FEDERAL TRADE COMMISSION

[Docket No. 9288]

Intel Corp.; Analysis To Aid Public Comment and Commissioner Statements

AGENCY: Federal Trade Commission.

ACTION: Proposed consent agreement: Publication of commissioner statements.

SUMMARY: The consent in this matter settles alleged violations of federal law prohibiting unfair or deceptive acts or practices or unfair methods of competition. The attached Analysis of Proposed Consent Order to Aid Public Comment describes both the allegations in the complaint that the Commission issued in June 1998 and the terms of the consent order—embodied in the consent agreement—that would settle these allegations. This document also contains the Statement of Chairman Pitofsky and Commissioners Anthony and Thompson, and the Statement of Commissioner Swindle.

DATES: Comments must be received on or before May 24, 1999.

ADDRESSES: Comments should be directed to: FTC/Office of the Secretary, Room 159, 600 Pennsylvania Avenue, NW, Washington, DC 20580.

FOR FURTHER INFORMATION CONTACT: John Horsley or Richard Parker, FTC/H–3105, 600 Pennsylvania Avenue, NW, Washington, DC 20580. (202) 326–2648 or (202) 326–2574.

SUPPLEMENTARY INFORMATION: Pursuant to section 6(f) of the Federal Trade Commission Act, 38 Stat. 721, 15 U.S.C. 46 and § 3.25(f) of the Commission's rules of practice (16 CFR 3.25(f)), notice is hereby given that the above-captioned consent agreement containing a consent order to cease and desist, having been filed with and accepted, subject to final approval, by the Commission, has been placed on the public record for a period of sixty (60) days. The following Analysis of Proposed Consent Order to Aid Public Comment describes the terms of the consent agreement, and the allegations in the complaint. This document also contains (1) the Statement of Chairman Pitofsky and Commissioners Anthony and Thompson, and (2) the Statement of Commissioner Swindle.[1] An electronic copy of the full text of the consent agreement package can be obtained from the FTC Home Page (for March 17, 1999) on the World Wide Web, at ''http://www.ftc.gov/os/actions97.htm.'' A paper copy can be obtained from the FTC Public Reference Room, Room H–130, 600 Pennsylvania Avenue, NW Washington, DC 20580, either in person or by calling (202) 326–3627.

Public comment is invited. Comments should be directed to: FTC/Office of the Secretary, Room 159, 600 Pennsylvania Avenue, NW, Washington, DC 20580. Two paper copies of each comment should be filed, and should be accompanied, if possible, by a 3½-inch diskette containing an electronic copy of the comment. Such comments or views will be considered by the Commission and will be available for inspection and copying at its principal office in accordance with § 4.9(b)(6)(ii) of the Commission's rules of practice (16 CFR 4.9(b)(6)(ii)).

Analysis of Proposed Consent Order To Aid Public Comment

The Federal Trade Commission has accepted for public comment an Agreement Containing Consent Order with Intel Corporation (''Intel'') to resolve the matters charged in an administrative Complaint issued by the Commission on June 8, 1998. The Agreement has been placed on the public record for sixty (60) days for receipt of comments from interested members of the public. The Agreement is for settlement purposes only and does not constitute an admission by Intel that the law has been violated as alleged in the Complaint or that the facts alleged in the Complaint, other than jurisdictional facts, are true.

I. The Complaint

The Complaint alleges that Intel has monopoly power in the worldwide market for general purpose microprocessors. According to the Complaint, Intel's market dominance is reflected in a market share approximating 80 percent of dollar sales, together with high entry barriers including large sunk costs of design and manufacture, substantial economies of scale, customers' investments in existing software, the need to attract support from software developers, and reputational barriers.

The Complaint alleges that Intel sought to maintain its dominance by, among other things, denying advance technical information and product samples of microprocessors to Intel customers (''original equipment manufacturers'' or ''OEMs'') and threatening to withhold product from those OEMs as a means of coercing those customers into licensing their patented innovations to Intel.

A microprocessor is an integrated circuit that serves as the central processing unit (or CPU) of computer systems. Microprocessors are sometimes described as the ''brains'' of computers because they perform the major data processing functions essential to computer systems. Advance technical information about new microprocessor products is essential to Intel's OEM customers, who design, develop, manufacture, and sell computer system products such as servers, workstations, and desktop and mobile personal computers. Computer design and development require the effective integration of multiple complex microelectronics components (including microprocessors, memory components, core logic chips, graphics controllers, and various input and output devices) into a coherent system. To achieve such system integration, a computer OEM requires product specifications and other technical information about each component, such as the electrical, mechanical, and thermal characteristics of the microprocessor. OEMs also need advance product samples, errata, and related technical assistance in order to perform system testing and debugging, thereby assuring the high performance and reliability of new computer products.

Intel promotes and markets its microprocessors by providing customers with technical information about new Intel products in advance of their commercial release, subject to formal nondisclosure agreements. Such information sharing has substantial commercial benefits for Intel and its OEM customers. Customers benefit because the information enables them to develop and introduce new computer system products incorporating the latest microprocessors as early and efficiently as possible. Intel benefits because a larger group of OEMs can sell new computer systems incorporating Intel's newest microprocessors as soon as the new microprocessors are introduced to the market.

The Complaint charges that Intel suspended its traditional commercial relationships with three established customers—Digital Equipment Corporation, Intergraph Corporation, and Compaq Computer Corporation—by refusing to provide advance technical information about, and product samples of, Intel microprocessors. Intel did so, according to the Complaint, to force those customers to end disputes with Intel concerning the customers' asserted intellectual property rights and to grant Intel licenses to patented technology developed and owned by those customers. In at least one of the cases,

[1] The Analysis and other Commissioner Statements were published in the **Federal Register** on March 24, 1999, and the public comment period began at that point. *See* 64 FR 14246 (March 24, 1999).

the Complaint alleges that Intel also acted to create uncertainty in the marketplace about the customer's future source of supply of Intel microprocessors.

The computer industry is characterized by short, dynamic product cycles, which are generally measured in months. Time to market is crucial. Indeed, the denial of advance product information is virtually tantamount to a denial of actual parts, because an OEM customer lacking such information simply cannot design new computer systems on a competitive schedule with other OEMs. An OEM who suffers denial of such information over a period of months will lose much of the profits it might otherwise have earned even from a successful new computer model. Continued denial of advance technical information to an OEM by a dominant supplier can make a customer's very existence as an OEM untenable.

As a result of the commercial pressure exerted by Intel's conduct, Compaq and Digital quickly entered into cross-license arrangements with Intel. Intergraph was able to resist that pressure because it succeeded in obtaining a preliminary injunction from a federal district court requiring Intel to resume and continue supplying Intergraph with advance product information, part samples, and other technical support pending a judicial resolution on the merits of the claims in the lawsuit.

The alleged conduct tends to reinforce Intel's domination of the general purpose microprocessor market in at least three ways. First, the alleged conduct tends to give Intel preferential access to a wide range of technologies being developed by many other firms in the industry. To the extent that firms desiring to compete with Intel are unable to obtain comparable access to such a wide range of technology, they can be seriously disadvantaged, thus making it more difficult for them to challenge Intel's dominance. Second, because patent rights are an important means of promoting innovation, coercion that forces customers to license away rights to microprocessor-related technologies on unfavorable terms tends to diminish the customers' incentives to develop such technologies, and thus harms competition by reducing innovation. Finally, Intel's conduct tends to make it more difficult for an OEM to serve as a platform for microprocessors that compete with Intel's. Intel's actions ensure that Intel can act as a conduit for technology flows from one OEM to another. That is, an OEM that seeks to enforce its intellectual property rights against other Intel customers may face retaliation from Intel, as the Complaint alleges Compaq did when it sued Packard-Bell for patent infringement. The result is that OEMs find it more difficult to differentiate their computer systems from their competitors through patented technology. As a result, an OEM seeking to use non-Intel microprocessors is less able to offset the lack of an Intel microprocessor by the strength of its own reputation for offering superior technology in other areas. For all of these reasons, continuation of this pattern of conduct would likely have injured competition by entrenching Intel's dominant position.

The Complaint also alleges that Intel's exclusionary conduct was not reasonably necessary to serve any legitimate, procompetitive purpose.

Exclusionary conduct by a monopolist that is reasonably capable of significantly contributing to the maintenance of a firm's dominance through unjustified means has long been understood to give rise to serious competitive concerns. *See, e.g., Lorain Journal Co.* v. *United States,* 342 U.S. 143, 154 n.7 (1951); *Eastman Kodak Co.* v. *Image Technical Services,* 504 U.S. 451, 483 & n.32 (1992); *Aspen Skiing Co.* v. *Aspen Highlands Skiing Co.,* 472 U.S. 585, 596 n.19 (1985); *United States* v. *Grinnell Corp.,* 384 U.S. 563, 570–71 (1966); *Barry Wright Corp.* v. *ITT Grinnell Corp.,* 724 F.2d 227, 230 (1st Cir. 1983) (Breyer, J.) (citing 3 P. Areeda & D. Turner, *Antitrust Law,* ¶ 626 at 83 (1978)).

Such conduct harms consumers, not only because competition brings lower prices, but also because competition is a powerful spur to the development of new, better, and more diverse products and processes. Unjustified conduct by a monopolist that removes the incentive to such competition by depriving innovators of their reward or otherwise tilting the playing field against new entrants or fringe competitors thus has a direct and substantial impact upon future consumers.

In the absence of a legitimate business justification that outweighs these concerns, such conduct constitutes a violation of Section 2 of the Sherman Act, 15 U.S.C. 2, and therefore Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45. In issuing the Complaint, the Commission found reason to believe that such a violation had occurred.

II. Terms of the Proposed Consent Order

The Proposed Order would remedy all of the concerns embodied in the Complaint. The substantive prohibition, Section II.A., prohibits Intel from withholding or threatening to withhold certain advance technical information from a customer or taking other specified actions with respect to such information for reasons relating to an intellectual property dispute with that customer. It also prohibits Intel from refusing or threatening to refuse to sell microprocessors to a customer for reasons related to an intellectual property dispute with that customer. This provision is designed to prevent Intel from restricting access to microprocessor products, or advance technical information relating to such products, as leverage in an intellectual property dispute against a customer that is receiving advance technical information from Intel at the time the dispute arises. The Proposed Order does not impose any kind of broad ''compulsory licensing'' regime upon Intel. So long as it is otherwise lawful, Intel is free to decide in the first instance whether it chooses to provide or not provide information to customers, and whether to provide more information or earlier information to specific customers in furtherance of a joint venture or other legitimate activity. Moreover, the Order is limited to the types of information that Intel routinely gives to customers to enable them to use Intel microprocessors, not information that would be used to design or manufacture microprocessors in competition with Intel.

In short, Paragraph II.A. secures to Intel customers the right to seek full and fair value for their intellectual property, free from the risk of curtailment of needed advance technical information or product. With one exception, Intel will be required to continue providing information and product while the customer seeks any of a range of legal and equitable remedies available to it, such as damages (trebled or otherwise increased in appropriate cases), reasonable royalties, and attorneys fees and costs. These remedies will generally be sufficient to protect the customer in its exercise of its intellectual property rights.

The exception involves situations where a customer maintains the right to seek an injunction against Intel's manufacture, use, sale, offer to sell or importation of its microprocessors. The Order contemplates that Intel may request a customer to waive that remedy and give the customer a reasonable opportunity to make a simple written statement to that effect. If the customer refuses, Intel will not be required by this Order to continue providing information or product with respect to the microprocessors that the customer is seeking to enjoin.

This part of the Order strikes an appropriate balance, on a prospective basis, between the interests of Intel and its customers. If a customer chooses to seek an injunction against Intel's microprocessors, it cannot, under the provisions of this Order, be assured of continuing to receive advance technical information about the very same microprocessors that it is attempting to enjoin. If an Intel customer nevertheless wishes to seek injunctive relief against Intel's manufacture, use, sale, offer to sell or importation, it remains free to do so, but without the protections in this Order. In all other circumstances, Intel is required to continue supplying technical information and product under the Proposed Order.

The Proposed Order contains a number of other definitions and provisos to ensure that it will achieve its purposes while not sweeping more broadly than needed to remedy the competitive concerns alleged in the Complaint:

- ''Advance Technical Information'' (or ''AT Information'') is defined in Paragraph I.C. to encompass all information necessary to enable a customer to design and develop, in a timely way, computer systems incorporating Intel microprocessors. The Proposed Order establishes a rebuttable presumption that the provision of AT information six months before the commercial release date of a microprocessor is sufficient to enable the customer to design and develop new systems based on that microprocessor in a competitive and timely way. AT Information does not include detailed microprocessor design information or other information not generally provided to Intel's customers.
- ''Intellectual Property Dispute'' is defined in Paragraph I.D. to include not only situations in which a customer directly or indirectly asserts or threatens to assert patent, copyright or trade secret rights against Intel, but also to situations in which a customer asserts such rights against another Intel customer, or where a customer has refused a request by Intel to license or otherwise convey its intellectual property rights.
- Paragraph II.B.1. states that the Proposed Order does not prohibit Intel from seeking legal or equitable remedies based upon its own intellectual property, provided that it continues to supply AT Information to the customer.
- Paragraph B.2. and B.3. make clear that the Proposed Order does not prohibit Intel from withholding AT Information or making decisions about product supply based on otherwise lawful business considerations unrelated to the existence of the intellectual property dispute. For example, Intel retains the right to withhold information from a customer that has breached an agreement regarding the disclosure or use of the information.
- Paragraph B.4. provides that the Proposed Order does not require Intel to provide AT Information or microprocessors to facilitate the design or development of a type of system that the customer has not designed or developed or demonstrated plans to design or develop within the preceding year.
- Paragraph B.5. makes clear that the Proposed Order does not prohibit Intel from restricting the use of AT Information to the customer's design and development of computer systems that incorporate the microprocessor to which the AT Information pertains. For example, if a recipient of AT Information is in the business of designing competing microprocessors, the Proposed Order would not prevent Intel from using reasonable firewall provisions to prevent that recipient from using the information in that competing business.
- Paragraph B.6. provides that the Proposed Order does not require Intel to disclose information or supply microprocessors that are not otherwise available for disclosure or supply to Intel's customers. If the information or product is not being provided to other customers, then the refusal to provide it to a customer with which Intel has an intellectual property dispute does not provide the kind of leverage that the challenged conduct provides.
- Paragraph B.7. makes clear that, apart from the specific requirements and prohibitions, the Proposed Order does not otherwise limit Intel's intellectual property rights.

In light of the rapidly changing nature of the industry, Intel's obligations under the Proposed Order would terminate in ten years. The Commission appreciates that this same industry dynamic makes it important for it to address disputes over Intel's compliance with the Order expeditiously, should any such disputes arise.

Parts III, IV, and V of the Proposed Order set out various procedural requirements, such as notice to affected persons and annual compliance reporting. Paragraph III.A. permits Intel to provide notice of the Order to recipients of AT Information through a conspicuous notice placed, for thirty days after final entry of the Order, as the first item on the ''In the News'' portion of the ''developers'' page of Intel's World-Wide Web site. Because recipients of AT Information must frequently visit that area of Intel's Website in order to receive information needed in their business, a notice displayed at that location will ensure notice to all affected persons. After the initial thirty day period, Intel will maintain a link from the ''developers'' page to the Order, so that new customers will also have access to the Order. The other provisions of these paragraphs are standard provisions of the type typically included in Commission orders of this kind.

III. Opportunity for Public Comment

The Proposed Order has been placed on the public record for 60 days in order to receive comments from interested persons. Comments received during this period will become part of the public record. After 60 days, the Commission will again review the Agreement and comments received, and will decide whether it should withdraw from the Agreement or make final the Order contained in the Agreement.

By accepting the Proposed Order subject to final approval, the Commission anticipates that the competitive issues described in the complaint will be resolved. The purpose of this analysis is to invite and facilitate public comment concerning the Proposed Order. It is not intended to constitute an official interpretation of the Agreement and Proposed Order or in any way to modify their terms.

By direction of the Commission.

Donald S. Clark,

Secretary.

Statement of Chairman Robert Pitofsky and Commissioners Sheila F. Anthony and Mozelle W. Thompson

In the Matter of Intel Corporation

Docket No. 9288

We join our colleague Commissioner Swindle in welcoming comments during the public comment period. To facilitate that comment, we briefly recapitulate the precedent, legal and economic reasoning, and judgment that led us to accept the settlement for public comment.

The Complaint alleged that Intel has monopoly power in the worldwide market for general purpose microprocessors, and that it sought to maintain that monopoly power by coercing customers into licensing to it certain patented innovations. Intel carried out this coercion, according to the Complaint, by refusing to provide advance technical information about Intel microprocessors, withholding product samples, and creating uncertainty in the marketplace about the

customer's future source of supply. Advance technical information about new microprocessor products is essential to Intel's customers, so it is alleged, because one cannot achieve the effective integration of components such as microprocessors, memory components, core logic chips, graphics controllers, and various input and output devices without information such as the electrical, mechanical, and thermal characteristics of the microprocessor.

The conduct is alleged to reinforce Intel's domination of the general purpose microprocessor market in at least three ways. First, the conduct gives Intel preferential access to the technologies of other firms. To the extent that competitors cannot obtain comparable access to technology, it would be more difficult for them to challenge Intel's dominance. Second, coercion that forces customers to license away patent rights on unfavorable terms tends to diminish the incentives to develop such technologies. Finally, a computer maker's inability to enforce its patent rights makes it more difficult to develop and maintain a brand name based on superior technology, because the patent owner is forced to share its technology with all computer makers. In turn, a weakened brand identification tends to make it more difficult for that computer manufacturer to find consumer acceptance for computers using non-Intel microprocessors.

These are allegations, not proven facts, and Intel would have had a full opportunity to respond to these allegations had there been a trial. But the allegations are consistent with our knowledge of the industry and with common sense, and the proposed remedy is consistent with both of those as well as with Intel's representations as to its own legitimate business needs.

Some have raised questions about a few of the factual predicates of the case. But those questions are of a type that one would litigate at trial, not use as a basis to reject a settlement. It is in the nature of any settlement before trial that the facts are not fully known. Were we to demand certainty, no case could ever be settled. Complaint Counsel would have had an opportunity to present its evidence with respect to each of the points that we have heard raised, and its pretrial brief promised to do so.[1]

Some have also questioned the practicalities of enforcing the order. But courts weigh facts and circumstances and make determinations about the purposes motivating challenged conduct every day, both within and outside the antitrust field. Certainly the order could have been made more certain in its application by, for example, requiring Intel to deal with all comers on identical terms, regardless of circumstances or the credit-worthiness or other characteristics of would-be customers. Such an order would have been far more burdensome on Intel and would have deterred a wide range of efficient conduct. Both the Commission and a respondent share a common interest in an order that is well-tailored to the violation and to the competitive circumstances—even, sometimes, at the expense of bright-line clarity.

In short, in welcoming public comments on the proposed order, we remain of the view that Complaint Counsel and Intel have done a commendable job of crafting a remedy that addresses serious potential competitive harm without significantly hindering Intel's legitimate business activity. Moreover, this important balance supports the climate of innovation that benefits both industry and consumers.

Statement of Commissioner Orson Swindle

In the Matter of Intel Corporation

Docket No. 9288

When the Commission accepted the consent agreement with Intel Corporation last month, I said that I would take the opportunity to express my views about it following my medical leave. In this statement I will address issues arising from both the consent agreement and the administrative complaint, from whose issuance I dissented last June. Since we do not have the benefit of a trial record here [1]—and because the information in hand does not allay the misgivings I have had since the outset—I hope that public comment on the consent agreement will provide helpful guidance on how to vote once the agreement comes off the public record.

In essence, the complaint consists of an allegation that Intel has monopoly power in general-purpose microprocessors (complaint ¶¶ 4–10, 38 [2]); an allegation that Intel engaged in exclusionary conduct toward several customers by cutting off key technical information and microprocessor prototypes in order to coerce those customers to license certain of their intellectual property to Intel (¶¶ 11–37, 39); and concluding allegations that, through its exclusionary behavior, Intel has both illegally maintained its monopoly power in general-purpose microprocessors and attempted to monopolize current and future generations of such microprocessors, in violation of Section 5 of the FTC Act (¶¶ 40–42).

In the first place, there is no doubt that Intel has long bestrode the market for general-purpose microprocessors, but there has also been reason to ask whether Intel's position in the market is as unassailable as the complaint suggests. It is widely recognized that Intel is facing vigorous competition in supplying microprocessors to the segment consisting of personal computers costing less than $1000—a segment toward which a good deal of consumer demand appears to have been shifting lately. Although Intel has not

[1] As to monopoly power, Complaint Counsel said it would offer evidence that the sub-$1000 segment was a small and relatively unprofitable portion of the market (CCBr. at 13), and that at the high-end, many computer manufacturers have been abandoning their proprietary microprocessor designs in favor of Intel's (CCBr. at 11–12). In the market as a whole, Complaint Counsel contended that Intel's share had grown, not shrunk, and was in the range of 80% or more. (CCBr. at 9 n.6.) Complaint Counsel also represented that it would prove the existence of formidable barriers to entry and expansion—including large sunk costs, long development lead times, economies of scale, network effects, intellectual property rights, and reputational barriers. (CCBr. at 15.)

As to whether Intel's actions affected actions taken against *customers* rather than *competitors,* these customers had microprocessor or related technology that Intel, the alleged monopolist, desired. Moreover, the Supreme Court has repeatedly condemned both monopolists and cartels that strike at their customers in order to injure competitors. *See, e.g., Lorain Journal Co.* v. *United States,* 342 U.S. 143 (191); *Blue Shield* v. *McCready,* 457 U.S. 465 (1982).

As to the customers in question being ''litigious,'' one could alternatively characterize the customers as firms attempting to resist inappropriate demands to turn over their constitutionally-derived patent rights. If monopoly power could be used to force an end to litigation, in such a Hobbesian world the strong would always vanquish the weak, regardless of he underlying merits. Such an outcome is the antithesis of civil society. Nor would forbidding such conduct necessarily condemn parties to lengthy an expensive litigation. Non-monopolists settle disputes all the time, even though they do not have the powerful weapon of monopoly power to wield.

As to whether Intel's conduct harmed consumer welfare, Compliant Counsel acknowledged the burden of proving that Intel engaged in ''conduct, other than competition on the merits or restraints reasonably 'necessary' to competition on the merits, that reasonably appear[s] capable of making a significant contribution to creating or maintaining monopoly power.'' CCBr. at 5–6, *quoting Barry Wright Corp.* v. *ITT Grinnell Corp.,* 724 F.2d 227, 230 (1st Dir. 1983) (Breyer, J.) (*quoting* 3 P. Areeda & D. Turner, Antitrust Law ¶ 626 at 83 (1978).

[1] Were we considering this matter at the conclusion of an adjudicative proceeding, I would of course base my analysis strictly on information in the adjudicative record. In the absence of such a record, I am compelled to rely on other sources of information.

[2] Unless otherwise indicated, all further citations to paragraph numbers refer to the administrative complaint.

faced challenges of the same magnitude in the midrange and high-end segments of the business, some have also questioned the durability of the firm's dominance of those segments as well. In the absence of a full-blown adjudicative record that might have proved what Paragraph 38 alleges, available information has not dispelled my questions about whether Intel has monopoly power—as opposed to just an extremely large market share—in general-purpose microprocessors.[3]

Second, even if one were to assume Intel's monopoly power, I have misgivings about the theory of violation underlying the complaint. The complaint claims that Intel took action against three *customers*—firms whose primary significance to the case, according to the Commission's own documentation, lies in their being manufacturers of PCs, not in their being competitors of Intel in the microprocessor market.[4] What action did Intel take against those customers, and for what reasons?

The Commission's complaint says that Intel cut off the supply of technical information and microprocessor prototypes to Digital Equipment, and demanded the return of information and prototypes already in Digital's possession, after Digital sued Intel for patent infringement (¶¶ 18–19). Intel took similar actions against Intergraph, a customer focused largely on workstations and servers, after Intergraph spurned Intel's demand for a royalty-free license to certain Intergraph microprocessor-related technology (¶¶ 26–29). Finally, Intel cut off technical information to Compaq Computer, which had earlier sued Packard Bell Electronics on the theory that certain Packard Bell computer systems used Intel microprocessors that infringed Compaq's patents—a lawsuit in which Intel felt an obligation to intervene on behalf of the defendant (¶¶ 34–35). According to the complaint, Intel's purpose in taking these actions was to ''forc[e] those customers to grant Intel licenses to microprocessor-related technology developed and owned by those customers' (¶ 13). The alleged effects of Intel's behavior were ''to diminish the incentives of those three Intel customers—as well as other firms that are Intel customers or otherwise commercially dependent upon Intel—to develop new innovations relating to microprocessor technology'' (¶ 14) and to ''entrench[] [Intel's] monopoly power in the current generation of general-purpose microprocessors and reduce[] competition to develop new microprocessor technology and future generations of microprocessor products' (¶ 39).

At this point I do not have sufficient information to be confident that complaint counsel would have proved these rather dramatic charges. My vote against pursuing the case last June, especially as regards Intel's conduct toward Digital and Compaq, rested in part on my sense that the Commission had not sufficiently considered the grounds on which even a putative monopolist is entitled to withhold aid and comfort from another company that threatens serious harm by suing it or suing a third party on whose behalf the monopolist is obligated to intervene. It was my judgment then, and it remains so now, that one could plausibly view Intel's conduct in precisely such an exculpatory light. If the Commission intended to broadcast some kind of general admonition that a monopolist in these circumstances cannot resort to ''self-help'' (by, *e.g.*, withdrawing and withholding technical information and prototypes) but must instead hire lawyers and take its disputes through lengthy and expensive litigation, then that is a message to which I most assuredly do not subscribe. On the other hand, if the complaint was meant to tell a narrower, more traditional antitrust story based on harm to competition and consumers—in this case, harm to innovation in a high-technology industry—I remain unsure whether even that more modest edifice can rest on Intel's decision to withdraw assistance from a handful of customers who were litigious or otherwise flouted Intel's wishes.[5]

Before I turn to the order, I wish to address one other consideration concerning issuance of the complaint against Intel. Regardless of how one characterizes the dealings between Intel and its three customers—*i.e.*, regardless of whether one accepts the complaint's claim that Intel used its monopoly power to unfairly gain access to intellectual property developed by those customers—I do not believe that the complaint spells out an especially coherent theory of how those dealings harmed consumers. Consumer welfare is the touchstone of antitrust enforcement, and the ''public interest'' standard of Section 5 of the FTC Act embodies considerations of consumer welfare. In the absence of clear evidence of how Intel's dealings with Digital, Intergraph, and Compaq could have adversely affected consumers, one can question the very basis for issuing this complaint—and for injecting a government agency into the dynamic workings of a fast-moving, high-technology industry.[6] I look forward to any public comments that deal with the likely harm to consumers stemming from the misconduct alleged in the Commission's complaint.

Regarding the proposed order itself, some observers have characterized it as

[3] In their statement, my fellow Commissioners—citing complaint counsel's pretrial brief as support—assert that ''Compliant Counsel said it would offer evidence that the sub-$1000 segment was a small and relatively unprofitable portion of the market * * * and that at the high-end, many computer manufacturers have been abandoning their proprietary microprocessor designs in favor of Intel's * * *. Moreover, according to my colleagues, ''[i]n the market as a whole, Compliant Counsel contended that Intel's share had grown, not shrunk, and was in the range of 80% or more.'' Statement of Chairman Robert Pitofsky and Commissioners Sheila F. Anthony and Mozelle W. Thompson at 2 n.1. I do not disagree that these propositions that complaint counsel aimed to establish. My point is simply that I have not yet been persuaded by the *evidence* in the Commission's possession—as distinguished from complaint counsel's representations and contentions—that Intel possesses monopoly power in the relevant market.

[4] Of course, both Digital (the developer of the Alpha microprocessor) and Intergraph (which developed the Clipper chip prior to 1993) were not only Intel's customers but also—at least to the extent that they were able to chisel away at Intel's alleged monopoly—its competitors in the microprocessor market. The Commission's complaint, however, is couched almost entirely in terms of Intel's allegedly anticompetitive behavior toward three victims that needed Intel technical information and prototypes *so that they could build computers.* And although press releases do not necessarily reflect the official views of the Commission (in the sense that the complaint does), both the June 8, 1998, FTC press release that announced the issuance of this complaint as well as the March 17, 1999, release announcing the Commission's acceptance of this consent agreement spoke almost entirely in terms of Intel's conduct toward its customers. Even if Digital and Intergraph can be characterized as Intel's present or erstwhile competitors—thereby giving this matter more of the character of a traditional monopolization case—the Commission has consistently placed far greater emphasis on the supplier/customer relationship between Intel and its alleged victims.

[5] My colleagues characterize Intel's conduct as ''coercion that forces customers to license away patent rights on unfavorable terms'' (Statement of Chairman Pitofsky and Commissioners Anthony and Thompson, *supra* n.3, at 1), which begs the important question whether Intel was truly engaged in such coercion or was instead defending against attacks by its alleged victims. Regarding my doubts about whether Intel's alleged conduct (and its anticompetitive effects) could have been proved, my colleagues state that these allegations ''are consistent with our knowledge of the industry and with common sense * * *'' *Id.* It bears repeating that my concerns arise from the state of the evidence underlying the Commission's allegations. I take little comfort from—indeed, I am not sure I fully understand—the notion that monopolization allegations are ''consistent with our knowledge of the industry and with common sense.'' I do not—as my colleagues suggest (*id.*)—''demand certainty'' about the facts at issue, but I do look to the strength of the evidence rather than to what a litigant's pretrial brief might promise to deliver (*id.* at 2).

[6] I note that to the extent this case is depicted as involving harm to Intel's competitors (rather than to its customers), that would tend to attenuate further any theory that Intel's conduct threatened harm to consumers.

having achieved whatever objective prompted the Commission's suit against Intel. I am not so sure, in part because of my uncertainty (discussed earlier) over what message the complaint was meant to communicate and in part because of the very terms of the order. In fact, given my reservations about the merits of the complaint, I would be more concerned about the order—comprising a difficult-to-enforce mandate to ''sin no more,'' with a major proviso and some significant exceptions—if it seemed likely to impose real and significant restrictions on Intel.

I expect the proposed order to present possible enforcement difficulties because, among other things, its basic prohibition (order ¶ II.A) commands Intel not to take certain adverse actions against microprocessor customers with regard to ''Advance Technical Information'' ''*for reasons related to* an Intellectual Property Dispute'' [7] and not to ''*base[ ]* any supply decisions for general purpose microprocessors *upon the existence of* an [Intellectual Property] Dispute.'' No matter what may motivate Intel's future decisions whether to furnish technical information and microprocessor prototypes to customers, it is extremely doubtful that Intel is going to create any kind of record that will enable the Commission to ascertain whether such a decision is ''for reasons related to'' or ''base[d] * * * upon'' the one ground made impermissible by the order—an intellectual property dispute. Exacerbating the impact of Paragraph II.A's subjective language are two further paragraphs that allow Intel to withhold advance technical information from customers (order ¶ II.B.2) or make product supply decisions (order ¶ II.B.3) based on ''*business considerations unrelated to* the existence of the [Intellectual Property] Dispute''—further verbiage that appears to make order enforceability hinge on difficult inquiries into the state of mind of Intel decision makers. I hope that my pessimism is unwarranted, but the key terms of the order seem destined to enmesh the Commission in expensive, and perhaps intractable, enforcement proceedings if Intel is ever suspected of violating it.[8]

I end where I began—searching for information to help me decide whether I now have reason to believe that Intel violated the law and, if so, whether I can support this consent order. I genuinely look forward to receiving public comments both supportive and critical of the settlement and the underlying theory of violation. I hope that the considerations spelled out in this statement will be helpful to those preparing to submit comments to the Commission.

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[7] All italics in this paragraph are added.

[8] Presumably in response to my point about the difficulty of order enforcement in this case, my fellow Commissioners note that ''[c]ertainly the order could have been made more certain in its application by, for example, requiring Intel to deal with all comers on identical terms, regardless of circumstances or the credit-worthiness or other characteristics of would-be customers.'' Statement of Chairman Pitofsky and Commissioners Anthony and Thompson, *supra* n. 3, at 2. There is nothing in my statement to suggest that I would favor an order drafted along such rigid, mechanical lines. My point was that, in its current form, the order against Intel could present formidable enforcement problems.