UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES

In the Matter of	)	
INTEL CORPORATION, Respondent.	)	DOCKET NO. 9341

ORDER DENYING COMPLAINT COUNSEL'S MOTION TO ADMIT EUROPEAN COMMISSION DECISION

I.

On March 17, 2010, Complaint Counsel submitted a Motion to Admit European Commission Decision ("Motion"). Respondent Intel Corporation ("Respondent" or "Intel") submitted its opposition on April 12, 2010, pursuant to the parties' agreement set forth in Respondent's Notice of Withdrawal of Intel's Motion for Extension of Time and For Leave to File Over-Length Memorandum in Opposition to Complaint Counsel's Motion to Admit European Commission Decision. On April 26, 2010, pursuant to a stipulation of the parties, Complaint Counsel submitted a reply brief. *See* Order on Joint Motion and Stipulation of the Parties Regarding Reply Brief of Complaint Counsel, April 14, 2010. For the reasons set forth below, Complaint Counsel's Motion to Admit European Commission Decision is DENIED.

II.

Complaint Counsel moves to admit into evidence the decision by the European Commission ("EC") that found Intel's conduct in the Central Processing Units ("CPU") markets to be a violation of Article 82 of the EC Treaty, the European Union's anti-monopoly law ("EC Decision"). Complaint Counsel does not contend that the EC Decision is binding in this proceeding, or that the EC Decision must be given particular weight. Rather, Complaint Counsel argues, the sole issue presented by its Motion is whether the EC Decision is admissible evidence.

Complaint Counsel urges that the EC Decision is relevant, material, and reliable, pursuant to Commission Rule 3.43(b). Specifically, Complaint Counsel argues that the EC's factual findings regarding market definitions, market power, and exclusionary arrangements with certain original equipment manufacturers ("OEMs") not to do business, or to do less business, with Intel's competitors, are relevant and material to facts alleged in the Complaint, and, therefore, constitute relevant and material evidence

under Commission Rule 3.43(b). Complaint Counsel contends that differences between the antitrust laws of the United States and the EC are not material because Complaint Counsel seeks to introduce only the findings of fact of the EC Decision. Complaint Counsel further argues that the EC Decision is reliable for purposes of admissibility under Rule 3.43(b), because it would be deemed trustworthy and, therefore, admissible under Federal Rule of Evidence 803(8)(C). Federal Rule of Evidence 803(8)(C) allows as an exception to the hearsay rule the admission of "reports . . . of public offices or agencies, setting forth . . . factual findings resulting from an investigation made pursuant to authority granted by law." Fed. R. Evid. 803(8)(C). Complaint Counsel contends that admission of the EC Decision would not be prejudicial because this proceeding is an administrative proceeding and not a jury trial.

Respondent states that the findings of the EC are not relevant because they are based upon European legal principles which, according to Respondent, are materially different than applicable principles of American law. Therefore, Respondent argues, the EC Decision must be excluded as irrelevant and immaterial under Rule 3.43. Respondent further contends that the EC Decision is not trustworthy, for purposes of the hearsay exception described in Federal Rule of Evidence 803(8)(C), because the EC Decision reflects suspect motivations and was based upon inadequate procedures and unreliable evidence. Moreover, Respondent argues, any probative value of the EC Decision is substantially outweighed by the danger of unfair prejudice, undue delay, and waste of time, as the parties engage in a "minitrial" of the validity of the evidence, findings, conclusions, and procedures relied upon in the EC matter.

III.

The admissibility of evidence in Part III administrative trials is governed by Rule 3.43 of the Commission's Rules of Practice. 16 C.F.R. § 3.43. Rule 3.43(b) sets forth, in part:

> Relevant, material, and reliable evidence shall be admitted. Irrelevant, immaterial, and unreliable evidence shall be excluded. Evidence, even if relevant, may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or if the evidence would be misleading, or based on considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

16 C.F.R. § 3.43(b). Regarding the admissibility of hearsay in particular, the 2009 amendments to Rule 3.43(b) added the following language:

> Evidence that constitutes hearsay may be admitted if it is relevant, material, and bears satisfactory indicia of reliability so that its use is fair . . . . If otherwise meeting the standards for admissibility described in this paragraph, depositions, investigational hearings, prior testimony in Commission or other proceedings, and any other form of hearsay, shall be admissible and shall not be excluded solely on the ground that they are or

contain hearsay.

16 C.F.R. § 3.43(b). *See also* 74 Fed. Reg. 1804, 1816 (Jan. 13, 2009) (Commission commentary stating that the revised rule does not "provide for the admission of hearsay evidence 'in every circumstance,' but only where such evidence is sufficiently relevant, reliable and probative 'so that its use is fair.'").

When read and considered in its entirety, the language of Rule 3.43(b) makes clear that, while evidence is not subject to exclusion solely on hearsay grounds, the fact that evidence may fall under an exception to the hearsay rule does not automatically require that the evidence be admitted. Rather, hearsay evidence, like any other proffered evidence, must "otherwise meet . . . the standards for admissibility described" in Rule 3.43(b). This standard of admissibility, in turn, requires a determination of whether the probative value of the proffered evidence "is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or if the evidence would be misleading, or based on considerations of undue delay, waste of time, or needless presentation of cumulative evidence." 16 C.F.R. § 3.43(b). In this regard, it is noteworthy that when the Commission amended its Rules of Practice in 1996, it stated:

> Rule 3.43(b) is being amended to incorporate relevant language in Rules 403 and 611 of the Federal Rules of Evidence regarding the exclusion of cumulative evidence. The amended rule is intended to make clearer to litigants that the ALJ is empowered to exclude unduly repetitious, cumulative, and marginally relevant materials that merely burden the record and delay the trial. This clarification is intended to enhance the ALJ's ability to assemble a concise and manageable record.

61 Fed. Reg. 50640, 50644 (Sept. 26, 1996).

As more fully explained below, even if the EC Decision is relevant, and even if it meets the standard of trustworthiness for purposes of Federal Rule of Evidence 803(8)(C), its probative value is substantially outweighed by the danger of unfair prejudice, undue delay, waste of time, and needless presentation of cumulative evidence. Thus, the EC Decision is excluded pursuant to the balancing test provided in Commission Rule 3.43(b).

Courts have declined to admit investigative reports of public offices or agencies under Rule 403 of the Federal Rules of Evidence, on which Commission Rule 3.43(b) is modeled in part. In *Rambus, Inc. v. Infineon Technologies*, 222 F.R.D. 101 (E.D. Va. 2004), for example, Rambus sought to introduce the Initial Decision issued by the Administrative Law Judge in the FTC's proceeding against Rambus. The court held that "[e]ven if the Initial Decision were admissible under Rule 803(8)(C), it would need to be excluded under Fed. R. Evid. 403 . . . because its probative value is substantially outweighed by the danger of unfair prejudice and its tendency to mislead the jury, confuse the issues, and waste time." *Id.* at 109-10. The court further explained:

> [I]f the Initial Decision were admitted here, Infineon would be required to address issues not presented by its claim or its evidence. And following that presentation, it would be necessary to tell the jury that Infineon's evidence on those issues is admissible only to prove that the Initial Decision is unreliable, not to prove Infineon's substantive claims. One can hardly envision a more confusing and misleading scenario. Nor can one conjure a more wasteful exercise. The evidence in a straight-forward monopolization claim is certainly not simple, and the instructions, even without introduction of the Initial Decision, will be quite complex. It would be utterly wasteful, even if manageable at all, to overlay that evidence and those instructions with, as Infineon correctly asserts, a series of mini-trials respecting the reliability of the findings in the Initial Decision.

Id. at 110-11. *Accord Hynix Semiconductor, Inc. v. Rambus, Inc.*, 2008 U.S. Dist. LEXIS 10859 (N.D. Cal. 2008) ("The court concludes that the probative value of the [C]ommission's opinion [in the FTC proceeding against Rambus] is substantially outweighed by the danger of prejudice and confusion of the issues. FRE 403.").

Complaint Counsel's request for admission of the EC Decision is similar to the request made and denied in *Zenith Radio Corp. v. Matsushita Elec. Indus. Co., Ltd.*, 505 F. Supp. 1125, 1150 (E.D. Pa. 1980), *aff'd in part, rev'd in part on other grounds*, 723 F.2d 238 (3d Cir. 1983), *rev'd on other grounds*, 475 U.S. 574 (1986). In *Zenith*, plaintiffs sought to introduce into evidence documents, including certain findings, promulgated by the U.S. Treasury Department and U.S. Tariff Commission in connection with proceedings under the 1921 Antidumping Act ("antidumping act material"). The court first evaluated admissibility of the antidumping act material under Rule 803(8)(C) and then its relevance and probative value. *Id.* at 1155-60. The court held "that even if the documents in fact have some probative value, they would have to be excluded by reason of Rule 403." *Id.* at 1160. The court in *Zenith* provided four rationales for excluding the antidumping act material under Rule 403.

First, the court stated that the findings, which bore the imprimatur of the United States government and used conclusory legal terms, presented "a substantial danger of unfair prejudice, similar to that presented by the admission of a prior verdict against an antitrust defendant in another case." *Id.* at 1160-61.

Second, the court stated that "[a]dmissions of the findings would require a 'minitrial' as to their trustworthiness, weight and credibility and as to their correctness under the 1921 Act . . . [which] would undoubtedly contribute to confusion of the issues." *Id.* at 1161. "If the findings were admitted, the defendants would, of course, be entitled to point out to the jury, whether by argument or by bringing in testimony, that the 1921 Act findings were made under the particular standards of that Act." *Id.*

Third, the court stated that "if the documents [were] admitted, defendants would be entitled to raise at trial all the evidentiary matters which support their contention that the documents are not trustworthy. Furthermore, they would be entitled to try to prove that the findings were wrong as a matter of interpretation of the 1921 Act." *Id.* The court

found that "these matters would add to the length of the trial" and, thus, "[a]ny probative value which the documents possess is far outweighed by the undue delay that would ensue from their admission." *Id.*

Fourth, the court in *Zenith* noted that the plaintiffs there argued that antidumping act material was relevant to show that the defendants' prices in the United States were lower than prices in Japan and that the plaintiffs were injured by this price differential. *Id.* The court stated that the plaintiffs had developed extensive evidence of alleged price differentials between the United States and Japan and that that evidence showed injury to the plaintiffs. Accordingly, the court found the documents from the 1921 Act proceeding to be "at best needlessly cumulative of this other evidence." *Id.* at 1161-62.

The court in *Zenith* concluded that even if the proffered documents were trustworthy and relevant, "because of the clear result of the balancing evaluation under F.R.E. 403," the court was "obliged to exclude them at trial." *Id.* at 1162. Similar to the holdings in *Zenith* and *Rambus*, in this case as well, even if the EC Decision were deemed trustworthy and relevant, the balancing test envisioned by Commission Rule 3.43(b) weighs in favor of exclusion. Although the danger of confusing or misleading a jury, as discussed in *Zenith* and *Rambus,* is not applicable to an administrative trial, as shown *infra*, other balancing elements of Federal Rule of Evidence 403, which have been incorporated into Commission Rule 3.43(b), provide strong reasons for excluding the EC Decision.

First, there is danger of unfair prejudice to Respondent. According to the sworn declaration of James S. Venit, Esquire, a long-time antitrust practitioner before the EC, submitted with Intel's Opposition to the Motion, the EC Decision was based on numerous documents and witness statements that were not disclosed to Intel in advance, and/or not subject to cross examination. Venit Decl. ¶¶ 28, 35. Moreover, according to Mr. Venit, EC confidentiality rules prohibit Intel from disclosing in this matter certain information which Intel believes supports its contentions of error by the EC. Venit Decl. ¶¶ 46-52. These impediments to any attempt by Respondent to demonstrate that the findings of the EC were erroneous create a danger of unfair prejudice to Respondent.

Second, as in *Rambus* and *Zenith*, admissions of the findings of the EC would require a "minitrial" as to their trustworthiness, weight, credibility, and validity under Article 82 of the EC Treaty, points which Respondent states it intends to litigate. Opposition at 7-8; s*ee also Coleman v. Home Depot, Inc.*, 306 F.3d 1333, 1346 (3d Cir. 2002) (noting that "trial-within-a-trial" would be required to enable defendant to rebut findings of discrimination in EEOC report). As in *Zenith*, if the EC Decision were admitted, Respondent "would be entitled to raise at trial all the evidentiary matters which support [its] contention that the [EC Decision is] not trustworthy. Furthermore, [Intel] would be entitled to try to prove that the findings were wrong as a matter of interpretation" of Article 82 of the EC Treaty. *See Zenith*, 505 F. Supp. at 1161. For example, Respondent would be compelled, in its defense, to present, among other things, evidence as to potential bias in the findings; variances between European and American law applicable to the findings; and evidence that was inaccessible to, or ignored by, the

EC. As noted in *Zenith*, this would clearly "add to the length of the trial." *Id.* Thus, any probative value that the EC Decision possesses is far outweighed by the undue delay that would ensue from its admission.

Third, the EC Decision would be cumulative of evidence required to be presented by Complaint Counsel in this case. Complaint Counsel argues that the EC found that demand substitution evidence supported separate markets for: (1) x86 CPUs for desktop computers; (2) x86 CPUs for laptop computers; and (3) x86 CPUs for server computers, and that the relevant geographic market was the world. Motion at 6. Complaint Counsel also states that the EC found that Intel was the dominant participant in the relevant markets and that there were significant barriers to entry. Motion at 6-9. In addition, Complaint Counsel states that the EC found that Intel entered into exclusive arrangements with OEMs. Motion at 10. Respondent notes that Complaint Counsel will seek to establish the same facts at this administrative trial, with actual testimony and documents produced in this case. Opposition at 6, 7-8. To this extent, as in *Zenith*, the EC Decision would be cumulative, yet at the same time, would open multiple new doors for presentation of rebuttal evidence. Commission Rule 3.41(b) provides that the time for trial "should be limited to no more than 210 hours," which evinces a policy for an efficient hearing process. Admission of the EC Decision, as discussed herein, is contrary to such policy.

The purpose of this proceeding is to litigate the Complaint issued by the FTC, not the case brought by the EC. Admitting the decision and factual findings of the EC risks converting this forum into another litigation of the EC case, which utilized different legal procedures than those used in Part III administrative litigation (*e.g.*, Venit Decl. ¶¶ 15-16, 22-25, 28), while detracting from the central issues in the instant case. For this reason as well, the EC Decision should not be admitted.

IV.

Pursuant to Commission Rule 3.43(b), the EC Decision is excluded on the ground that, even if relevant, and even if trustworthy for purposes of Federal Rule of Evidence 803(8)(C), its probative value is substantially outweighed by the danger of unfair prejudice, and by considerations of undue delay, waste of time, and/or needless presentation of cumulative evidence. Accordingly, whether the evidence would be deemed trustworthy pursuant to Federal Rule of Evidence 803(8)(C) need not be, and is not, determined.

ORDERED:

D. Michael Chappell
Chief Administrative Law Judge

Date: May 6, 2010