD to maximize value to BPC — Final draft’. HP submission of 23 December 2005, Appendix 15, p. 6.

¹²³ HP submission of 23 December 2005, answer 2.24.

2.4.5. Conclusion on facts

(413) On the basis of contemporaneous evidence and of the HP submissions, it is concluded that the rebates provided for under the HPA1 and HPA2 agreements, in the period between November 2002 and May 2005, were subject to the following unwritten conditions:

- (1) HP had to source at least 95% of its corporate desktop x86 CPUs from Intel;
- (2) HP's AMD-based business desktops could only be sold to SMB and GEM customers and not to mainstream business customers;
- (3) HP's channel partners could not sell AMD-based business desktops, so that these could only be obtained direct from HP; and
- (4) HP would delay the launch of its AMD-based business desktop (D315) in the EMEA region by six months.

EXHIBIT B

Redacted Passage as Published	Unredacted Passage
<p>(331) In addition, HP states that following the launch of the 0315, “<i>Intel made a request of a senior HP executive to have [...]</i>”¹²⁴ HP goes on to state that it “<i>believes that this request was made in the days immediately following 19 August 2002 - the date on which HP launched its D315 business desktop product (...) To the best of HP’s knowledge and belief, this request was made by [senior executive] of Intel; it is possible that [Intel senior executive] was also on the call when this request was made. Again to the best of its knowledge, it believes that the request was made of [HP executive].</i>”¹²⁵ As regards the reasons for the request, HP states that it “[...]”¹²⁶ (see recital [...] above).</p>	<p>(331) In addition, HP states that following the launch of the 0315, “<i>Intel made a request of a senior HP executive to have [REDACTED]</i>”¹²⁷ HP goes on to state that it “<i>believes that this request was made in the days immediately following 19 August 2002 - the date on which HP launched its D315 business desktop product ([REDACTED])</i> To the best of HP’s knowledge and belief, this request was made by [REDACTED] of Intel; it is possible that [REDACTED] was also on the call when this request was made. Again to the best of its knowledge, it believes that the request was made of [REDACTED].”¹²⁸ As regards the reasons for the request, HP states that it “[REDACTED]”¹²⁹ (see recital [REDACTED] above).</p>

¹²⁴ HP submission of 23 December 2005, answer 2.16.

¹²⁵ HP submission of 24 April 2006, pp. 1-2.

¹²⁶ HP submission of 24 April 2006, p. 2.

¹²⁷ HP submission of 23 December 2005, answer 2.16.

¹²⁸ HP submission of 24 April 2006, pp. 1-2.

¹²⁹ HP submission of 24 April 2006, p. 2.