

## INTEL'S ABUSE OF MARKET DOMINANCE IN KOREA

The American Antitrust Institute has reported on the various allegations against Intel around the world, with respect to dominance of the microchip market. The Korea Fair Trade Commission completed its investigation and found Intel guilty of abusing market dominance through its use of a rebate conditioned on its customers not purchasing the microchips of its only competitor, AMD. The allegations in the Korean case seem to be quite similar to those being investigated in Europe, Japan, and the United States and therefore Korea's decision throws light on how other jurisdictions may interpret the facts in their own investigations.

The translation into English of the KFTC decision has not previously been available. In the following memorandum, AAI Research Fellow Byung-Geon ("B.K.") Lee, a Hubert H. Humphrey Fellow working with the AAI, provides his own translation of what he has determined to be highlights of the 133-page opinion.<sup>1</sup>

Bert Foer, President  
American Antitrust Institute

Date: February 14, 2009  
To: Bert Foer, President  
From: Byung-Geon Lee, AAI Research Fellow  
Re: The KFTC's Decision in its Intel Case

This memorandum summarizing highlights is based on my translation of the public version of the Korea Fair Trade Commission's Intel decision (133 pages in all), which was posted on the KFTC website in the middle of January, 2009. It should be kept in mind that the translation could be inaccurate. Only the Korean version is legally authoritative. For reference, the press release of the English version produced by the KFTC can be found at <http://eng.ftc.go.kr> . I have put what seem to be key statements in bold.

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<sup>1</sup> The AAI has received contributions from many high tech companies, including AMD. A list of contributors is available on request.

## I. Provisions of Relevant Laws Applied in the Case

-MRFTA Article 3-2, ①, 5

-MRFTA Enforcement Decree, Article 5, ⑤, 2

### 1. MRFTA (Monopoly Regulation and Fair Trade Act – Korean Antitrust Law)

Article 3-2 (Prohibition on the Abuse of Market Dominance)

① No market-dominating enterpriser shall commit any of the following acts (hereinafter referred to as “abusive acts”): <Amended on February 5, 1999>

1. - 4. (omitted)

**5. Act of unfairly excluding competitive enterprisers or act that may considerably harm the interest of consumers**

### 2. MRFTA Enforcement Decree

Article 5 (Types of and Criteria for Abusive Acts)

① - ④ (omitted)

⑤ “Unreasonable transaction to exclude competitors” as per Item 5, Clause (1), Article 3-2 (Prohibition on the Abuse of Market Dominance) of the Act pertains to any of the following:

1. Omitted (*See below box*)

**2. Unreasonably transacting with a partner under the condition that the partner does not transact with a competing enterpriser**

\* According to the decision, Intel argued that the below “predatory pricing clause” should be applied in adjudicating its alleged behaviors, which the KFTC firmly dismissed. However, in the course of reviewing Intel’s arguments, the KFTC could observe the result that Intel’s alleged behavior could exclude competitors even if the defendant-argued economic methodology (i.e. “effective price test” using Commercially Viable Share) were applied with certain assumptions.

MRFTA Enforcement Decree, Article 5 (Types of and Criteria for Abusive Acts)

⑤ 1. Where there is a possibility of excluding a competitor by supplying goods or services at unreasonably low prices or purchasing goods or services at unreasonably high prices compared to the normal transaction price

## II. Structure of the Decision

\* Below outline is re-categorized based on the substantial contents of the decision.

**1. Basic Facts (Background):** Jurisdiction issue, Standing issue, General information on relevant industries, etc

### 2. Fact Findings

a. Involving Samsung

b. Involving Sambo

### 3. Reviewing Intel's argument involving Fact Findings

a. Involving Samsung

b. Involving Sambo

#### **4. Market Definition**

Relevant Market according to Product, Geography, and Transaction stage/partner

#### **5. Judgment of Illegality**

a. Interpretation of relevant provisions

b. Judgment of Illegality

(i) Intents & Purpose elements

(ii) Exclusionary Effects: Binding Power of Defendants' Rebates, Leverage Effects, Effects of Back-end style Rebates, Enhanced Binding Power by Non-transparent size of rebates, Actual Exclusionary Effects according to various distribution channels

(iii) Consumer Harms: Reduced Variety of Products, Impediments to Price Cuts, and Damages to a competitor's substantive competitiveness

#### **6. Reviewing Intel's argument involving judgment of illegality**

a. Economic Analysis on Occurrence of Exclusionary Effects

b. Occurrence of Anti-competitive effects

c. Pro-efficiency effects

d. Meeting-competition effects

### **III. Excerpts from the Decision**

\* Legend: "Samsung" = "Samsung Electronics," "Sambo" = "Sambo Computer," "ooo" = redacted by request from defendants on the grounds of business confidentiality

\* Numbers were heavily redacted in the public decision for confidentiality reasons.

## **1. Factual Findings**

### A. Involving Samsung

#### Overall Facts

**“As Samsung, the No.1 domestic PC maker and the 100% defendants-CPU using company at that time, had been starting to buy AMD CPUs and launched AMD CPUs- installed PCs from the first quarter of 2002, the defendants continuously requested Samsung to cease from buying AMD CPUs. As Samsung rejected these requests, the defendants significantly reduced the volume of rebates in the first quarter and second quarter of 2002. Since then, the defendants continuously had requested Samsung to cease from buying AMD CPUs, exploiting the provision of rebates as an instrument. In May 2002, the defendants suggested Samsung the “long term support plan” with promise to offer maximum-level rebates from the latter half of 2002 and afterwards, on the condition of Samsung’s suspending the purchase of AMD CPUs by the third quarter of 2002, and, consequently, Samsung accepted this proposal. Since then, from third quarter 2002 to second quarter 2005, the defendants established the quarterly support plans pursuant to the “long term support plan,” and provided rebates to Samsung during the period. In accordance with these rebates, Samsung stopped purchasing AMD CPUs in the third quarter of 2002, and from that time, Samsung maintained the Intel CPU Market Segment Share (henceforth, ‘MSS’) at 100% level until the second quarter of 2005.” (17p)**

#### Specific Facts Involving Samsung

"In the beginning of January 2001, the defendants suggested a total \$8 million rebate proposal to Samsung on the condition of abandoning the AMD CPUs-installed PC models named 'Airfox' and 'Leo'(defendants described it as "AMD Drop"<sup>2</sup>), with concerns such as an erosion of domestic market share, a difficulty of accomplishing 100% Intel CPU MSS, an increase of AMD’s brand value, and domino effects to other

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<sup>2</sup> According to the “Dragon Project Proposal” produced by Samsung, Samsung mentioned that “Intel is expected to request a negotiation involving AMD model Drop.” With respect to the reason why this term was used, the Samsung staff testifies that the defendants requested a negotiation involving the abandonment of AMD CPUs-installed PCs in 2002, and, therefore, the staff again expected that defendants might request a same negotiation involving the AMD Drop when Samsung again reviewed a plan for introducing AMD CPUs. Meanwhile, the term “Drop” is frequently used involving AMD also in the defendants-produced documents. (18p)

PC makers<sup>3</sup>. As Samsung rejected this proposal, defendants established a plan named "Samsung Risk Mgmt Plan" in January 22, 2002. According to the plan, the defendants would focus on a marketing plan for isolating AMD, also no rebate benefits and no co-marketing program with Samsung. Then, the defendants notified Samsung that it would not help but to reduce the volume of rebates if Samsung adopted AMD CPUs. (Omitted) After this notice, as the <Table 20> illustrates, the defendants actually reduced the amount of rebates by \$0.76 million in the first quarter of 2002, which was significantly under the prior level of rebates (average \$4 million quarterly)." (18p)

"ooo and ooo, respectfully, the Chief of Samsung's Computer System Headquarters' Purchasing Team and the Division Chief of the same department, and ooo, the Director of Planning Group, **consistently testified that the defendants suggested rebates in exchange for abandoning the AMD CPUs-installed PCs, or in exchange for retaining the 100% Intel CPU MSS.** They testified also that defendants reduced the amount of rebates and stopped providing MDF money to Samsung when Samsung rejected the proposals. (20p)

"According to Samsung's internal documents named "Review of Intel Special Proposal" (produced in January 29, 2002), Intel Korea's internal document named "oooo"<sup>4</sup> (produced in January 2002), and "oooo"(produced in January 22, 2002), the defendants requested \$2,490,000 in first quarter 2002 and total \$8 million + alpha in 2002, in exchange for abandoning the production plan or production of 'Airfox' and 'Leo'." (21p)

"Also, according to the Intel Korea's internal documents "ooo", "ooo", and "ooo," **the following outcomes are mentioned as main achievements: excluded a competitor-AMD, hindered AMD's expansions in the domestic market; AMD's decreasing awareness or reputation in the market and within Samsung; Samsung's abandonment of AMD CPUs.** (25p)

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<sup>3</sup> The name of the relevant document (name), produced month, and original sentences are not publicized by requests from defendants for a business confidentiality reason. (18p)

<sup>4</sup> The name of the relevant document (title) is not publicized by request of defendants for a business confidentiality reason. Henceforth the same.

“With providing rebates to Samsung pursuant to the quarterly support plan from first quarter 2003 to second quarter 2005, as <Table 25> illustrates, the defendants particularly emphasized that only Intel products should be used and maintained as CPUs installed in the PCs sold through home-shopping distribution channel and governmental network (government agency usage) channel, where AMD’s market entry or expansions were predicted, especially in the low-price PC lines. Consequently, the defendants could secure the 100% Intel CPU MSS in Samsung.” (26p)

“According to the defendants’ internal documents “oooo” (produced in December 10, 2002), defendants reviewed the first quarter 2003 assistance plan in which defendants would provide assistance such as the ECAP on the condition that Samsung would not develop competitor’s CPUs-installed PCs. Also, “oooo” (produced in February 16, 2004) describes the guideline that was approved by Intel Corporation at the outset and the fact that Samsung accepted this proposal” (28p)

"First of all, involving the 'long term support plan,' according to the defendants’ internal documents "oooo" (produced in July 19, 2002 produced)<sup>Footnote 72</sup>, "oooo" (produced in June 19, 2002)<sup>Footnote 73</sup>, "oooo" (produced in July 26)<sup>Footnote 74</sup>, Samsung accepted the defendants’ 'long term support plan’ in the latter half of 2002, and, as a result, Samsung promised to cease from purchasing AMD CPUs in both Desktop and Laptop lines" (44p-45p)

<Footnote 72>

“Samsung long term support plan accepted by Samsung!!! We ikl delivered “we’ll do best” in Q4 but samsung still wants firmed long term commitment. In spite of some argument in samsung internal, the detail win back schedule on the processing base on DT drop by July, NB by SEP” (44p-45p)

<Footnote 73>

“SEC accepted our total package proposal and will drop all competition by end of Q3.” (45p)

<Footnote 74>

“Samsung committed 100% ia MSS for both DT and NB by the end of Q3 based on Intel’s Q3 support plan” (45p)

"Meanwhile, Intel requested Samsung to cease from using the SIS (Silicon Integrated System Corp, President & CEO: Mr. Daniel Chen)’s chipset in the fourth quarter of 2002. But Samsung delivered its own position that the defendants’ 'Support Plan' should be confined to the maintenance of 100% Intel CPU MSS. Thus, it is sufficiently verified that the premise or prerequisite of defendants’ 'Support Plan' was the maintenance of 100% Intel CPU MSS." (45p)

#### B. Involving Sambo

#### Overall

**“The defendants provided rebates on the condition that Sambo would convert its CPUs from AMD to defendants within the home-shopping channel from the third quarter of 2003. Consequently, in the fourth quarter 2003, Sambo started to convert CPUs from AMD to defendants in the home-shopping channel and consummated the conversion in first quarter 2004. Also, the defendants requested that Sambo would not participate in the AMD CPUs products’ launching event dated September 25, 2003 and also requested that Sambo would not launch AMD’s new CPUs-installed PCs. Sambo accepted this proposal and in turn, received rebates from the defendants. Moreover, the defendants provided rebates to Sambo on the condition that Sambo maintained the proportion of defendants CPUs at over 70% level within its domestic-consumption PC CPUs from fourth quarter 2004 to second quarter 2005. Consequently, Sambo maintained the proportion of the defendants CPUs within its domestic-consumption PC- installed CPUs at over 70% level.” (29p)**

### Specific facts Involving Sambo

"Former leader of Sambo's Product-Planning Team ooo stated that defendants requested exclusion of AMD from the home-shopping channel so Sambo agreed to maintain the Intel CPUs at 100% level for purpose to receive the maximum-level rebates from Intel. Also, according to the deposition of Intel Korea's executive director ooo, the defendants provided ECAP on the condition that Sambo converted its using CPUs from AMD to defendants in the home-shopping channel because Intel CPUs' proportion in the home-shopping channel was merely 30% at that time, and consequently, Sambo accepted the proposal." (31p)

"In this context, the defendants requested Sambo several times not to join in the launching event and not to launch PCs installed with AMD 64 bit CPUs. As a result, Sambo did not join in the launching event and eliminated its trademark from the prototype PCs, in which AMD 64 bit CPUs was installed. Since then, Sambo did not launch or sell the AMD 64 bit CPUs installed PCs more than six months. In return for this, in third quarter 2003, the defendants provided MDF 3~30 times higher than before and thereafter quarters, as the <Table 28> illustrates." (32p)

**"The former leader of Sambo's Product Planning Team ooo and a former executive director ooo testified that Sambo had intended to join the launching event of AMD 64 bit CPUs. However, as Intel Korea's director and head, respectively, ooo and ooo requested Sambo not to join in the event and not to launch AMD 64 bit CPUs-installed PCs, Sambo accepted the requests. In return for this acceptance, Sambo could receive more assistance such as MDF."** (33p)

### Reviewing the defendants' argument

"The defendants argue that the ECAP was only provided in certain items which were competing with competitor's products, and the rebates were simply "a certain type of

volume discount", in which the amount of rebates is calculated by the purchased volume of ECAP-applied items.” (35p)

“Reviewing this argument, as the Table 31 illustrates, considering the amount of rebates actually provided to Samsung and Sambo, we could observe that the rebate rate was in the lowest level in first quarter 2002 when Samsung rejected the defendants’ request for abandonment of AMD’s products, despite Samsung's purchase amount of the defendants’ products was in the highest level at the same period. On the contrary, we could observe that the rebate rate was at the highest level in third quarter 2002 when Samsung stopped purchasing the AMD’s products, despite Samsung's purchased amount of the defendants’ products was at the lowest level during the same period. This fact resulted from the fact that the defendants’ rebates had not been provided in pursuant to the amount of partner’s purchased volume but pursuant to the purchased volume of competitor AMD’s products. **Accordingly, it is appropriate to conclude that the defendants’ rebate program is totally different from the volume discount scheme which defendants are arguing.**” (36p)

<Table 31> Rebates provided by defendants to Samsung

	2001		2002			
	3/4	4/4	1/4	2/4	3/4	4/4
Rebate rate	8.1%	3.3%	1.2%	2.4%	7.2%	3.0%

	2003			
	1/4	2/4	3/4	4/4
Rebate rate	4.4%	4.5%	2.5%	3.7%

	2004

	1/4	2/4	3/4	4/4
Rebate rate	2.6%	4.6%	7.7%	3.8%

	2005	
	1/4	2/4
Rebate rate	5.4%	5.3%

\*Edited for simplification by editor, amount of rebates were redacted in the Decision

**“Consequently, the defendants’ rebate system is not a volume discount program but a system where the amount of rebates is reduced or increased according to fulfillment of conditions involving exclusion of competitors, through the determination of ECAP applied items, amount of discounts, and payment of MDF, regardless of partner’s purchasing volume. (38p)**

“First, considering the fact that both Samsung and Intel Korea’s employees testified consistently that the defendants suggested rebates in exchange for abandoning AMD products in first quarter and second quarter 2002 continuously (defendants’ employees describe it as “Full Alignment”), also considering that they testified that rebates were provided in exchange for using only defendants’ products and abandoning AMD products during third quarter 2002 ~ second quarter 2005, the defendants’ arguments are not appropriate.” (38p-39p)

“Actually, ooo and ooo, respectfully, the Chief of Samsung's Computer System Headquarters’ Purchasing Team and the Division Chief of the same department, testified that the rebates provided by the defendants were not related with the Design Win competition.” <sup>Footnote 79</sup> (50p)

<Footnote 79>

“They testified that “the support plan was not directly related with the specific-CPU’s related Design Win because the assistance was provided on the condition of dropping AMD and maintaining the 100% level in 2002” (50p)

<Footnote 82>

“Briefing for Executive Meeting with Trigem Computer, Inc.”

Intel Meeting Objectives

<omitted>

intel objective #1 : Domestic-Keep current winning pace to maintain > 95% IA MSS and prevent 64Bit launch(rephrase with positive tone-good job done so far...etc...)”

(excerpts from the defendants’ internal document, 50p)

## **2. Judgment of Illegality**

Exclusionary effects: Overall

**“The defendants’ requests for PC makers to abandon competitor’s CPUs by leveraging its rebates program have strong probability to exclude competitors, and actually caused exclusion of competitors during the above period considering following elements: the binding power of rebates; feasibility of securing alternative partner for competitors, rebates-provided period; importance of rebate-given partners.” (76p)**

Leverage effects

“The rebates provided by the defendants in exchange for not transacting with competitors, exploited the volume that the PC makers had to purchase as leverage, causing PC makers

to cease or reduce their transaction with competitors and also causing PC makers to transact with the defendants.” (77p)

#### Back-end methodology

“Under this rebate scheme, the amount of rebates could be sharply reduced or the provision itself could be reserved whenever the conditions to provide rebate has been not fulfilled. Consequently, the PC makers’ incentives to comply with the condition offered by the defendants become larger.” (79p)

#### Non-transparency

“In fact, in the third quarter of 2002, when defendants suggested that they would provide rebates in exchange for ceasing from purchasing AMD CPUs and for exclusively using the defendants CPUs, Samsung requested to fix the rebates at 7% of the purchasing price. However, the defendants rejected the request and simply promised to provide the maximum-level supports quarterly if Samsung used the defendants CPUs exclusively. There have been no prior words on what the maximum-level supports would be. Also, it is difficult to find certain criteria involving the size or rate of rebates that Samsung and Sambo had been received.” (80p)

“Such non-transparency hinders PC makers from making rational choice after comparing defendants’ actual price including rebates with a competitor’s price. In addition, it makes competitors difficult to decide their own responsive price level. It is because competitors have difficulty in figuring out to what extent the price should be discounted to compete with the defendants’ CPUs.” (80p)

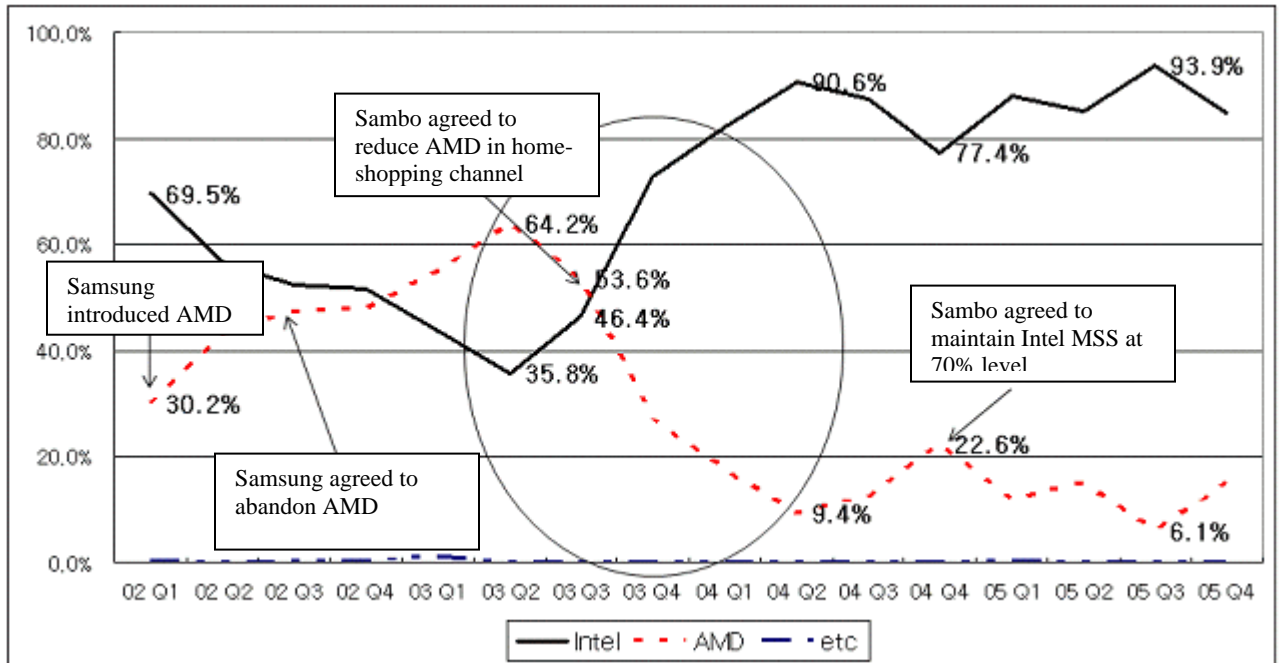
#### Binding Power of defendants’ rebates using Actual case

“Samsung introduced AMD CPUs first in first quarter 2002. The purchased quantity was total 10,670 CPUs, 10,400 for desktop and 270 for laptop. It was only 3% of the entire

volume Samsung bought at that period. But Samsung experienced a sharp decrease in the defendants-provided rebates. The amount of rebates was sharply reduced to \$0 million, which was only 1.15% of the entire purchase quantity. This was a significantly lower level than any other period before or after.” (82p)

“If the above analysis measure were applied to the period till the second quarter of 2005 when the defendants provided the rebates in exchange for not trading with competitors, it could be easily confirmed that there are only a few incentive for Samsung to buy AMD CPUs unless AMD set the price at a significantly low or even at a negative (-) level.” (84p)

<Picture 11> Trend of MSS changes in home-shopping channel



(98p)

Consumer Harms: Reduced Variety of Products, Impediments to Price Cuts, and Damages to a competitor’s substantive competitiveness

**“If AMD were excluded by the defendants’ conducts of providing rebates on the condition of not transacting with a competitor, consumers’ right to choose PCs would be curtailed.** For consumers who prefer AMD CPUs-installed PCs made by Samsung or Sambo, they would not buy these PCs as a result of the defendants’ conducts. A group of these consumers will buy PCs installed with the defendants’ more expensive CPUs. Another group of consumers would convert to other third PC makers or agency channels to buy the AMD CPUs-installed PCs. In some cases, certain consumers may even give up buying a PC.” (104p)

**“The defendants’ rebates scheme, namely, offering rebates in exchange for not trading with a competitor, has effects of saving discount cost comparing with other common price discount or simple volume discount scheme. Under common discount or simple volume discount method, PC makers could more freely choose the profit-maximizing volume. In comparison, under the defendants’ alleged rebate scheme, PC makers could be restrained to purchase more volume of defendants’ CPUs than their profit-maximizing volume.” (105p-106p)**

“In fact, with respect to the rebate level that defendants provided to PC makers, we could observe a sharp increase of rebate rate after Intel’s abandonment of the alleged conditional rebate scheme in the fourth quarter of 2005.” (106p)

“These phenomena could be interpreted that the defendants had no choice but to increase the rebate rate (discount rate) to induce PC makers to purchase voluntarily when the defendants only used common price discount or simple volume discount methodology instead of alleged conditional rebates.” (106p)

“If the defendants had competed through a common price discount policy or a simple volume discount policy, the defendants might have to provide more discounts to PC makers. Subsequently, price of PCs would have been more decreased if defendants offered more discounts, considering the severely competitive situation of PC market. **In conclusion, the defendants’ rebates provided on the condition of not trading with**

**competitors could be assessed as rendering negative effects on consumer welfare by maintaining the market price higher than the competitive market price, which could have been achieved through a common and simple volume discount policy.” (106p-107p)**

“The defendants argue that the conditional rebates do not have exclusionary effects because the effective price is significantly higher than the average cost, according to an economic analysis. However, the defendants’ conclusion is based on the defendant-favorable assumptions with respect to the size of the CVS (commercially viable share), the amount of conditional rebates, and the average costs. The defendants chose relatively large number for CVS whereas chose relatively small number for both the amount of conditional rebates and the average costs to come up with the favorable result for them.” (112p)

“When we applied this analysis methodology, unlike the defendants’ argument, the results many times indicated the existence of possibility for excluding competitors. Specifically, if we assumed the CVS as 4.7% and non-conditional rebate rate as 0%, the result indicated that competitors could be excluded even AVC was used as an average costs. Consequently, unlike the defendants’ argument, we cannot conclude that there were no exclusionary effects in case we analyze the defendants’ conditional rebates according to the EU discussion paper.” (120p)