



COMMISSION OF THE EUROPEAN COMMUNITIES

Brussels, 20.11.2007  
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**COMMISSION DECISION**

**of 20 November 2007**

**relating to a proceeding under Article 81 of the EC Treaty  
and Article 53 of the EEA Agreement**

**Case COMP/38.432 – Professional Videotape**

**(ONLY THE ENGLISH TEXT IS AUTHENTIC)**

**(Text with EEA relevance)**

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# **COMMISSION DECISION**

**of 20 November 2007**

**relating to a proceeding under Article 81 of the EC Treaty  
and Article 53 of the EEA Agreement**

**Case COMP/38.432 – Professional Videotape**

**(Only the English text is authentic)**

**(Text with EEA relevance)**

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Community,

Having regard to the Agreement on the European Economic Area,

Having regard to Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty<sup>1</sup>, and in particular Article 7 and Article 23(2) thereof,

Having regard to the Commission decision of 8 March 2007 to initiate proceedings in this case,

Having given the undertakings concerned the opportunity to make known their views on the objections raised by the Commission pursuant to Article 27(1) of Regulation (EC) No 1/2003 and Article 12 of Commission Regulation (EC) No 773/2004 of 7 April 2004 relating to the conduct of proceedings by the Commission pursuant to Articles 81 and 82 of the EC Treaty<sup>2</sup>,

After consulting the Advisory Committee on Restrictive Practices and Dominant Positions<sup>3</sup>,

Having regard to the final report of the hearing officer in this case<sup>4</sup>,

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<sup>1</sup> OJ L 1, 4.1.2003, p.1. Regulation as last amended by Regulation (EC) No 1419/2006 (OJ L 269, 28.9.2006, p. 1).

<sup>2</sup> OJ L 123, 27.4.2004, p. 18. Regulation as amended by Regulation (EC) No 1792/2006 (OJ L 362, 20.12.2006, p. 1).

<sup>3</sup> OJ [...].

Whereas:

## **1. INTRODUCTION**

- (1) From at least as early as 23 August 1999 and at least until 16 May 2002, the addressees of this Decision discussed and entered into agreements and/or concerted practices contrary to Article 81 of the Treaty and Article 53 of the Agreement on the European Economic Area (hereinafter 'the EEA Agreement'), with a view to increasing and to maintaining or stabilising prices for Betacam SP and Digital Betacam videotape in the EEA.

## **2. THE INDUSTRY SUBJECT TO THE PROCEEDINGS**

### **2.1. The product**

- (2) Videotapes for professional use ("professional videotapes") serve to record optical signals (mainly films) produced by a camera, a computer or other means. They are suited to fit to special video recording equipment which is nearly exclusively used by professionals like TV-Stations and independent producers of TV-content and advertising films.
- (3) The product range in the professional video tape segment in the EEA includes different types of videotape formats such as Digital Betacam, Betacam SP, Betacam SX, Betacam, DVPRO, D5, D3, D2, M2, DigitalS, U-matic, SVHS or Hi8. There are different types of video recording equipment which use different videotape formats. Compatibility of formats is limited (video recording equipment which represents a development of a given system can sometimes be compatible with videotape used for a previous version of the same system).
- (4) This procedure concerns two technical formats of professional videotapes: Betacam SP and Digital Betacam.
- (5) The original Betacam format was launched by Sony in 1982. In 1986 Betacam SP ("Superior Performance") was developed, using metal-formulated tape, as opposed to Betacam's oxide tape, and providing better quality and new features. In 1993, the Digital Betacam format was introduced in the market, as an upgrade of the analogue Betacam and Betacam SP formats.
- (6) Video recording equipment compatible with Digital Betacam and Betacam SP video tapes is manufactured by Sony and other third party companies.
- (7) Digital Betacam and Betacam SP videotape is available in large and small cassettes with various lengths (minutes of recording time).

### **2.2. The undertakings subject to these proceedings**

#### **2.2.1. Sony**

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<sup>4</sup> OJ [...].

- (8) Sony Corporation, with principal place of business at 6-7-35 Kitashinagawa, Shinagawa-ku, Tokyo, Japan, is the ultimate parent company of a group of companies established and operating world-wide (the "Sony Group"). *Inter alia*, the Sony Group manufactures and sells professional videotape (including Betacam SP and Digital Betacam) world-wide.
- (9) During the period of the infringement, Sony Corporation wholly owned Sony Europe Holding BV, which in turn owned 99.99964% of Sony France S.A. (the remaining 0.00015% being owned by Sony Overseas SA and 0.00022% held in trust by board members). Sony Europe Holding BV has its principal place of business at Schipholweg 275, 1171PK Badhoevedorp, The Netherlands. Sony France, S.A. ("Sony France") has its principal place of business at 20-26 rue Morel, Clichy, France.
- (10) Betacam SP videotape manufactured by Sony France and Digital Betacam manufactured by other Sony Group companies were sold in the EEA via a number of subsidiaries such as Sony France itself, Sony Deutschland GmbH, Sony Hellas SA, Sony Italia SpA., Sony Portugal Lda, Sony United Kingdom Limited, Sony Austria GmbH, Sony Benelux BV, Sony España SA and Sony Nordic a/s.
- (11) In the financial year ending on 31 March 2007, Sony Corporation had a consolidated world-wide turnover of JPY 8 295 695 million (EUR 55 300 million).
- (12) The combined EEA turnover of the Sony Group for Betacam SP and Digital Betacam videotape in the financial year ending on 31 March 2002, the last full year of the infringement, is indicated in Table 1 below.
- (13) "Sony" is the term used hereafter in this Decision, unless otherwise specified, to refer to any company which belongs to the Sony Group.

#### 2.2.2. *Fuji*

- (14) FUJIFILM Holdings Corporation (formerly called Fuji Photo Film Co. Ltd.), with principal place of business at 26-30 Nishiazabu &-chome, Minato-ku, Tokyo, Japan, is the ultimate parent company of a group of companies established and operating world-wide (the "FUJIFILM Group"). *Inter alia*, the FUJIFILM Group manufactures and sells world-wide professional videotape (including Betacam SP and Digital Betacam).
- (15) During the period of the infringement, Fuji Photo Film Co. Ltd. wholly owned Fuji Magnetics GmbH ("Fuji Magnetics"), with principal place of business at Fujistrasse, 1, Kleve, Germany.
- (16) On 1 October 2006, Fuji Photo Film Co. Ltd. changed its corporate name to FUJIFILM Holdings Corporation and transferred its business and assets, including the shares in all of its subsidiaries (except for Fuji Xerox Co., Ltd) to a newly incorporated company, FUJIFILM Corporation, which is wholly owned by FUJIFILM Holdings Corporation and owns in turn 100% of the shares of Fuji Magnetics.
- (17) In November 2006, Fuji Magnetics changed its corporate name to FUJIFILM Recording Media GmbH.
- (18) Betacam SP and Digital Betacam videotapes manufactured by the FUJIFILM Group in Japan (and, from 2002 also in Germany) were sold in the EEA by Fuji Magnetics and

other wholly owned direct or indirect subsidiaries of Fuji Photo Film Co. Ltd., such as Fuji Magnetics Belgium, Fuji Magnetics France, FUJIFILM Magnetics Italia Srl or FUJIFILM Photo Film (UK) Ltd.

- (19) In the financial year ending on 31 March 2007, FUJIFILM Holdings Corporation had a consolidated world-wide turnover of JPY 2 782 526 million (EUR 18 548 million).
- (20) The combined EEA turnover of the FUJIFILM Group for Betacam SP and Digital Betacam videotape in the financial year ending on 31 March 2002, the last full year of the infringement, is indicated in Table 1 below.
- (21) "Fuji" is the term used hereafter in this Decision, unless otherwise specified, to refer to any company which belongs to the FUJIFILM Group.

### 2.2.3. *Maxell*

- (22) Hitachi Maxell, Ltd. ("Hitachi Maxell"), with principal place of business at 1-1-88 Ushitora, Ibaraki-shi, Osaka, Japan, is the ultimate parent company of a group of companies established and operating world-wide (the "Hitachi Maxell Group"). *Inter alia*, the Hitachi Maxell Group manufactures and sells world-wide professional videotape (including Betacam SP and Digital Betacam).
- (23) Maxell Europe Limited ("Maxell Europe"), with principal place of business at Multimedia House, High Street, Rickmansworth, United Kingdom, is a directly wholly owned subsidiary of Hitachi Maxell .
- (24) Betacam SP and Digital Betacam videotape manufactured by Hitachi Maxell were sold by Maxell Europe in the EEA via a number of 100% owned subsidiaries such as Maxell Deutschland GmbH, Maxell Benelux BV, Maxell France SA, Maxell Italia SpA, or Maxell Scandinavia AB. In other countries (such as Austria, Ireland, Greece, Portugal, Spain, Denmark and Norway) sales were organised through a network of export distributors.
- (25) In the financial year ending on 31 March 2007, Hitachi Maxell had a consolidated world-wide turnover of JPY 202 240 million (EUR 1 348 million).
- (26) The combined EEA turnover of the Hitachi Maxell Group for Betacam SP and Digital Betacam videotape in the financial year ending on 31 March 2002, the last full year of the infringement, is indicated in Table 1 below.
- (27) "Maxell" is the term used hereafter in this Decision, unless otherwise specified, to refer to any company which belongs to the Hitachi Maxell Group.

## 2.3. **Description of the sector**

### 2.3.1. *The supply*

- (28) During the infringement, there were three main suppliers of Digital Betacam and Betacam SP video tapes in the EEA: Sony, Maxell and Fuji.



- (29) In addition, [...] <sup>5</sup> also sold Digital Betacam and Betacam SP video tapes in the EEA. These undertakings are not concerned by this procedure.
- (30) Digital Betacam and Betacam SP tapes were manufactured in Germany ([...], Fuji from 2002), France (Sony – Betacam SP) and Japan (Fuji until 2002, Sony – Digital Betacam, Maxell) and they were supplied by the different European subsidiaries of each group directly to end-users or through distributors (sales channels varied depending on the company and the country).
- (31) Intellectual property rights were a key element for manufacturing and marketing the video tapes. (...)
- (32) The sales and market shares in the EEA for Digital Betacam and Betacam SP in the financial year from 1 April 2001 to 31 March 2002, which was the last full year of the infringement, were the following:

**Table 1 – Combined sales and market shares of Digital Betacam and Betacam SP video tapes in the EEA (01.04.2001-31.03.2002)**

| Undertaking | Sales in thousand EUR | Market share |
|-------------|-----------------------|--------------|
| Sony        | 46 933                | 40,04%       |
| Fuji        | 31 112                | 26,54%       |
| Maxell      | 25 801                | 22,01%       |
| Others      | 13 373                | 11,41%       |
| Total       | 117 219               | 100%         |

### 2.3.2. The demand

- (33) Betacam SP and Digital Betacam tapes are nearly exclusively used by professionals like TV-Stations and independent producers of TV-content and advertising films ("Production Houses"). Professional video tapes, such as Betacam SP and Digital Betacam are generally not used by end-users for private purposes, as these can resort to other, mostly cheaper systems for video recording (for example, VHS). The customers in this sector are, therefore, mainly TV-Stations and Productions Houses.
- (34) TV-Stations and big Production Houses usually buy the professional videotapes directly from the producers ("direct customers") or their export distributors. Regularly, the TV-Stations decide to satisfy their demand by purchases from up to three providers, selected by means of a competitive tender. They only acquire from wholesalers in case of an ad-hoc need, as these generally apply higher prices than producers.

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<sup>5</sup> Throughout the Decision '(...)' signifies a passage which was removed for publication purposes by the Commission.

- (35) Wholesalers resell the videotapes mainly to small Production Houses. As quantities requested by wholesalers from producers are usually considerably smaller than sales volumes of TV-Stations and big Production Houses, prices offered by producers to the wholesalers are usually higher than those for direct customers.
- (36) During the period of the infringement, Betacam SP and Digital Betacam remained the most popular professional videotape formats in the EEA, representing an estimated 35% and 42% of total professional videotape sales respectively in 2001 .
- (37) From 1997 to 2002, there has been a continuous fall in demand for Betacam SP tapes in the EEA, mainly due to the re-use and recycling of tapes by TV stations and to the progressive substitution of Betacam SP by Betacam SX and MPEG IMX video recording equipment. Digital Betacam tape sales grew strongly until 2001 and fell slightly in 2002.

### 2.3.3. *Geographic scope*

- (38) The cartel discussions examined in this Decision were centred on the European market. Explicit references to all EU-15 countries (except Ireland) and Norway can be found in Fuji's minutes of the cartel meetings (see section 4). Ireland, Iceland and Liechtenstein may also be considered to be included in references made at cartel meetings to European prices in general. In addition, the internal corporate organisation of the cartel participants was so such that typically one of the affiliated companies was in charge of setting prices throughout Europe. The geographic scope of the cartel discussions for Digital Betacam and Betacam SP videotapes was therefore at least EEA-wide.
- (39) In its reply to the Statement of Objections, Maxell has argued that prices differed between Member States and that, therefore, the scope of any alleged infringement in terms of agreements reached needs to be assessed on a country by country basis. It has also claimed that any understanding for the period from August 1999 until April 2000 did not extend to the United Kingdom or the Netherlands and did not cover Austria, Belgium, Spain and Italy until late 1999 or early 2000.
- (40) This argument is clearly contradicted by (...) in respect of the United Kingdom (...) and the Netherlands (...). It appears, therefore, that the cartel participants were satisfied with the price levels in those two Member States and that the agreement not to increase them was part of a single EEA-wide conspiracy. Concerning Austria, Belgium, Spain and Italy, the contemporaneous note of meeting on 1 September 1999 is evidence of a clear intent to coordinate market behaviour in those Member States.

## 2.4. **Inter-state trade**

- (41) During the period of the cartel the producers used to sell Betacam SP and Digital Betacam videotape manufactured in Japan and France (at the end of the period also in Germany) to customers (end-users or resellers) established in the different Member States and in Contracting Parties to the EEA Agreement. These sales happened both directly through a network of subsidiaries and indirectly through independent export distributors in the different European countries.

- (42) Therefore, during the infringement period laid out in this Decision, there were important trade flows between Member States and between the Contracting Parties to the EEA Agreement as concerns Betacam SP and Digital Betacam videotape.
- (43) There is accordingly a substantial volume of trade between Member States, as well as between the Contracting Parties to the EEA Agreement as regards the relevant products.

### **3. PROCEDURE**

- (44) On 28 and 29 May 2002 the Commission carried out on-site inspections at a total of eleven premises belonging to members of the Sony, Fuji and Maxell groups in five Member States. The inspections were carried out pursuant to Article 14(3) of Council Regulation (EEC) No 17 implementing Articles 85 and 86 [now 81 and 82] of the Treaty<sup>6</sup>.
- (45) During the course of the inspections, the following incidents occurred:
- (a) a duly authorized representative of Sony Europe Holding BV refused to answer any of the oral questions asked by the Commission; no justification was given for this refusal during the inspection despite the fact that the representative in question was assisted by the company's legal counsel;
  - (b) an employee of Sony United Kingdom Limited admitted having shredded, during the investigation, documents from a file labelled "Competitors Pricing" which was found empty by the inspectors.
- (46) (...)
- (47) (...)
- (48) (...)
- (49) On 5 December 2006 FUJIFILM Corporation, together with FUJIFILM Recording Media GmbH, formally applied for leniency under the terms of the 2002 Commission Notice on immunity from fines and reduction of fines in cartel cases (the "2002 Leniency Notice")<sup>7</sup>. By letters of 18 December 2006 and 10 January 2007, it was clarified that the application was also made on behalf of FUJIFILM Holdings Corporation and that it referred to the information already provided by this undertaking (...). By letter of 23 February 2007, FUJIFILM Corporation was informed of the Commission's intention to grant that undertaking a reduction of 30 to 50 % of the fine which would otherwise have been imposed, pursuant to point 26 of the 2002 Leniency Notice.
- (50) On 8 March 2007 the Commission initiated proceedings and adopted a Statement of Objections, addressed to Sony, Fuji and Maxell, which was notified to the parties in the period between 13 March 2007 and 16 March 2007. The parties simultaneously received a CD-Rom that contained the accessible parts of the Commission's file.

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<sup>6</sup> OJ L3, 21.02.1962, p. 204-211.

<sup>7</sup> OJ C 45, 19.2.2002, p. 3.

- (51) On 10 April 2007 Hitachi Maxell Ltd., together with Maxell Europe Limited, formally applied for leniency under the terms of the 2002 Leniency Notice. The application referred to information which had already been submitted by Maxell and, in particular, (...). The Commission acknowledged receipt of said application by letter of 25 April 2007.
- (52) Sony, Fuji and Maxell made known to the Commission in writing their views on the objections raised against them by the prescribed deadline.
- (53) All the addressees of this Decision availed themselves of their right to be heard orally. An Oral Hearing was held on 12 June 2007. (...)
- (54) (...)

## **4. DESCRIPTION OF THE EVENTS**

### **4.1. General remarks**

- (55) The parties to the cartel engaged in anticompetitive meetings and other contacts in relation to the relevant products from at least 23 August 1999 until at least 16 May 2002.
- (56) After their initial meetings (see recital (59)), the organisation, as far as deciding the location and making the necessary hotel or other reservations were concerned, was taken in turns by Sony, Maxell and Fuji. At the end of every meeting the parties fixed the agenda and the date of the next meeting.
- (57) The meetings leading to the first price increase agreed in September 1999 were all chaired by Sony; the meetings leading to the second price increase agreed in April 2000 were chaired by Maxell. As for the remaining meetings (leading and following the third price increase agreed in August 2001) they were chaired in turns by the three participants, depending on the location of the meeting (in Paris, Sony; in London, Maxell, and in Düsseldorf, Fuji). In its response to the Statement of Objections, Sony France contends that there was no formal chairperson, and that the extent of any "chair" in the meetings was limited to the circumstance that each of the participants would take administrative responsibility for organizing it.
- (58) (...) the reasons for (...) participation in the arrangements leading to the first two price increases (which were agreed on 1 September 1999 and 20 April 2000) comprised the following: i) the weakness of the Japanese Yen against the Deutsche Mark, which had resulted in a drop of Betacam SP's and Digital Betacam's profitability in Europe, and ii) the fact that the prices achieved with Betacam SP and Digital Betacam were comparatively low. (...), the motive for the third price increase agreed on 16 August 2001 was to "close" the gap between the selling price towards TV stations (direct channel) and prices offered to resellers (indirect channel).

### **4.2. Chronology of the meetings**

- (59) (...), there were two meetings between the three competitors before September 1999 with the purpose of setting up a system of minimum prices for broadcasters and dealers, respectively, and to discuss an eventual price increase, the first on a date and at a location unknown (possibly Düsseldorf), and the second on 23 August 1999 in

Paris, (...). The participants in both meetings were (...) (Sony), (...) (Maxell) and (...) (Fuji).

- (60) In relation to the second meeting, (...) it “*was organised and arranged by Sony Europe and took place in Paris on 23rd August 1999. (...), from Maxell Europe, (...) from Sony Europe and (...) from Fuji Europe, were all present at this meeting. At this meeting Sony suggested the loose harmonisation of prices for two products ranges: the Betacam SP and Digital Betacam tape formats across Europe. Each of these companies already had similar pricing structures, each having a separate pricing level for at least two types of customers: TV broadcasting companies and distributors. The prices offered to TV broadcasters were and are generally priced lower than the prices offered to distributors. However prices varied across Europe. [...] Sony Europe suggested that prices could be loosely harmonised by agreeing minimum prices for Betacam SP and Digital Betacam tape which each company would seek to achieve across Europe with higher minimum prices applicable to distributors as compared with TV companies. [...] As a result of this pricing agreement each company was free to set prices at any level above the minimum*”.
- (61) On 1 September 1999, a meeting took place (...) in London, between (...) (Sony), (...) (Maxell) and (...) (Fuji), in which they agreed on a general price increase of Betacam SP and Digital Betacam products, to be implemented in October 1999, with full implementation after 1 November 1999. It was also agreed to apply this price increase to distributors and TV stations in Germany, France and Scandinavia, with separate discussions planned for Spain (December 1999) and Italy (Spring 2000). It was decided to take no action in respect of the United Kingdom and the Netherlands, while the position in some other countries was to be confirmed by Maxell (Austria and Belgium) and Sony (Switzerland).
- (62) A contemporaneous internal note from Fuji intended to serve as a minute of this meeting bears out, under the title “*Pro-Video Tape (1<sup>st</sup> September)*”, the agreements that were reached for each of the above-mentioned countries:

*“1. Germany*

*(1) S [Sony] are entering negotiations for a price increase that is to begin from September.*

*The new price list for distributors will be published on 1st October.*

*(2) Both F [Fuji] and M [Maxell] will publish the new price list for distributors around 15th October.*

*(3) Negotiations will open with the new price for (\*broadcast TV)<sup>8</sup> stations as well. There will be complete implementation after 1st November (no exception) (S will begin earlier). [...]*

*2. France*

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<sup>8</sup> (...) In all the translated extracts quoted in this Decision, (...) comments on the translation are marked with an asterisk and shown between brackets.

*(1) Sony (\*S) will begin negotiations as in Germany.*

*(2) Both Fuji (\*F) and Maxell (\*M) will follow Sony (\*S), but, keeping an eye on the movement in Germany, intend to discuss (\*study separately) when to implement separately (confirmed to be (\*to be confirmed) between the middle and the end of September). Until then, each company is to implement (\*imply) the price increase and instructs there to be no more discounts (\*price decrease).*

### *3. Scandinavia*

*(1) Sony (\*S) will increase the price. The price for (\*broadcast) stations can be altered (\*adjusted) by both Fuji (\*F) and Maxell (\*M) as Sony's price is low (\*S' quantity is few).*

*M have already altered the tender price in 4 countries, all of which do not go below the current price. Fuji (\*F) will join the tender with a price that is higher than Maxell's (\*M) current price.*

*(2) Sony (\*S) will increase the price for distributors in Denmark (the person who offered an abnormal price last time has been fired).*

*4. Regarding Austria (...) and Belgium, Maxell (\*M) will confirm (\*check) and reply.*

*[...]*

*5. Spain – a separate discussion will commence at the time of the new tender in December.*

*Italy – discussions will commence next spring.*

*6. Both the UK and Holland are in a satisfactory situation and so no actions will be taken.*

*[...]”*

- (63) (...) “Sony proposed to lead the way with announcements of price increases in those countries where it was necessary to be followed by the other two companies. The implementation of price increases following an announcement can take some time. A large volume of professional videotape is supplied to TV companies which buy pursuant contracts following a tender. It was not possible to seek to increase prices until these contracts (which were often 6 or 12 months in duration) expired. Furthermore, prices to distributors were also negotiated individually so any price increase necessitated a process of negotiation with each distributor. These price increases are believed to have been announced by Sony Europe after the meeting in September 1999, and Maxell Europe and Fuji Europe followed suit sometime later. (...) instructed Maxell's European operating subsidiaries in certain countries to increase their prices once Sony Europe had increased prices in some countries. It is believed Maxell announced price increases from late 1999 until April 2000. However, the implementation of price increases took further time and were not in most cases implemented until after April 2000”.

- (64) On 20 December 1999, a meeting took place in London, (...), between (...) (Sony), (...) (Maxell) and (...) (Fuji), in which they reviewed the implementation of the agreed price increases in Germany, Switzerland and France, and discussed details of prices and tenders in Germany, Austria, Spain, France, Scandinavia and Portugal. A contemporaneous internal document from Fuji, prepared as an agenda for this meeting and headed “*European professional videos situation in each country*”, illustrates the information exchanged between the companies on prices throughout Europe:

*“1. Germany: With the exception of (...) (from 1st January 2000), Sony, Maxell and Fuji have all increased the prices of their products for both TV broadcasters and dealers. [...].*

*2. Switzerland: [...]*

*3. Austria: [Details of position and prices of each company in two tenders in this country].*

*4. Spain: We offered a price that was 5% higher than the lowest for the (...) tender. However, this action has resulted in more than 20% of a difference in price compared with last year and therefore an adjustment in price is needed for (...).*

*5. France: For (...), waiting for SONY to increase the price (\*The price increase by Sony to (...) is expected) (From January 2000?). [Details of another tender].*

*6. The tender in Scandinavia:*

*SP: the difference in price between Fuji and Maxell is minimal:*

*Sweden: Fuji      Denmark: Maxell*

*(...): Maxell's price is cheaper (below the lowest) in absolute terms. Maxell secured 80%.*

*[...]*

*[Handwritten text]*

*Portugal: November (...) M/S below*

*[...]*”

- (65) A contemporaneous handwritten note from (...) (Fuji), taken during this meeting and intended as a memorandum for the minutes, states the following:

*“Germany: M 1st December –*

*Switzerland: [...]*

*Austria              for dealers*

*Price for dealers if S increases, we increase*

*[Followed by details about tenders held in France]*

*S Portugal, we don't think that they will take any actions that are of an extraordinary nature.*

*[Details of another tender]*

*For dealers: December - S have increased a few %*

*[Details of tenders in the Netherlands, Spain, and Belgium]."*

- (66) On 20 April 2000, a meeting took place in Paris, (...), between (...) (Sony), (...) (Maxell) and (...) (Fuji), in which they agreed to increase prices in Europe for dealers and broadcasters from September 2000, with increases to be announced in July 2000. A contemporaneous internal note prepared by (...) (Fuji) during the meeting, (...), summarises the agreements that were reached as follows:

*"To adjust European prices*

*Price increase 5% (dealers) 10% (Broadcast)*

*Increase from autumn needs to be discussed.*

*June onwards dealer price*

*Autumn (new tenders) → for broadcasters*

*M initiative*

*Base film – approximately 20% increase. ([illegible] (...))*

*Euro 115 yen → went below 100 yen*

*Reason for this. How do we grasp the timing and act?*

*(Suggestion) How about starting in July.*

*Announcement to be made during May.*

*S. → There are more products for dealers next week*

*Conclusion:*

*1) From September – simultaneous price increase for dealers/BC [broadcasters]*

*(Notices to be distributed from July (\*to August))*

*Study the broadcasters by the end of May.*

*2) How much to increase for broadcasters needs to be discussed."*



- (67) The existence and the terms of price agreements between Sony, Fuji and Maxell is also confirmed by several internal documents from Maxell and by (...). As an example, an exchange of e-mails dated 16 June 2000 between two employees of Maxell, headed “*PI Pricing*” contains the following statement:

*“I have spoken to (...) [another Maxell’s employee] and he informs me by August 1st all Japanese manufacturers will increase their prices and this includes Fuji. If Fuji do not do this please inform me immediately. In the UK Sony have increased prices this week and Fuji will follow”.*

- (68) (...)

- (69) In addition, another internal document from Maxell (a report headed “*Comment on Sales Report 08/00*”, subheading “*PI VIDEO*”) also shows that, after this second price increase, some customers had already started to become suspicious about the possible existence of a cartel:

*“Concerning the price increases, I would like to mention the following important remark.*

*[Details regarding a tender]. In the case of Sony, the prices are exactly the same as Maxell [...]. People from [customer name] are saying that there has been an agreement between brands & therefore they requested an improved offer. The decision has to be taken during September & like I said already last month we will come back to you later when the result is known. We hope that the story of ‘similar prices’ will have no further consequences because as you can imagine, if they can prove that there has been an agreement between different brands, we might be in deep problems. Some customers are using the word ‘Cartel’ when they talk about price changes & have the same impressions as [customer name]. These comments concern mainly Maxell & Sony because concerning Fuji, so far there has been no change in their pricing policy”.*

- (70) On 21 August 2000, a meeting took place in Düsseldorf, (...), between (...) (Sony), (...) (Maxell) and (...) (Fuji), in order to review the market situation, after the recent price increase, in Germany, Switzerland, Austria, France, Scandinavia, the Netherlands, Belgium, Italy, Spain, Greece and Eastern Europe. A contemporaneous internal note from Fuji of 24 August 2000, headed “*Re: Minutes of the meeting on professional videos*”, confirms the date, time and participants in the meeting, and states the following:

*“3. Agenda: Confirmation of the price increase situation in the European markets*

*1) Germany: All three companies implemented the price increase on 1st August and things are going well. S have commented that the success of the price increase in Germany, the largest market, has been very effective in terms of convincing other markets this time as well as last time.*

*2) Switzerland: [...]*

3) Austria: *We don't know when SONY and Maxell will raise their prices. After checking with SONY, we have issued a PL [price list] containing the price increase from September 1st. Maxell use an agent in Austria and they have said that they have instructed this agent to put up the price in August. However, the agent has still not put up the price, and Maxell offer their sincere apologies. The matter will be dealt with in August. [Manuscript notes] My impression is, 'Can this be accepted?'*

4) France:

*1) Maxell implemented the price increase in the last week of July. The guidelines for TV broadcasters will be observed, but the price for dealers is below the guideline as it is still within the maximum 15% price differential.*

*Maxell are also using the broadcasters' price for (...) even though they are dealers. This has caused disputes between the 3 companies, especially between Maxell and Fuji. The 3 companies have agreed: 1. To follow, without exception, the guidelines for prices to broadcasters and dealers. 2. In the event of a problematic price difference, to raise the price for TV broadcasters.*

*Following this, Maxell will implement the price increase next week when (...) returns from his holiday. Regarding (...) and (...), we have confirmed that the price will be increased precisely to the reseller guidelines.*

*3) [sic] Valid period of the price for broadcasters: SONY have said that they are unable to alter the price this year for (...) because in both cases they are bound by the respective contracts. Both are large broadcasters and so S will inform F/M as to whether S really cannot increase the price, and if so, whether F/M will also have to wait until the end of this year for those two broadcasters.*

*4) Sony have been informed that (...), a production house, had pointed out that our price was below the guidelines. We will verify this and inform the other 2 companies of our findings (\* Sony pointed out that our price to (...) was below guideline, so we will verify to inform).*

5) Scandinavia:

*1) Both Maxell and Fuji will increase the price from 1st August. In Sweden, there seems to be no announcement of a price increase from SONY. S report of a price increase and we will verify the situation.*

*2) It has been pointed out that we have not increased the price in Norway. Verification is needed.*

*3) In Denmark, only (...) implemented the price increase from 1st September (\*the price increase to only (...) will be implemented from September 1<sup>st</sup>) in accordance with the contract.*

4) *The tender in Scandinavia: although it may need to involve a significant price increase, we will continue to observe the guidelines.*

6) *Holland: Fuji, Maxell and Sony will all increase the price, but SONY's price for dealers is 3% less than ours, and 5% less than Maxell's (\*Maxell's price is 5% less than ours). With our 5% bonus + CD, our price is very close to the minimum level, but if both Sony and Maxell continue to act as they have done (\*give some conditions), their prices will go under the guidelines. Sony insist that their price is the Net/Net price. (\*we) will reconfirm the matter with FMN [Fuji Magnetics Netherlands]). Maxell have said that they do not set any conditions such as bonus / cash discount.*

7) *Belgium: Maxell have pointed out that Sony are giving out 5% rebates. Whether this is true or not, we confirmed that we will strictly follow the guidelines on a Net/Net basis.*

8) *Italy: There was an apology from Maxell stating that their planned price increase has now been delayed to September due to the closure of their office for a three week holiday. (...) have not received a reply from any of the companies (\*Any of our company have not received reply from (...)). [Manuscript notes] (...) --- Fuji will be on board (although it was decided verbally). (...)*

9) *Spain: (...) were offered prices this year that, because of substantial price increases, were below the guidelines this year. However, Maxell will, without exception, follow the new guidelines for the next tender.*

10) *Greece: Rumour has it that the (...) was 100% obtained by (...) and not Maxell. (It seems they obtained the tender by giving crazy conditions such as 180 days Usance in addition to a cheap price). We gave a stark warning to Maxell stating that they must observe the guidelines from the next tender onwards. [Great thanks]*

11) *Eastern Europe: [...]."*

- (71) After this meeting, a series of internal Maxell documents confirm the existence of the price agreements and illustrate the close monitoring of their implementation in every country, as well as the complaints formulated by local sales executives about possible infringements of the agreements (especially by Fuji) in some European countries. As an example, a document dated 5 December 2000 (an e-mail from (...) to (...), headed "[customer name]") includes the following statements:

*"Like you I am not very happy about this situation when especially my understanding was that all the Japanese Companies are meant to be working to the same price level.*

*Could you if possible get us [sic] much information as possible on Fuji's price to [customer name] for the Products you Tendered because I want to take this up with (...) because Fuji are making a habit around Europe in ignoring this so called price agreement".*

- (72) (...).

- (73) On 24 May 2001, a meeting was held in Japan between representatives of Fuji, Sony and Maxell. Evidence of this meeting was found at the inspections in the form of an internal Fuji memorandum dated 28 May 2001 written by (...), in which he reports a telephone conversation with (...) ((...)) of Fuji Photo Film Co, Ltd, based in Japan) of the same day. It reads as follows:

*"(1) SONY, Maxell and Fuji all held a meeting on 24 May 2001.*

*(2) Maxell: There was an apology for the issue of (...). Their explanation was that they were unable to control the agents. They would still like to observe the agreement between Maxell, Fuji and SONY regardless of this incident.*

*(3) SONY: Although they have already implemented two price increases in the space of two years, they would like to implement a third price increase this year if possible. However, they will need to correct price differences which exist between the Dealers & the TV Broadcasters beforehand • When? Price details? To be decided at the meeting with European branches.*

*(4) (...)*

*(5) SONY have issued (...) with a warning letter regarding the Digital • products been sold in the market • if you obtain an (...) product, please send it to SONY. Maxell didn't do any business with (...) in the period April to May 2001."*

- (74) (...).

- (75) In its response to the Statement of Objections, Maxell supplied evidence showing that the person named (...) as the representative of Maxell at the meeting on 24 May 2001 could not have attended a meeting in Japan as he was travelling to another country on that precise date. Sony Corporation has also claimed that the person who allegedly represented it at the meeting on 24 May 2001 had no recollection of attending it and that it would be unlikely, given his position in the company, that he would have attended it.

- (76) Sony Corporation has further argued that the notion that a meeting was convened in Japan to discuss matters of relevance for the European market is inconsistent with the general description of the infringement and that the Commission may not maintain that any meeting took place on 24 May 2001 in Japan only on the basis of (...) statement.

- (77) As the contemporaneous document found at the inspections does not record the names of Sony's and Maxell's representatives and these two companies deny the presence of the persons named (...), the exact identities of the representatives of Maxell and Sony cannot be established. Nevertheless, the Commission considers that the fact that there was a cartel meeting in Japan on 24 May 2001 between representatives of the parent companies of Sony, Fuji and Maxell has been sufficiently proven. In this regard, the contemporaneous document quoted in recital (73), which clearly states the date of the meeting and the names of the three undertakings as participants, constitutes in itself sufficient evidence of these facts. Besides, the references the document contains to (...) and the "European branches", together with the fact that the meeting is being reported by (...), an executive of Fuji Photo Film (Japan), to an employee of its

European subsidiary, indicate (...) that it was a meeting in Japan attended by representatives of the parent companies. Finally, the characterization of the meeting as a cartel meeting also stems from the text of the contemporaneous document and, in particular, from the references to Maxell's commitment to "observe the agreement" despite the (...) incident (also mentioned at the previous meeting, see recital (70)) and to Sony's proposal to correct price differences between dealers and broadcasters. This proposal was discussed at the 29 May 2001 meeting (see the minutes in recital (78), where the suggestion to increase prices is attributed to SONY Tokyo) and finally agreed at the meeting of 16 August 2001 (see recital (80)). Maxell and Sony have not provided any alternative explanation of the contemporaneous document in question.

- (78) On 29 May 2001, a meeting took place in Paris, (...), between (...) (Sony), (...) (Maxell) and (...) (Fuji), in which they discussed the implementation of the existing arrangements, in particular in relation to Spain, the Netherlands, Italy, Belgium, Denmark and Eastern Europe. In this meeting there was also a proposal to increase prices by 5% for direct users to take effect in mid-August 2001, following announcements in June and July and an agreement to maintain prices unchanged for indirect users. A contemporaneous internal note from Fuji of 30 May 2001, headed "*Pro video meeting Minutes*", confirms the date and venue of the meeting. The excerpts below serve to illustrate some of the issues discussed at the meeting:

*"2. Special mentioned matters (Discussed points)/Topics*

*[...]*

*(4) Market Price Increase: • (...) Due to this low exchange rate SONY would like to increase the market price again. SONY Tokyo have suggested a price increase of 8% for Direct Sales and an increase of 5% for Indirect Sales.*

*Maxell have taken a severe knocking from the low prices of (...) as well as the pressure of dealers residing in each country. Their market share is thought to have decreased. Maxell are not confident of being able to successfully implement a price increase as they are unable to get the locals on their side.*

*The price difference between Dealers and TV Broadcasters is our most serious problem.*

*(...)*

*The reason why it is difficult to increase the price for dealers is that the price for TV Broadcasters (Production Houses) has been leaked to the market and the dealers then stated that they would not buy products through the official route unless the same price level was offered to them.*

*• Maxell are of the same opinion. SONY feel that it is important to close the gap due to the legal issue of fair trade.*

*The entire European committee concluded that it is of foremost importance to try to reduce the price difference that exists between Direct and Indirect customers as soon as possible.*

*Specific actions that need to be taken:*

*1- Increase the price for Direct Users by 5% (verify each product type as the current price balance varies from product to product).*

*2- No change in the price for Indirect Users*

*3- In addition to the conventional two prices for the End User /Reseller, we will set a new standard price that is midway between these two prices (Each company must discuss whether or not this 3 price strategy works).*

*If each party agrees with the above mentioned actions then SONY will announce the price increase at the end of June 2001, to take effect from early August. Both Maxell and Fuji will make their announcements in the period early to mid July 2001 to take effect from mid August, monitoring SONY's action.*

*SONY will issue an internal order at the sales meeting on 12th June and Maxell will do likewise in mid June. Fuji will also issue orders to all branches in Europe around 15th June 2001.*

*A follow up meeting has been arranged regarding this issue for 17th July 2001.*

*[...]*

*(4) Special Topics in each market*

*(1) Holland: [...]*

*SONY, Fuji and Maxell are all under pressure from dealers it seems, especially SONY, who are under pressure not to change their sales scheme as the dealers they do business with say that it will be much more difficult to sell products following such a move. It is therefore imperative all three of us keep the standard price for dealers the same on a Net Net Net basis.*

*(2) Italy: We all agreed to increase the price up to the current standard level for this year's (...) tender (we will closely monitor Maxell as they may mistakenly announce last year's price). SONY have already mentioned this year's price increase to (...) (no signs of rejection).*

*(3) Belgium: Maxell's (...) price is low. It has been pointed out that Fuji's (...) (Dealer) price is low, so we will need to investigate both of these.*

*(4) Denmark: SONY have pointed out that Fuji give resellers the price that is meant for TV Broadcasters.*

*(5) Eastern Europe: [...]"*

- (79) Some weeks after this meeting, there seemed to be an internal debate in Maxell about the new price increase proposal, before it was finally accepted. In an internal Maxell e-mail dated 3 August 2001 (from (...) to (...), headed "RE: PI-V/T in German Market"), (...) says:

*“I was informed that our competitor will postpone the announcement of price increase about one month. They will combine the announcement of price increase and alteration of the trade conditions, which will be released in the middle to end of August After one month of notice period, the execution of price increase will be in force from the beginning of October. I will let you know as soon as I collect further information.”*

- (80) On 16 August 2001, a meeting took place in Düsseldorf, (...), between (...) (Sony), (...) (Maxell) and (...) (Fuji), in which they finally agreed to increase prices for European broadcasters in September/October 2001 and discussed how to implement the price changes country by country. A contemporaneous internal note from Fuji of 17 August 2001, headed *“Handle with care - Professional video Meeting Minutes”*, gives details on the agreements reached for each country:

*“6) The market price increase trend (individual countries)*

*(1) Germany: The price will be increased from 1st October following Sony’s invoicing change. Sony will give the announcement in the last week of August.*

*Both Maxell and Fuji will also increase the price after obtaining information of Sony.*

*[...]*

*(2) France: Sony have already made the announcement. Both Maxell and Fuji will increase the price from 10th September.*

*(3) Italy: Sony have already announced the price increase from 1st September. We informed beforehand those customers with a different type of offer validity such as (...). Both Maxell and Sony have also agreed to exchange any information should an exceptional article arise.*

*(3) Scandinavia: Neither Maxell nor Fuji have been able to confirm the informing of the price increase from (...). Sony France know to increase the price from 1st August and verification will be made once more.*

*Anyway, the price will be increased from 1st September after reconfirming with Sony.*

*Denmark: Both Fuji and Maxell will increase the price as soon as Sony receive confirmation on the information of (...).*

*By the way, (...) [Fuji Denmark] has informed us that SONY are offering a price that is close to the price for broadcasters to (...), who are categorised as medium to small production houses.*

*We had set a middle class price, but it is difficult for each company to harmonise their price with us, so we concluded that all we could do is to increase the price wherever we can after each company reviews the quantity and the possibility of reselling in each country. I would therefore like to advise FMD [Fuji Magnetics Denmark] to check the identity of (...) well and if necessary, adjust the price to that of SONY’s.*

*The (...) has been announced and the deadline is 14th September. Although (...) actions are worrying to say the least (M), we will continue to try to keep the new price.*

*(4) Benelux*

*Holland: Sony (\*S) have announced the price increase to (...). Both Maxell (\*M) and Fuji (\*S) will announce the price increase on 1st September.*

*Belgium: Sony (\*S) have announced the price increase to (...). Both Maxell (\*M) and Fuji (\*F) will announce the price increase on 1st September.*

*We have offered the current price as of July for the (...) Tender and are waiting for the result.*

*We will use the new price for the next (...) Tender.*

*[...].”*

- (81) The implementation of this new price increase is confirmed by an internal Maxell report headed “*Comment on Sales Report 08/01*”, for distribution to (...), under the heading “*Comment about Price Increase – PI Video*”, where we find the following entry:

*“Dealers & direct accounts have all been informed around mid August about price increase & it seems to be accepted. Concerning the broadcasters, we have faced problems to impose the new prices as it seem [sic] that some of them have not yet been informed about new prices from our competitors. The only problem we have ... is [customer name]. This is mainly a Maxell/Sony account & so far there is no price increase applied to this account by Sony... They will meet again for a new tentative end of September. In the meantime, if we have an order, I would like to keep the previous prices until at least the end of September.”*

- (82) On 25 October 2001, a meeting took place in Düsseldorf, (...), between (...) (Sony), (...) (Maxell) and (...) (Fuji), in which they reviewed the market situation, overall and for each company and country, following the agreed price increases. A contemporaneous internal note from Fuji, headed “*Strictly Confidential – discard it after reading / RE: Minutes of the Meeting for professional videos*”, confirms the date and venue of the meeting, as well as the participants. It is divided into three parts: “*Overall situation*”, “*Special notes for each company*” and “*Special notes for each country*”. The first part shows the difficulties faced in the market to implement the latest agreed price increase:

*“1. Overall Situation*

*(1) The price increase has seen more difficulties in its implementation than the previous two occasions when we have done so. The locals of each company in Germany especially showed resistance and hesitation to implement the price increase, which traditionally has been a smooth market to implement a price increase.*



*The situation:*

*(1) All three companies saw a huge decrease in their turnover due to reduced total demand from the recession, major broadcasters opting for the reuse and share up of (...). (2) Local Sony have taken actions in order to suppress the repulsion of customers as a result of Sony's sales restructuring, but these actions were not wisely chosen (preference selecting for the number of accounts, condition reduction for direct invoice from S France, etc.) (3) The watchful attitude of M was clearer than ever before."*

- (83) After reviewing the price situation in each company and in Germany, France, Italy, Spain, Greece, Portugal, Scandinavia, Benelux and the United Kingdom, the note finishes with the following conclusion:

*"(1) The next price increase will be impossible to implement and Maxell will definitely drop out (Even though Maxell would like to increase the price, the locals will not be able to be controlled). We will therefore give priority to preventing the current price from tumbling down uncontrollably.*

*(2) The problem with B Cam related products is the way in which total demand is dropping and that no system can be found at the moment to supplement this. There being no line-up of DVCAM is fatal for both Fuji and Maxell.*

*(3) The next review will be held in February (in Paris)."*

- (84) Several internal documents from Maxell written at the beginning of 2002 show the continuation of the pricing agreements between Fuji, Sony and Maxell.
- (85) On 6 March 2002, a meeting took place in Paris, (...), between (...) (Sony), (...) (Maxell) and (...) (Fuji), in order to review the general market situation and check European market prices country by country (in particular, there were discussions on prices in Scandinavia, Germany, France, Italy, Spain, the Benelux, the United Kingdom and Turkey). The companies ruled out a further price increase because of the market situation, and agreed to make every effort to maintain current prices. A contemporaneous internal note from Fuji, headed "*Strictly Confidential – discard it after reading / RE: Minutes of the Meeting for professional videos*", confirms the date and venue of the meeting, as well as the participants. The final point reads as follows:

*"(3) Summary*

*(1) All three companies have agreed that it is impossible to increase the price once more in 2002. We will do our best in keeping the current price.*

*(2) Each company will make every effort not to back down and reduce their price, especially in the major countries such as the UK, Germany, France and Italy."*

- (86) An internal Maxell document (e-mail dated 26 April 2002 from (...) to (...)) shows that the pricing agreements continued to be implemented, against the opinion of some of Maxell's sales executives:

*“Read this below*

*I hope that Maxell get stung at [customer name] over this as (...) has insist [sic] on sticking to the floor price agreement”.*

- (87) On 16 May 2002, a meeting took place in Düsseldorf, (...), between (...) (Sony), (...) (Maxell) and (...) (Fuji), in which there were further discussions on the market situation and the prices in each country. A contemporaneous internal note from Fuji, headed *“Strictly Confidential – discard it after reading / RE: Minutes of the Meeting for professional videos”* confirms the date and place of the meeting. The excerpts below serve to illustrate some of the issues discussed at the meeting:

*“2.- Situations in each country in Europe*

*[...]*

*(3) Belgium: With regard to Belgium business, M is very suspicious of F. (The fact that the price of (...) was low makes them think a lower price might be offered at the next (...) tender as well.)*

*FMB [Fuji Magnetics Belgium] also complains about the price of M at (...) being low, it is a kind of catch 22 situation. In order to avoid any more of this situation where suspicion arises, M has suggested submitting the offer price beforehand to (...) headquarters, with S and M headquarters taking the responsibility for observing it. (Same applies to (...) in Italy)*

*[...]*

*(5) UK:*

*This time, none of the companies made any complaint about the price. (The reason why all three companies are not complaining is perhaps because they remember what happened before.)*

*Maxell is losing share.*

*S has notified the price increase to (...), for which this is the first contract price offer for one and a half years.*

*[...]*

*(8) Austria: Price for (...). M says to correct the situation by increasing the price for agents next.*

*[...]*

*(10) Italy*

*(...) – All three companies confirmed firmly to increase the price for this year’s offer.*

*[...]*

(11) *France*

*S France: S made a strong claim that neither M nor F has been observing the lowest for major broadcasters (...) and as things carry on like this, S has no choice but to follow suit.*

*[...]*

*(...); despite being resellers, M is using the price for direct customers.*

*[...]”*

#### **4.3. Participants at cartel meetings**

- (88) Table 2 lists all the persons who were present at some or all of the cartel meetings mentioned in section [4.2] and the company or companies which employed them during the period in which these meetings took place.

*(...)*

#### **4.4. Other contacts**

- (89) A series of internal notes, faxes and e-mails from Fuji, dated 18 September 2000, 11 December 2000, 31 January 2001, 12 March 2001, 17 April 2001, 26 April 2001, 28 May 2001, 13 June 2001, 20 July 2001, 3 August 2001, 26 October 2001 and 4 January 2002, provide further evidence of continuous contacts between Fuji, Sony and Maxell to discuss prices and specific clients and to follow-up the implementation of the cartel agreements.

- (90) An internal exchange of e-mails from Maxell illustrates how the parties did not seem to hesitate to contact each other in order to monitor compliance with the cartel agreements. In an e-mail dated 26 January 2002, (...) (Maxell Benelux) states that he is “*sending by e-mail the latest prices from Fuji (list released on 07/01/02)*” which “*are most of the time under our TV prices while the source of the evidence [sic] is a production house*” and asks (...) for his comments. In his reply dated 25 January 2002, (...) answers:

*“I will call the headquarter of the other party on Monday from Japan and let you know their response as quickly as possible (maybe on Tuesday or Wednesday)”.*

- (91) In a subsequent e-mail dated 28 January 2002, (...) explains:

*“I called the other party to explain the problem and asked them to investigate immediately.*

*They promised to check it and come back to me tomorrow”.*

- (92) (...) replies to (...) in the following terms:

*“Thank you very much for your concern.*

*In the meantime, I can already tell you that the Fuji prices have been spread more than we were supposing as we continue to have reactions. So if Fuji*

*confirms that this is an isolated case, I would not accept this explanation to easily [sic]”.*

- (93) The last e-mail in the exchange, dated 29 January 2002, is from (...) and reads as follows:

*“HQ of the other party denied the problem which you picked up on the market. I insisted the fact that they had announced the TV price to the production house with the evidence which you sent to me by fax. I asked them to make a further investigation (with their visit to Belgium office if necessary) and come back to me within tomorrow (JAN/30<sup>th</sup>)”.*

## **5. APPLICATION OF ARTICLE 81 OF THE TREATY AND ARTICLE 53 OF THE EEA AGREEMENT**

### **5.1. Relationship between the Treaty and the EEA Agreement**

- (94) The arrangements for Betacam SP and Digital Betacam videotape described in this Decision applied to the **entire territory of the EEA**, as the cartel members had sales of Betacam SP and Digital Betacam videotape in all the Member States and EFTA countries party to the EEA Agreement. There are also explicit references to all Member States (except Ireland) and to Norway in the minutes of the cartel meetings.
- (95) The EEA Agreement, which contains provisions on competition analogous to the Treaty, came into force on 1 January 1994. The infringement described in this Decision is deemed to have started at the latest on 23 August 1999 (see recital (194)). This Decision therefore includes the application as from that date of those rules (primarily Article 53 of the EEA Agreement) to the arrangements to which objection is taken.
- (96) Insofar as the arrangements affected competition in the common market and trade between Member States, Article 81 of the Treaty is applicable. Insofar as they affected competition in the EFTA States which are part of the EEA (“EFTA/EEA States”) and trade between Member States and EFTA/EEA States or between EFTA/EEA States, they fall under Article 53 of the EEA Agreement.

### **5.2. Jurisdiction**

- (97) In this case the Commission is the competent authority to apply both Article 81 of the Treaty and Article 53 of the EEA Agreement on the basis of Article 56 of the EEA Agreement, as the cartel had an appreciable effect on trade between Member States.
- (98) The fact that some of the undertakings concerned, at the time of the facts, were based outside the Community does not rule out the applicability of both Article 81 of the Treaty and Article 53 of the EEA Agreement to them, as for these provisions to be applicable it suffices that the anti-competitive conduct in question affects trade within the Community and the EEA<sup>9</sup>.

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<sup>9</sup> See Joined Cases 89/85, 104/85, 114/85, 116/85, 117/85 and 125/85 to 129/85, *Åhlström and Others v Commission* [1988] ECR 5193.

### 5.3. Application of Article 81(1) of the Treaty and Article 53(1) of the EEA Agreement

#### 5.3.1. Article 81(1) of the Treaty and Article 53(1) of the EEA Agreement

- (99) Article 81(1) of the Treaty prohibits as incompatible with the common market all agreements between undertakings, decisions by associations of undertakings or concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the common market, and in particular those which directly or indirectly fix purchase or selling prices or any other trading conditions, limit or control production and markets, or share markets or sources of supply.
- (100) Article 53(1) of the EEA Agreement (which is modelled on Article 81(1) of the Treaty) contains a similar prohibition. However the reference in Article 81(1) to trade "between Member States" is replaced by a reference to trade "between contracting parties" and the reference to competition "within the common market" is replaced by a reference to competition "within the territory covered by the ... [EEA] Agreement".

#### 5.3.2. The nature of the infringement

##### 5.3.2.1. Agreements and concerted practices

##### *Principles*

- (101) Article 81(1) of the Treaty and Article 53(1) of the EEA Agreement prohibit anticompetitive *agreements* between undertakings, *decisions of associations of undertakings* and *concerted practices*.
- (102) An *agreement*, within the meaning of Article 81(1) of the Treaty and Article 53(1) of the EEA Agreement, can be said to exist when the parties adhere to a common plan which limits or tends to limit their individual commercial conduct by determining the lines of their mutual action or abstention from action in the market. It does not have to be made in writing; no formalities are necessary, and no contractual sanctions or enforcement measures are required. The agreement may be express or implicit in the behaviour of the parties. Furthermore, it is not necessary, in order for there to be an infringement of Article 81 of the Treaty, for the participants to have agreed in advance upon a comprehensive common plan. The concept of *agreement* in Article 81(1) of the Treaty would apply to the inchoate understandings and partial and conditional agreements in the bargaining process which lead up to the definitive agreement<sup>10</sup>.
- (103) In its judgment in Joined Cases T-305/94 etc. *Limburgse Vinyl Maatschappij NV and others v Commission* (PVC II)<sup>11</sup>, the Court of First Instance of the European Communities stated that "it is well established in the case law that for there to be an agreement within the meaning of Article [81(1)] of the Treaty it is sufficient for the

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<sup>10</sup> Case T-9/99 *HFB and Others v Commission* [2002] ECR II-1487, paragraphs 196 and 207.

<sup>11</sup> Joined Cases T-305/94 etc. *Limburgse Vinyl Maatschappij N.V. and others v Commission* (PVC II), [1999] ECR II-931, paragraph 715.

*undertakings to have expressed their joint intention to behave on the market in a certain way*”<sup>12</sup>.

- (104) Although Article 81(1) of the Treaty and Article 53(1) of the EEA Agreement draw a distinction between the concept of “*concerted practices*” and that of “*agreements between undertakings*”, the object is to bring within the prohibition of those Articles a form of coordination between undertakings by which, without having reached the stage where an agreement properly so-called has been concluded, they knowingly substitute practical co-operation between them for the risks of competition<sup>13</sup>.
- (105) The criteria of coordination and cooperation laid down by the case law of the Court of First Instance and the Court of Justice of the European Communities, far from requiring the elaboration of an actual plan, must be understood in the light of the concept inherent in the provisions of the Treaty relating to competition, according to which each economic operator must determine independently the commercial policy which he intends to adopt in the common market. Although that requirement of independence does not deprive undertakings of the right to adapt themselves intelligently to the existing or anticipated conduct of their competitors, it strictly precludes any direct or indirect contact between such operators the object or effect of which is either to influence the conduct on the market of an actual or potential competitor or to disclose to such a competitor the course of conduct which they themselves have decided to adopt or contemplate adopting on the market<sup>14</sup>.
- (106) Thus, conduct may fall under Article 81(1) of the Treaty and Article 53(1) of the EEA Agreement as a *concerted practice* even where the parties have not explicitly subscribed to a common plan defining their action in the market but knowingly adopt or adhere to collusive devices which facilitate the co-ordination of their commercial behaviour<sup>15</sup>. Furthermore, the process of negotiation and preparation culminating effectively in the adoption of an overall plan to regulate the market may well also (depending on the circumstances) be correctly characterised as a concerted practice.
- (107) Although in terms of Article 81(1) of the Treaty the concept of *concerted practice* requires not only concertation but also conduct on the market resulting from the concertation and having a causal connection with it, it may be presumed, subject to proof to the contrary, that undertakings taking part in such a concertation and remaining active in the market will take account of the information exchanged with competitors in determining their own conduct on the market, all the more so when the concertation occurs on a regular basis and over a long period. Such a concerted

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<sup>12</sup> The case law of the Court of Justice and the Court of First Instance in relation to the interpretation of Article 81 of the Treaty applies equally to Article 53 of the EEA Agreement. See recitals No 4 and 15 as well as Article 6 of the EEA Agreement, Article 3(2) of the Agreement between the EFTA States on the establishment of a Surveillance Authority and a Court of Justice, as well as Case E-1/94 of 16.12.1994, recitals 32-35. References in this text to Article 81 of the Treaty therefore apply also to Article 53 of the EEA Agreement.

<sup>13</sup> Case 48/69, *Imperial Chemical Industries v Commission* [1972] ECR 619, paragraph 64.

<sup>14</sup> Joined Cases 40-48/73 etc. *Suiker Unie and others v Commission* [1975] ECR 1663, paragraphs 173 and 174.

<sup>15</sup> See also Case T-7/89 *Hercules v Commission* [1991] ECR II-1711, paragraph 256.

practice is caught by Article 81(1) of the Treaty even in the absence of anti-competitive effects on the market<sup>16</sup>.

- (108) Moreover, it is established case law that the exchange, between undertakings, in pursuance of a cartel falling under Article 81(1) of the Treaty, of information concerning their respective deliveries, which not only covers deliveries already made but is intended to facilitate constant monitoring of current deliveries in order to ensure that the cartel is sufficiently effective, constitutes a concerted practice within the meaning of that Article<sup>17</sup>.
- (109) In the case of a *complex infringement* of long duration it is not necessary for the Commission to characterise the conduct as exclusively one or other of the above mentioned forms of illegal behaviour. The concepts of agreement and concerted practice are fluid and may overlap. The anti-competitive behaviour may well be varied from time to time, or its mechanisms adapted or strengthened to take account of new developments. Indeed, it may not even be possible to make such a distinction, as an infringement may present simultaneously the characteristics of each form of prohibited conduct, while when considered in isolation some of its manifestations could accurately be described as one rather than the other. It would however be artificial analytically to sub-divide what is clearly a continuing common enterprise having one and the same overall objective into several different forms of infringement. A cartel may therefore be an agreement and a concerted practice at the same time. Article 81 of the Treaty lays down no specific category for a complex infringement of the type involved in this case<sup>18</sup>.
- (110) In its PVC II judgement<sup>19</sup>, the Court of First Instance stated that “[i]n the context of a complex infringement which involves many producers seeking over a number of years to regulate the market between them, the Commission cannot be expected to classify the infringement precisely, for each undertaking and for any given moment, as in any event both those forms of infringement are covered by Article [81] of the Treaty”.
- (111) An “agreement” for the purposes of Article 81(1) of the Treaty and Article 53(1) of the EEA Agreement does not require the same certainty as would be necessary for the enforcement of a commercial contract in civil law. Moreover, in the case of a complex cartel of long duration, the term “agreement” can properly be applied not only to any overall plan or to the terms expressly agreed upon but also to the implementation of what has been agreed on the basis of the same mechanisms and in pursuance of the same common purpose, as well as to the measures designed to facilitate the implementation of price initiatives<sup>20</sup>. As the Court of Justice, upholding the judgement of the Court of First Instance, pointed out in *Commission v Anic Participazioni SpA*<sup>21</sup>, it follows from the express terms of Article 81 of the Treaty that an agreement may consist not only of an isolated act but also of a series of acts or continuous conduct.

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<sup>16</sup> See also Case C-199/92 *P Hüls v Commission*, [1999] ECR I-4287, paragraphs 158-166.

<sup>17</sup> See, in this sense, Cases T-147/89, T-148/89 and T-151/89, *Société Métallurgique de Normandie v Commission*, *Trefilunion v Commission* and *Société des treillis et panneaux soudés v Commission*, [1995] ECR II-1057, II-1063 and II-1191, respectively, paragraph 72.

<sup>18</sup> See again Case T-7/89, *Hercules v Commission*, cited in footnote 15, paragraph 264.

<sup>19</sup> See paragraph 696 of *PVC II* judgment referred to in footnote 11 above.

<sup>20</sup> Case T-7/89, *Hercules v Commission*, cited in footnote 15, at paragraph 256.

<sup>21</sup> Case C-49/92 P, *Commission v Anic Participazioni SpA*, [1999] ECR I-4125, at paragraph 81.

- (112) It is also well-settled case law that “*the fact that an undertaking does not abide by the outcome of meetings which have a manifestly anti-competitive purpose is not such as to relieve it of full responsibility for the fact that it participated in the cartel, if it has not publicly distanced itself from what was agreed in the meetings*”<sup>22</sup>. Such distancing should have taken the form of an announcement by the company, for instance, that it would take no further part in the meetings (and therefore did not wish to be invited to them).

#### *Application in this case*

- (113) The facts described in section [4] of this Decision demonstrate that Sony, Fuji and Maxell agreed to increase (see recitals (57) - (61), (66), (73) and (80)) and to maintain or stabilise (see recitals (73), (82) and (85)) the prices for Betacam SP and Digital Betacam videotape in the EEA market on several occasions during the period of the infringement. The undertakings concerned thus clearly adhered to a common plan which limited their individual commercial conduct by determining the lines of their mutual action or abstention from action in the market. Their behaviour had therefore all the characteristics of a fully fledged “agreement” within the meaning of Article 81(1) of the Treaty.
- (114) (...), as a result of these agreements, there were three general price increases during the period of the infringement. The first two, implemented (...) on 1 October 1999 and 1 August 2000, implied a general price increase (of an average of 10% each time) as regards Betacam SP and Digital Betacam videotape for all types of customers. The third price increase (5-7%) for both products, implemented on 1 October 2001, concerned only TV-Stations and big Production Houses (the so-called “direct users”, whose prices were generally lower than those for wholesalers/distributors – “indirect users”). At the same time there was an explicit agreement not to change the price for indirect users. The timing of the specific price increases for each company, country and/or customer was also often discussed at the meetings and it took into account the specific market circumstances in each instance (for example, TV-Stations usually asked for tenders once a year, so prices could not be modified until the next tender process was open).
- (115) Further co-ordination took place, mainly in the form of exchanges of information to facilitate and/or monitor the implementation of the agreements on prices throughout the EEA (see recitals (64), (70), (82) - (87), (89) and (90)).
- (116) Some factual elements of the illicit arrangements, such as exchanges of confidential information and the steps in the bargaining process leading up to the agreements, could also aptly be characterised as concerted practices that facilitated the coordination of the parties’ commercial behaviour. In general, however, regardless of whether the different elements of behaviour qualify separately as agreements or concerted practices, it is not necessary for the Commission to characterise conduct as exclusively one or the other of these forms of illegal behaviour<sup>23</sup>. The concepts of agreement and

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<sup>22</sup> See, *inter alia*, Case T-141/89, *Tréfileurope Sales v Commission*, [1995] ECR II-791, at paragraph 85; Case T-7/89, *Hercules Chemicals v Commission*, cited in footnote 15, at paragraph 232; and Joined Cases T-25/95 etc., *Cimenteries CBR and others v Commission*, [2000] ECR II-491 (*Cement cases*), at paragraph 1389.

<sup>23</sup> See paragraph 696 of *PVC II* judgment referred to in footnote 11 above.



concerted practice are fluid and may overlap, as in this case. Indeed, it may not even be possible to make such a distinction, as an infringement may present simultaneously the characteristics of each form of prohibited conduct, while when considered in isolation some of its manifestations could accurately be described as one rather than the other.

- (117) The Commission concludes that in line with the above case law, the behaviour of the undertakings concerned can be characterised, for the two products within this sector, as a complex infringement consisting of various actions which can either be classified as an agreement or concerted practice, within which the competitors knowingly substituted practical co-operation between them for the risks of competition. Furthermore, the Commission presumes, also based on the above cited case law, that the participating undertakings in such concertation have taken account of the information exchanged with competitors in determining their own conduct on the market, all the more so because the concertation occurred on a regular basis over nearly three years. According to the case law, such a concerted practice is caught by Article 81(1) of the Treaty even in the absence of anti-competitive effects on the market<sup>24</sup>.
- (118) On the basis of the above considerations, it is concluded, and has not been disputed, that the complex of infringements in this case present all the characteristics of an agreement and/or a concerted practice in the sense of Article 81 of the Treaty and Article 53 of the EEA Agreement.

#### 5.3.2.2. Single and continuous infringement

##### *Principles*

- (119) A complex cartel may properly be viewed as a *single and continuous infringement* for the time frame in which it existed. The Court of First Instance has pointed out, *inter alia*, in the *Cement* cartel case that the concept of ‘single agreement’ or ‘single infringement’ presupposes a complex of practices adopted by various parties in pursuit of a single anti-competitive economic aim<sup>25</sup>. The agreement may well be varied from time to time, or its mechanisms adapted or strengthened to take account of new developments. The validity of this assessment is not affected by the possibility that one or more elements of a series of actions or of a continuous course of conduct could individually and in themselves constitute a violation of Article 81 of the Treaty.
- (120) It would be artificial to split up such continuous conduct, characterised by a single purpose, by treating it as consisting of several separate infringements, when what was involved was a single infringement which progressively would manifest itself in both agreements and concerted practices.
- (121) Although a cartel is a joint enterprise, each participant in the arrangement may play its own particular role. One or more may exercise a dominant role as ringleader(s). Internal conflicts and rivalries, or even cheating may even occur, but will not however prevent the arrangement from constituting an agreement/concerted practice for the

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<sup>24</sup> See, for example, Case T-62/98, *Volkswagen AG v Commission*, [2000] ECR II-2707, paragraph 178 and case-law cited therein.

<sup>25</sup> *Cement* cases, cited in footnote 22, paragraph 3699.

purposes of Article 81 of the Treaty where there is a single common and continuing objective.

- (122) The mere fact that each participant in a cartel may play the role which is appropriate to its own specific circumstances does not exclude its responsibility for the infringement as a whole, including acts committed by other participants but which share the same unlawful purpose and the same anti-competitive effect. An undertaking which takes part in the common unlawful enterprise by actions which contribute to the realisation of the shared objective is equally responsible, for the whole period of its adherence to the common scheme, for the acts of the other participants pursuant to the same infringement. This is certainly the case where it is established that the undertaking in question was aware of the unlawful behaviour of the other participants or could have reasonably foreseen or been aware of them and was prepared to take the risk<sup>26</sup>.
- (123) In fact, as the Court of Justice stated in *Commission v Anic Partecipazioni*<sup>27</sup>, the agreements and concerted practices referred to in Article 81(1) of the Treaty necessarily result from collaboration by several undertakings, who are all co-perpetrators of the infringement but whose participation can take different forms according, in particular, to the characteristics of the market concerned and the position of each undertaking on that market, the aims pursued and the means of implementation chosen or envisaged. It follows, as reiterated by the Court in the *Cement* cases, that an infringement of Article 81 may result not only from an isolated act but also from a series of acts or from continuous conduct. That interpretation cannot be challenged on the ground that one or several elements of that series of acts or continuous conduct could also constitute in themselves and taken in isolation an infringement of Article 81 of the Treaty. When the different actions form part of an 'overall plan', because their identical object distorts competition within the common market, the Commission is entitled to impute responsibility for those actions on the basis of participation in the infringement considered as a whole<sup>28</sup>.

#### *Application in this case*

- (124) The evidence referred to in section [4] of this Decision shows the existence of a complex, single and continuous collusion between Sony, Maxell and Fuji with regard to the sales of Betacam SP and Digital Betacam videotape. The collusion was in pursuit of a single anti-competitive economic aim: the elimination of competition in the European market for those two products.
- (125) That plan found application in a series of specific instances which are further documented in this Decision.
- (126) During the relevant period, the cartel participants co-ordinated at least three price increases for both products (recitals (61), (66), and (80)).

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<sup>26</sup> See Case *Commission v Anic Partecipazioni*, cited in footnote 21, at paragraph 83.

<sup>27</sup> See Case *Commission v Anic Partecipazioni*, cited in footnote 21, at paragraph 79.

<sup>28</sup> See Joined Cases C-204/00 P etc, *Aalborg Portland A/S and others. v Commission*, [2004] ECR I-123, paragraph 258. See also Case C-49/92 P, *Commission v Anic Partecipazioni*, cited in footnote 21, paragraphs 78-81, 83-85 and 203.

- (127) At times when the market circumstances would not allow further price increases, the parties agreed to maintain prices unchanged at the previously agreed level, or at least to prevent them "from tumbling down uncontrollably" (see recitals (73) for indirect users and (82) and (85) for all customers).
- (128) Exchanges of sensitive information (on both prices and customers) also occurred with a view to proposing new price increases and to implementing and monitoring the agreements which had been concluded (recitals (59), (64), (70), (73), (82) – (87) and (89)).
- (129) The existence of a single and continuous infringement finds further support in the following circumstances.
- (130) First, the cartel followed a similar pattern throughout the years. The parties met regularly to propose and enter into price agreements and to coordinate and monitor their implementation. There is evidence of meetings between the three cartel participants on 23 August 1999, 1 September 1999, 20 December 1999, 20 April 2000, 21 August 2000, 24 May 2001, 29 May 2001, 16 August 2001, 25 October 2001, 6 March 2002 and 16 May 2002 (see recitals (60), (61), (64), (66), (70), (73), (78), (80), (82), (85) and (87)). The proximity of the different meetings, together with the evidence of other contacts between the parties (see recitals (89)-(93)), constitute sufficiently precise and consistent indicia to support the firm conviction that the infringement followed uninterrupted during its whole duration<sup>29</sup>. Moreover, none of the parties distanced themselves from the cartel in between<sup>30</sup>.
- (131) Secondly, during the entire duration of the cartel Betacam SP and Digital Betacam videotape prices were discussed at the same meetings and price increase or stabilisation agreements covered both products.
- (132) Thirdly, within the three participating undertakings, the persons attending the meetings were responsible for the marketing and pricing of both products across Europe. These managers were constantly behind the organisation of the cartel.
- (133) It is concluded that the conduct of the addressees of this Decision constitutes a single and continuous infringement of Article 81 of the Treaty and Article 53 of the EEA Agreement.

### 5.3.3. *Restriction of competition*

- (134) The complex of agreements and/or concerted practices in this case had the **object and effect** of restricting competition in the Community and the EEA.
- (135) Article 81(1) of the Treaty and Article 53(1) of the EEA Agreement expressly include as restrictive of competition agreements and concerted practices which<sup>31</sup>:

<sup>29</sup> See Case T-43/92, *Dunlop Slazenger v Commission*, [1994] ECR II-441, at paragraph 79.

<sup>30</sup> See Cases T-241/01, *SAS v Commission*, [2005] ECR II-2917, paragraphs 190-201; T-62/02, *Union Pigments v Commission*, [2005] ECR II-5057, paragraphs 36-42 and 90; T-322/01, *Roquettes Frères v Commission*, [2006] ECR II-3137, paragraphs 189-202, and T-314/01, *Avebe v Commission*, [2006] ECR II-3085, paragraphs 113-115

<sup>31</sup> The list is not exhaustive.

- (a) directly or indirectly fix selling prices or any other trading conditions;
  - (b) limit or control production, markets or technical development;
  - (c) share markets or sources of supply.
- (136) The principal aspect of the complex of agreements and concerted practices adopted by the producers which can be characterised as having as its object the restriction of competition within the meaning of Article 81(1) of the Treaty and Article 53(1) of the EEA Agreement is the fixing of prices, described in detail in the factual part of this Decision. The characteristics of the horizontal arrangements under consideration in this case constitute essentially price fixing, of which agreeing upon price increases or maintaining a certain price level are typical examples. By planning common action on price initiatives, the undertakings aimed at eliminating the risks involved in any unilateral attempt to increase prices, notably the risk of losing market share, as the cartel members were able to predict with a reasonable degree of certainty what the pricing policy pursued by their competitors was going to be<sup>32</sup>. Prices being the main instrument of competition, the various collusive arrangements and mechanisms adopted by the producers were all ultimately aimed at inflating prices for their benefit and above the level which would be determined by conditions of free competition. Ceasing to determine independently their policy in the market, the cartel members thus undermined the concept inherent in the provisions of the Treaty relating to competition<sup>33</sup>.
- (137) It is settled case-law that for the purpose of application of Article 81(1) of the Treaty and Article 53(1) of the EEA Agreement there is no need to take into account the actual effects of an agreement when it has as its object the prevention, restriction or distortion of competition within the common market. Consequently, it is not necessary to show actual anti-competitive effects where the anti-competitive object of the conduct in question is proved<sup>34</sup>.
- (138) In this Decision, it has however been established that the cartel participants implemented at least three consecutive price increases and agreed to maintain prices at a certain level (recitals (61), (66), and (80) – (85)), reported regularly on the implementation of those agreements country by country (recitals (64), (70), (73), (82) – (87) and (89)), closely monitored compliance by the other participants and complained whenever there was a perceived breach (see, as an example, recital (90))<sup>35</sup>.
- (139) Furthermore, it has been established that the members of the cartel covered over 85% of the sales in the EEA of the professional videotapes in question and that they devoted considerable efforts to organising, following up and monitoring the implementation of the agreements of the cartel<sup>36</sup>. There is also concrete evidence that the participants succeeded in raising their prices in certain Member States (see, for example, recitals (64), (70) and (59)).

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<sup>32</sup> Case 8/72 *Vereeniging van Cementhandelaren v Commission* [1972] ECR 977, paragraph 21.

<sup>33</sup> Case T-311/94 *BPB de Eendracht v Commission* [1998] ECR II-1129, paragraph 192.

<sup>34</sup> Case T-62/98, *Volkswagen AG v Commission*, cited in footnote 24, paragraph 178.

<sup>35</sup> See Joined Cases T-259/02 etc., *Raiffeisen Zentralbank Österreich and others v Commission*, judgment of 14 December 2006, not yet reported, paragraphs 285-286.

<sup>36</sup> Case T-329/01 *Archer Daniels Midland v Commission*, [2006] ECR II-3255, paragraphs 180-181.

- (140) Whilst the competition-restricting object of the arrangements is sufficient to support the conclusion that Article 81(1) of the Treaty and Article 53(1) of the EEA Agreement apply, the likelihood of the competition-restricting effects of those arrangements has also been established and leads to the same conclusion.
- (141) In its response to the Statement of Objections, Maxell argued that the implementation of the infringement was limited and that it had little or no effect on the market, on the basis of Maxell's behaviour and because any actual price increases reflected the cost increases which producers faced as a result of the appreciation of the yen.
- (142) The Commission considers, first of all, that Maxell's arguments on the implementation and effects of the infringement are not relevant for the purpose of determining the application of Article 81(1) of the Treaty and Article 53(1) of the EEA Agreement apply, as they do not negate the competition-restricting object of the arrangements.
- (143) In any event, Maxell has not provided any evidence to counter the Commission's conclusion about the likelihood of the competition-restricting effects of the infringement. The contention that the arrangements did not affect actual prices, which necessarily had to rise as a result of the appreciation of the yen, is purely hypothetical and cannot rule out, as such, the likelihood of the competition-restricting effects of the cartel. As for the circumstances raised by Maxell which are specific to its individual position and behaviour, they will be considered when examining the applicability to it of mitigating circumstances.

#### 5.3.4. *Effect upon trade between Member States and between Contracting Parties to the EEA Agreement*

- (144) The continuing agreement between the producers had an appreciable effect upon trade between Member States and between Contracting Parties to the EEA Agreement.
- (145) Article 81(1) of the Treaty is aimed at agreements which might harm the attainment of a single market between the Member States, whether by partitioning national markets or by affecting the structure of competition within the common market. Similarly, Article 53(1) of the EEA Agreement is directed at agreements that undermine the achievement of a homogeneous European Economic Area.
- (146) The Court of Justice and Court of First Instance have consistently held that, *"in order that an agreement between undertakings may affect trade between Member States, it must be possible to foresee with a sufficient degree of probability on the basis of a set of objective factors of law or fact that it may have an influence, direct or indirect, actual or potential, on the pattern of trade between Member States"*<sup>37</sup>. In any event, whilst Article 81 of the Treaty *"does not require that agreements referred to in that provision have actually affected trade between Member States, it does require that it be established that the agreements are capable of having that effect"*<sup>38</sup>.

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<sup>37</sup> See Case 56/65, *Société Technique Minière*, [1966] ECR 282, paragraph 7; Case 42/84, *Remia* and others, [1985] ECR 2545, paragraph 22, and judgment in the *Cement* cases, cited in footnote 22.

<sup>38</sup> Case C-306/96, *Javico*, [1998] ECR I-1983, paragraphs 16 and 17; see also Case T-374/94, *European Night Services*, [1998] ECR II-3141, paragraph 136.

- (147) As demonstrated in section [2.4] on “Inter-State trade”, the sector is characterised by a substantial volume of trade between Member States and there is also trade between the Community and EFTA countries belonging to the EEA.
- (148) The application of Articles 81 of the Treaty and Article 53 of the EEA Agreement to a cartel is not, however, limited to that part of the participants’ sales that actually involve the transfer of goods from one State to another. Nor is it necessary, in order for those provisions to apply, to show that the individual conduct of each participant, as opposed to the cartel as a whole, affected trade between Member States<sup>39</sup>.
- (149) In this case, the cartel arrangements covered the EEA<sup>40</sup>. The existence of agreements to increase or maintain prices for Betacam SP and Digital Betacam videotape throughout the EEA must have resulted, or was likely to result, in the automatic diversion of trade patterns from the course they would otherwise have followed in the EEA<sup>41</sup>.
- (150) Insofar as the activities of the cartel related to sales in countries that are not Member States or Contracting Parties to the EEA Agreement, they lie outside the scope of this Decision.

#### **5.4. Non-application of Article 81(3) of the Treaty and Article 53(3) of the EEA Agreement**

- (151) The parties have not presented any argument suggesting that the conditions of Article 81(3) of the Treaty or Article 53(3) of the EEA Agreement are satisfied and it is concluded that they are not.

## **6. ADDRESSEES**

### **6.1. Principles**

- (152) In order to identify the addressees of this Decision, it is necessary to determine the legal entities to which responsibility for the infringement should be imputed.
- (153) As a general consideration, the subject of Community competition rules is the “undertaking”, a concept that has an economic scope and that is not identical with the notion of corporate legal personality in national commercial or fiscal law. The “undertaking” that participated in the infringement is therefore not necessarily the same entity as the precise legal entity within a group of companies whose representatives actually took part in the cartel meetings. The term “undertaking” is not defined in the Treaty. However, in *Shell International Chemical Company v. Commission*, the Court of First Instance held that “*in prohibiting undertakings inter alia from entering into agreements or participating in concerted practices which may affect trade between Member States and have as their object or effect the prevention, restriction or distortion of competition within the common market, Article 85(1) [now Article 81(1)] of the EEC Treaty is aimed at economic units which consist of a unitary*”

<sup>39</sup> See Case T-13/89, *Imperial Chemical Industries v Commission* [1992] ECR II-1021, paragraph 304.

<sup>40</sup> See recitals (38) and (94).

<sup>41</sup> See Joined Cases 209 to 215 and 218/78, *Van Landewyck and others v Commission*, [1980] ECR 3125, paragraph 170.

*organization of personal, tangible and intangible elements which pursues a specific economic aim on a long-term basis and can contribute to the commission of an infringement of the kind referred to in that provision*<sup>42</sup>.

- (154) Despite the fact that Article 81 of the Treaty is applicable to undertakings and that the concept of undertaking has an economic scope, only entities with legal personality can be held liable for infringements. This Decision should therefore be addressed to legal entities<sup>43</sup>. For each undertaking that is to be held accountable for infringing Article 81 of the Treaty in this case it is therefore necessary to identify one or more legal entities which should bear legal liability for the infringement in this case. According to the case law, “*Community competition law recognises that different companies belonging to the same group form an economic unit and therefore an undertaking within the meaning of Articles 81 EC and 82 EC if the companies concerned do not determine independently their own conduct on the market*”<sup>44</sup>. If a subsidiary does not determine its own conduct on the market independently, the company which directed its market strategy forms a single economic entity with that subsidiary and may be held liable for an infringement on the ground that it forms part of the same undertaking.
- (155) According to the settled case-law of the Court of Justice and the Court of First Instance, the Commission can generally assume that a wholly-owned subsidiary essentially follows the instructions given to it by its parent company without needing to check whether the parent company has in fact exercised that power<sup>45</sup>. However, the parent company and/or subsidiary can reverse this presumption by producing sufficient evidence that the subsidiary “*decided independently on its own conduct on the market rather than carrying out the instructions given to it by its parent company and such that they fall outside the definition of an ‘undertaking’*”<sup>46</sup>.
- (156) Where an infringement of Article 81 of the Treaty is found to have been committed, it is necessary to identify a natural or legal person who was responsible for the operation of the undertaking at the time when the infringement was committed so that it can answer for it.

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<sup>42</sup> See Case T-11/89, [1992] ECR II-757, paragraph 311. See also Case T-352/94, *Mo Och Domsjö AB v Commission*, [1998] ECR II-1989, paragraphs 87-96; Case T-43/02, *Jungbunzlauer v. Commission*, [2006] ECR II-3435, paragraph 125; Case T-314/01 *Avebe v Commission*, cited in footnote 30, paragraph 136 and Case T-330/01, *Akzo Nobel v Commission*, [2006] ECR II-3389, paragraph 83.

<sup>43</sup> Although an ‘undertaking’ within the meaning of Article 81(1) is not necessarily the same as a company having legal personality, it is necessary for the purposes of applying and enforcing decisions to identify an entity possessing legal or natural personality to be the addressee of the measure. See Case *PVC II*, cited in footnote 11, paragraph 978.

<sup>44</sup> Case 48/69, *Imperial Chemical Industries v. Commission*, cited in footnote 13, paragraphs 132-133; Case 170/83, *Hydrotherm*, [1984] ECR 2999, paragraph 11, and Case T-102/92, *Viho v Commission*, [1995] ECR II-17, paragraph 50, cited in Case T-203/01, *Michelin v Commission (Michelin II)*, [2003] ECR II-4071, paragraph 290.

<sup>45</sup> Case T-30/05 *William Prym GmbH & Co. KG and Prym Consumer GmbH & Co. KG v Commission*, judgment of 12 September 2007, paragraphs 146-147; Case T-330/01, *Akzo Nobel v Commission*, cited in footnote 42, paragraph 83; Joined Cases T-71/03 etc., *Tokai Carbon and others v Commission*, [2005] ECR II-10, paragraph 60; Case T-354/94 *Stora Kopparbergs Bergslags v Commission*, [1998] ECR II-2111, paragraph 80, upheld by Court of Justice in Case C-286/98 P, *Stora Kopparbergs Bergslags v Commission*, [2000] ECR I-9925, paragraphs 27-29; and Case 107/82 *AEG v Commission*, [1983] ECR 3151, paragraph 50.

<sup>46</sup> Joined Cases T-71/03 etc., *Tokai Carbon and Others v Commission*, cited in footnote 45, paragraph 61.

- (157) When an undertaking that has committed an infringement of Article 81 of the Treaty subsequently disposes of the assets which contributed to the infringement and withdraws from the market in question, it continues to be answerable for the infringement if it has not ceased to exist<sup>47</sup>. If the undertaking which has acquired the assets carries on the violation of Article 81 of the Treaty, liability for the infringement should be apportioned between the seller and the acquirer of the infringing assets, each undertaking being responsible for the period in which it participated through these assets in the cartel. However, if the legal person initially answerable for the infringement ceases to exist and loses its legal personality, being purely and simply absorbed by another legal entity, that latter entity must be held answerable for the whole period of the infringement and thus liable for the activity of the entity that was absorbed<sup>48</sup>. The mere disappearance of the person responsible for the operation of the undertaking when the infringement was committed does not allow the latter to evade liability<sup>49</sup>. Liability for a fine may thus pass to a successor where the corporate entity which committed the violation has ceased to exist in law.
- (158) Different conclusions may, however, be reached when a business is transferred from one company to another, in cases where transferor and transferee are linked by economic links, that is to say, when they belong to the same undertaking. In such cases, liability for past behaviour of the transferor may transfer to the transferee, notwithstanding the fact that the transferor remains in existence<sup>50</sup>.
- (159) The same principles hold true, *mutatis mutandis*, for the purposes of the application of Article 53 of the EEA Agreement.

## 6.2. Application to this case

### 6.2.1. Sony (Sony Corporation, Sony Europe Holding BV, Sony France SA)

- (160) It is established by the facts described in section 4 that employees of Sony France SA participated in all cartel meetings throughout the infringement. It is also established that representatives of Sony Corporation participated at the meeting on 24 May 2001 in Japan (see recitals (73) to (**Error! Bookmark not defined.**)).
- (161) This Decision should therefore be addressed to Sony France SA and Sony Corporation in consideration of their direct involvement in the cartel.

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<sup>47</sup> Case T-6/89 *Enichem Anic v Commission (Polypropylene)*, [1991] ECR II-1623; Case C-49/92 P, *Commission v Anic Partecipazioni*, cited in footnote 21, paragraphs 47-49.

<sup>48</sup> See Case C-279/98 P, *Cascades v Commission*, [2000] ECR I-9693, paragraphs 78-79: “It falls, in principle, to the natural or legal person managing the undertaking in question when the infringement was committed to answer for that infringement, even if, when the Decision finding the infringement was adopted, another person had assumed responsibility for operating the undertaking ... Moreover, those companies were not purely and simply absorbed by the appellant but continued their activities as its subsidiaries. They must, therefore, answer themselves for their unlawful activity prior to their acquisition by the appellant, which cannot be held responsible for it”.

<sup>49</sup> See Case *PVC II*, cited in footnote 11, paragraph 953.

<sup>50</sup> See judgment in Joined Cases C-204/00 P etc, *Aalborg Portland A/S and others v Commission*, cited in footnote 28, paragraphs 354-360, as confirmed in Case T-43/02, *Jungbunzlauer AG v Commission*, cited in footnote 42, paragraphs 132-133.



- (162) In any event, Sony Corporation wholly owns Sony Europe Holding BV, which in turn owns 99.99964% of Sony France SA (the remaining 0.00015% being owned by Sony Overseas SA and 0.00022% held in trust by board members).
- (163) In the light of the case law cited in recital (155) and of the shareholding relationship between Sony Corporation, Sony Europe Holding BV and Sony France SA, it can therefore be presumed, irrespective of their degree of involvement in the cartel, that Sony Europe Holding BV and Sony France SA followed the policy laid down by Sony Corporation without enjoying an autonomous position on the market and therefore that those three legal entities constituted one undertaking.
- (164) This presumption based on ownership is reinforced in this case both by Sony Corporation's participation in one of the cartel meetings (see recital (73)) and by the fact that the Sony France employees who directly participated in the cartel meetings were employed, immediately before or after those meetings, by Sony Corporation.
- (165) The fact that all the different Sony European subsidiaries, which were subsidiaries of Sony Europe Holding BV but not of Sony France SA, did not sell Betacam SP and Digital Betacam videotapes below the minimum prices established by the latter can only be explained by the decisive influence exercised over all of them by their common parent company, Sony Europe Holding BV.
- (166) In their replies to the Statement of Objections, both Sony Europe Holding BV and Sony Corporation have argued that they should not be held liable for the infringement of Sony France SA. As for Sony Corporation's denial of its direct participation in the cartel, reference is made to recitals (73) to (**Error! Bookmark not defined.**).
- (167) Concerning parental liability, Sony Corporation and Sony Europe Holding BV accept that the former exercised decisive influence on the latter company. However they claim that Sony Europe Holding BV could not in turn exercise decisive influence or effective control over its wholly owned subsidiary, Sony France SA, as Sony Europe Holding BV is a holding company that exists solely for internal administrative purposes and has no operational activities and no employees engaged in operational matters. This would amount to a broken link in the "chain of control" between Sony Corporation and Sony France SA.
- (168) Even if it had been established that, when exercising its powers as owner of Sony France SA, Sony Europe Holding BV merely acted as a transmission chain between the ultimate parent company, Sony Corporation, and its European subsidiaries, this would only reinforce the notion that all three companies formed part of a single undertaking. As explained in recital (154), although Article 81 of the Treaty is applicable to undertakings and the concept of undertaking has an economic scope, acts enforcing the Community competition rules must be addressed to legal entities. A decision concerning an infringement of Article 81 of the Treaty may therefore be addressed to one or several entities having their own legal personality and forming part of an undertaking, and thus to a group as a whole, or to subgroups, or to subsidiaries, including, as in this case, intermediate companies.
- (169) In the context of a group such as Sony, the existence of an intermediate wholly-owned holding company between the ultimate parent company and a wholly-owned subsidiary cannot serve, in any event, as evidence of the lack of control of the former

over the latter. In this regard, it is irrelevant that Sony France SA was an "indirect" subsidiary of Sony Corporation, as indirect control is sufficient for the presumption of exercise of decisive influence over a subsidiary to apply<sup>51</sup>.

- (170) In addition, as far as Sony Europe Holding BV is concerned, its denial of exercise of decisive influence over its European subsidiaries leaves unexplained why these companies followed the guidelines on prices dictated by Sony France SA. In this case, it may be assumed, in the absence of any evidence to the contrary, that the commercial leadership exercised by Sony France could only flow from a decision of Sony Europe Holding BV (or from its 100% parent company, Sony Corporation) to leave it to Sony France to oversee its sister companies' business and to instruct the latter to obey its commercial decisions<sup>52</sup>.
- (171) Sony Corporation further claims that the presumption of exercise of direct influence over its wholly owned subsidiaries, Sony Europe Holding BV and Sony France SA, can be rebutted on the basis of the following arguments:
- (a) Sony France's REE Business Unit enjoyed significant operational autonomy from Sony Corporation: i) it accounted for less than 0,1% of Sony Corporation's total revenues at the relevant time; ii) employees in the REE business unit independently formulated pricing policy and implemented pricing decisions, and iii) the existing reporting channels between Sony Corporation and its European subsidiaries were insufficient to make Sony Corporation aware of the infringement;
  - (b) there is no evidence that Sony Corporation knew about the infringement, either directly or because of information received from Sony France SA or any other Sony entity;
  - (c) the position of Sony Corporation may be contrasted with that of Fuji and Maxell, where there is a much stronger connection between their respective head offices and their European businesses.
- (172) Sony Corporation also argues that no employee of Sony Corporation participated in any of the cartel meetings and that the circumstance that certain of the employees who attended those meetings were at one time employed by Sony Corporation is not relevant.

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<sup>51</sup> Case T-330/01 *Akzo Nobel v Commission*, cited in footnote 42, paragraph 78 ff. See also the judgments in *Michelin II*, cited in footnote 44, paragraph 290 and in *Stora*, cited in footnote 45, paragraphs 78-86 (in particular with regard to two companies belonging to the Feno group, namely Feldmühle and CBC).

<sup>52</sup> See paragraph 129 of the judgment of 27 September 2006 in Case T-43/02, *Jungbunzlauer v Commission*, cited in footnote 42, not available in English. “*Sur la base des déclarations communes (...), la Commission pouvait à juste titre estimer que, (...), les activités de Jungbunzlauer GmbH se limitaient à la simple production d’acide citrique alors que la direction des activités du groupe, y compris en ce qui concerne ce produit, était confiée à Jungbunzlauer de sorte que Jungbunzlauer GmbH ne déterminait pas de façon autonome son comportement sur ce marché, mais appliquait, pour l’essentiel, les instructions données par Jungbunzlauer. En effet, la Commission pouvait valablement en déduire que la société mère commune à Jungbunzlauer GmbH et à Jungbunzlauer avait décidé de confier à cette dernière la tâche de conduire l’ensemble des activités du groupe et, par conséquent, également celles liées au comportement du groupe sur le marché faisant l’objet de l’entente, à savoir celui de l’acide citrique.*”

- (173) The Commission considers that Sony Corporation's arguments do not suffice to rebut the presumption that it exercised decisive influence on its wholly owned subsidiaries, Sony Europe Holding BV and Sony France SA.
- (174) The contention that REE's activities were marginal within the Sony Corporation group disregards the fact that REE's financial results are consolidated with those of the Sony Corporation group, implying that its profit or loss, albeit marginal if compared to the total result of the group, are reflected in the profit or loss of the whole group. More importantly, any benefits resulting from the cartel were reflected in the profit or loss of the whole Sony Corporation group. The fact that REE activities represent a small proportion of the group turnover does not in any way prove that the group allowed Sony France SA complete autonomy in defining its conduct on the market<sup>53</sup>. Indeed, it would be surprising if such autonomy was granted to a part of the core business of the Sony group with clear links to other group businesses such as the sale of professional video tape recording equipment. Furthermore, contrary to Sony's contentions, the fact that Sony Corporation's professional recording media business unit took the initiative with respect to product development, established global sales and marketing strategies and oversaw the annual budget process also indicates that Sony operated as a single economic entity in the market for professional videotapes.
- (175) The presumption cannot be rebutted by simply stating that Sony Corporation was not directly involved in or was not even aware of the cartel or that it gave no instructions to Sony France SA in this respect. Furthermore, in this case there are additional facts which contradict that statement, such as Sony's participation in the meeting in Japan on 24 May 2001 (see recital (77); the internal note discussed therein also bears out - apart from involvement in the cartel - control by Sony Corporation over its European subsidiaries) or the circumstance that all Sony France employees who directly participated in the cartel meetings were employed, immediately before or after those meetings, by Sony Corporation, which cannot be dismissed as irrelevant because it implies close connections between parent and subsidiaries and awareness of the infringement within Sony Corporation.
- (176) Finally, the alleged stronger connection between Fuji's and Maxell's respective head offices and their European businesses, is, in any event, irrelevant to assess whether Sony Corporation can be presumed to have exercised a decisive influence over Sony Europe Holding BV and Sony France SA.
- (177) Based on the above, it is concluded that Sony Corporation, Sony Europe Holding BV and Sony France SA formed part of a single undertaking and should therefore be held jointly and severally liable for the entire duration of the infringement.
- 6.2.2. *Fuji (FUJIFILM Holdings Corporation, FUJIFILM Corporation, FUJIFILM Recording Media GmbH)*

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<sup>53</sup> Judgment of 26 April 2007 in Joined Cases T-109/02, T-118/02, T-122/02, T-125/02, T-126/02, T-128/02, T-129/02, T-132/02 and T-136/02, *Bolloré SA and Others v Commission*, not yet reported, paragraph 144.

- (178) It is established by the facts described in section 4 that employees of FUJIFILM Recording Media GmbH (previously called Fuji Magnetics) participated in all cartel meetings throughout the infringement. (...) representatives of FUJIFILM Holdings Corporation participated at the meeting on 24 May 2001 in Japan (see recital (73)).
- (179) This Decision should therefore be addressed to FUJIFILM Recording Media GmbH and FUJIFILM Holdings Corporation in consideration of their direct involvement in the cartel.
- (180) In any event, FUJIFILM Holdings Corporation (formerly called Fuji Photo Film Co Ltd) wholly owned FUJIFILM Recording Media GmbH during the entire period of the infringement.
- (181) In the light of the case law cited in recital (155) and the shareholding relationship between FUJIFILM Holdings Corporation and FUJIFILM Recording Media GmbH, it can be presumed, irrespective of their degree of involvement in the cartel, that FUJIFILM Recording Media GmbH followed the policy laid down by its parent company without enjoying an autonomous position on the market and therefore that those two legal entities constituted one undertaking.
- (182) This presumption based on ownership is reinforced in this case both by direct participation of FUJIFILM Holdings Corporation's employees in the infringement (see recital (178)) and by the fact that all European subsidiaries of the FUJIFILM group, including those which were subsidiaries of FUJIFILM Holdings Corporation but not of FUJIFILM Recording Media GmbH, had to consult the latter before setting prices for tenders and big deals, which can only be explained by the decisive influence exercised over all of them by their common parent company.
- (183) As explained in recital (16), FUJIFILM Holdings Corporation has recently transferred a significant part of its business and assets to its wholly-owned subsidiary FUJIFILM Corporation, which is now the direct parent company of FUJIFILM Recording Media GmbH. In accordance with the case law cited in recital (158), it is concluded that FUJIFILM Corporation should also be held liable for the past behaviour of FUJIFILM Holdings Corporation.
- (184) In their joint response to the Statement of Objections, FUJIFILM Holdings Corporation, FUJIFILM Corporation and FUJIFILM Recording Media GmbH have not disputed imputation of liability to them for the infringement in this case.
- (185) Based on the above, it is concluded that FUJIFILM Holdings Corporation, FUJIFILM Corporation and FUJIFILM Recording Media GmbH should be held jointly and severally liable for the entire duration of the infringement.

**6.2.3. *Maxell (Hitachi Maxell Ltd., Maxell Europe Limited)***

- (186) It is established by the facts described in section 4 that employees of Maxell Europe Limited participated in all cartel meetings throughout the infringement. It has also been established that representatives of Hitachi Maxell, Ltd. participated at the meeting on 24 May 2001 in Japan (see recital (73)).

- (187) This Decision should therefore be addressed to Maxell Europe Limited and Hitachi Maxell, Ltd. in consideration of their direct involvement in the cartel.
- (188) In any event, Hitachi Maxell, Ltd. wholly owned Maxell Europe Limited during the entire period of the infringement.
- (189) In the light of the case law cited in recital (155) and the shareholding relationship between Hitachi Maxell, Ltd. and Maxell Europe Limited, it can be presumed, irrespective of their degree of involvement in the cartel, that Maxell Europe Limited followed the policy laid down by its parent company without enjoying an autonomous position on the market and therefore that those two legal entities constituted one undertaking.
- (190) This presumption based on ownership is reinforced in this case both by Hitachi Maxell, Ltd's participation in one of the cartel meetings (see recital (73)) and by the fact that (...), who was present at most cartel meetings, reported to several executives of Hitachi Maxell, Ltd. throughout the period.
- (191) In their joint response to the Statement of Objections, Hitachi Maxell, Ltd. and Maxell Europe Limited challenged the presence of the Maxell representative identified (...) at the meeting on 24 May 2001 in Japan (see recital (75)) but have not disputed that they both belonged to the same undertaking.
- (192) Based on the above, it is concluded that Hitachi Maxell, Ltd. and Maxell Europe Limited formed part of a single undertaking and should therefore be held jointly and severally liable for the entire duration of the infringement.

#### 6.2.4. *Conclusion on addressees*

- (193) Based on the foregoing, it has been established that the following legal entities bear liability for the entire duration of infringement of Article 81 of the Treaty and Article 53 of the EEA Agreement:
- Sony France SA;
  - Sony Europe Holding BV;
  - Sony Corporation;
  - FUJIFILM Recording Media GmbH;
  - FUJIFILM Corporation;
  - FUJIFILM Holdings Corporation;
  - Maxell Europe Limited; and
  - Hitachi Maxell, Ltd.

## 7. DURATION OF THE INFRINGEMENT

- (194) The first documented cartel meeting was held in Paris on 23 August 1999<sup>54</sup>.
- (195) It is apparent from the facts that the infringement continued uninterrupted at least until 16 May 2002 for each undertaking involved (see recitals (130)-(133)).
- (196) In its response to the Statement of Objections, Maxell has argued that it ceased effective participation in the cartel arrangements in late 2001, at least in respect to the export distributors and the United Kingdom.
- (197) This is directly contradicted by (...). In any event, only explicit distancing of itself from the cartel would be enough to assume an interruption of Maxell's participation<sup>55</sup>.
- (198) Therefore, it is concluded that the infringement started no later than 23 August 1999 and lasted at least until 16 May 2002 for each and every one of the legal entities previously identified: Sony France SA, Sony Europe Holding BV, Sony Corporation, FUJIFILM Recording Media GmbH, FUJIFILM Corporation, FUJIFILM Holdings Corporation, Maxell Europe Limited and Hitachi Maxell, Ltd.

## **8. REMEDIES**

### **8.1. Article 7 of Regulation (EC) No 1/2003**

- (199) Where the Commission finds that there is an infringement of Article 81 of the Treaty it may require the undertakings concerned to bring such infringement to an end in accordance with Article 7(1) of Regulation (EC) No 1/2003.
- (200) Given the secrecy in which the cartel arrangements were carried out, it is not possible to declare with absolute certainty that the infringement has ceased. It is therefore necessary for the Commission to require the undertakings to which this Decision is addressed to bring the infringement to an end (if they have not already done so) and henceforth to refrain from any agreement, concerted practice or decision of an association of undertakings which would have the same or a similar object or effect.

### **8.2. Article 23(2) of Regulation (EC) No 1/2003**

- (201) Under Article 23(2) of Regulation (EC) No 1/2003, the Commission may by decision impose fines on undertakings where either intentionally or negligently, they infringe Article 81 of the Treaty and/or Article 53 of the EEA Agreement. Under Article 15(2) of Regulation No 17<sup>56</sup> which was applicable at the time of the infringement, the fine for each undertaking participating in the infringement could not exceed 10 % of its total turnover in the preceding business year. The same limitation results from Article 23(2) of Regulation (EC) No 1/2003.
- (202) In fixing the amount of any fine, pursuant to Article 23(3) of Regulation (EC) No 1/2003, regard must be had both to the gravity and to the duration of the infringement.

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<sup>54</sup> See recital (59)

<sup>55</sup> See case law cited in footnote 30.

<sup>56</sup> Under Article 5 of Council Regulation (EC) No 2894/94 of 28 November 1994 concerning arrangements for implementing the Agreement on the European Economic Area (OJ L 305, 30.11.1994, p.6) "the Community rules giving effect to the principles set out in Articles 85 and 86 [now Articles 81 and 82] of the EC Treaty [...] shall apply *mutatis mutandis*". (OJ L 305, 30.11.1994, p.6)

In setting the fines to be imposed, the Commission will refer to the principles laid down in its Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003<sup>57</sup> (hereafter, “the 2006 Guidelines”).

### **8.3. The basic amount of the fines**

#### *8.3.1. Calculation of the value of sales*

- (203) In determining the basic amount of the fine to be imposed, the Commission takes the value of each undertaking's sales of goods or services to which the infringement directly or indirectly relates in the relevant geographic area within the EEA. In this case, the sales of Betacam SP and Digital Betacam tapes made by each undertaking in the EEA during the business year ended on 31 March 2002 (the last full business year of infringement) will be considered (see Table 1, recital (32)).

#### *8.3.2. Determination of the basic amount of the fines*

- (204) The basic amount of the fine should be determined as a proportion of the value of the sales, depending on the degree of gravity of the infringement, multiplied by the number of years of infringement.

##### *8.3.2.1. Gravity*

- (205) As a general rule, the proportion of the value of sales taken into account will be set at a level of up to 30% of the value of sales. In order to decide whether the proportion of value of sales to be considered in a given case should be at the lower or at the higher end of that scale, the Commission has regard to a number of factors, such as the nature of the infringement, the combined market share of all the undertakings concerned, the geographic scope of the infringement and whether or not the infringement has been implemented.

##### *(a) Nature*

- (206) Horizontal price-fixing is by its very nature among the most harmful restrictions of competition. In this case there is no indication of the existence of market-sharing or output-limitation agreements.

##### *(b) Combined market share*

- (207) The estimated combined market share of the three undertakings participating in this infringement (having regard to the last full business year of the infringement) was more than 85% (see recital (32)) in the EEA. (...).

##### *(c) Geographic scope*

- (208) The geographic scope of the infringement was at least the EEA (see section 2.3.3).

##### *(d) Implementation*

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<sup>57</sup> OJ C 210, 1.9.2006, p. 2

- (209) As indicated in recital (138), it has been established that the infringement was generally implemented.
- (210) In their replies to the Statement of Objections, Sony and Maxell have raised various arguments aiming at attenuating the gravity of this infringement.
- (211) Sony has argued that, in determining gravity, consideration should also be given to the following circumstances: affected sales were relatively minor in absolute and relative terms; the infringement was short lived, lasting less than three years; the infringement does not share the characteristics of very serious infringements; the infringement did not involve institutionalized arrangements; the infringement was unstructured and undisciplined in nature and did not attempt to control other parameters of competition; the infringement was not sanctioned by senior Sony France management. Sony also contends that the cartel agreements were not fully implemented due to contractual constraints, rebates and other pricing policies and initiatives, and extensive deviation from agreed arrangements.
- (212) Maxell has argued that the Commission should take into account the following: the effects of the infringement were limited; the understanding did not extend to the entire EEA for the entire duration alleged by the Commission; Maxell's implementation of the understanding in actual price increases was limited; the effective duration of the infringement was shorter than alleged; there is no evidentiary basis for alleging that HML conceived, directed or encouraged the understanding; Maxell was the smallest player.
- (213) Those arguments are not capable of undermining the conclusions reached in recitals (206) to (209) above on the factors which have to be considered when establishing the gravity of an infringement. The allegedly moderate size of affected sales is already reflected in the value which is used as a basis for the determination of the basic amount of the fine to be imposed. As for duration, it is taken into account under the appropriate heading. Price-fixing is always considered, by its very nature, as a very serious infringement of Article 81 of the Treaty<sup>58</sup>. In this context, the alleged absence of institutionalized arrangements and the unstructured and undisciplined nature of the conduct (which, in any event, are contradicted by the facts described in recital (56)) cannot modify such assessment<sup>59</sup>.
- (214) Similar conclusions can be drawn in respect of Sony's and Maxell's arguments about the limited effects and/or implementation of the infringement. The Commission considers that, for the purposes of assessing gravity, it is sufficient to establish that the infringement was generally implemented (as it has been established in recital (138)), regardless of the alleged existence of particular instances of non-implementation. As far as the circumstances raised by Sony and Maxell are specific to their individual position and behaviour, they will be considered when examining the applicability to them of mitigating circumstances.

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<sup>58</sup> See to the same effect judgments in case T-241/01 *SAS v Commission*, cited in footnote 30, at paragraph 122, and in case T-38/02 *Danone v Commission*, [2005] ECR II-04407 25 October 2005, at paragraph 148.

<sup>59</sup> Concerning the geographic scope of the infringement, Maxell's arguments are addressed under recitals (39) - (40) above.



- (215) In conclusion, taking into account the factors discussed above, in particular the nature, the combined market share and the geographic scope of the infringement, the Commission considers that the proportion of the value of sales of each undertaking involved to be used to establish the basic amount should be 18%.

#### 8.3.2.2. Duration

- (216) As explained in recital (198) the infringement lasted for at least 2 years and 8 months. In accordance with point 24 of the 2006 Guidelines, the amount determined under recital (215) should therefore be multiplied by three.

#### 8.3.2.3. Additional amount

- (217) In order to deter undertakings from entering into horizontal price fixing agreements such as that at issue in this Decision, the basic amount of the fine to be imposed should be increased by an additional amount, as indicated in point 25 of the 2006 Guidelines. For this purpose, having considered the factors discussed in recitals (206) to (209), in particular the nature, the combined market share and the geographic scope of the infringement, it is concluded that an additional amount of 17% of the value of sales would be appropriate.

#### 8.3.2.4. Conclusion on the basic amount

- (218) The basic amounts of the fines to be imposed on each undertaking should therefore be as follows:

All amounts are in EUR

|        |            |
|--------|------------|
| Sony   | 33 000 000 |
| Fuji   | 22 000 000 |
| Maxell | 18 000 000 |

### 8.4. Adjustments to the basic amount

#### 8.4.1. Aggravating circumstances

##### 8.4.1.1. Refusal to cooperate or obstruction

- (219) As described in recital (45), during the inspections carried out on 28 and 29 May 2002, representatives of Sony Europe Holding BV refused to answer oral questions, while an employee of Sony United Kingdom Limited shredded documents from a file labelled "Competitors Pricing".
- (220) In its response to the Statement of Objections, Sony did not contest these facts. Nonetheless, Sony contested that its conduct could amount to obstruction and be considered an aggravating circumstance. Its defence in this respect mainly focused on the alleged absence of effects that its behaviour had on the Commission's investigation.

- (221) For the aggravating circumstance of “refusal to cooperate with or obstruction of the Commission in carrying out its investigations” (point 28 of the 2006 Guidelines) to be applicable, it is sufficient that the conduct maintained by the undertaking be deliberately obstructive, irrespective of any effects it may have had on the course subsequently taken by the proceeding. Clearly, Sony's behaviour necessarily disrupted the proper conduct of the investigation and hindered the Commission's inspectors in the exercise of their investigative powers.
- (222) The fact that, as claimed by Sony, in previous cases<sup>60</sup> the conduct might have been or appear more egregious than in this case does not detract from this conclusion.
- (223) Sony has further pointed to the fact that the limitation period provided for in Article 1(a) of Regulation (EEC) No 2988/74 of the Council, of 26 November 1974, concerning limitation periods in proceedings and the enforcement of sanctions under the rules of the European Economic Community relating to transport and competition<sup>61</sup> has expired in respect of these incidents.
- (224) Sony's argument would only be applicable if the conduct described had been pursued as an autonomous infringement under Article 15(1)(c) of Regulation No 17. The existence of this provision, however, does not prevent the Commission from applying the aggravating circumstance of “refusal to cooperate with or obstruction of the Commission in carrying out its investigations referred to in point 28 of the 2006 Guidelines when imposing fines for an infringement of Article 81 of the Treaty, which is not time-barred<sup>62</sup>.
- (225) In relation to the refusal to answer the Commission's questions, Sony has argued that certain questions went beyond the Commission's powers under Regulation No 17. That argument cannot be accepted as all questions were aimed at obtaining explanations concerning documents found at the inspected premises, and therefore did not exceed the scope of Article 14(1)(c) of Regulation No 17. In any event, it remains that, as stated in recital (45), Sony's refusal to answer during the inspection extended to all questions without a justification being given despite the assistance of the company's legal counsel. In addition, in the course of the administrative procedure, Sony has not even attempted to substantiate objections against most of those same questions. Under these circumstances, its outright refusal to answer all questions during the inspections appears to be all the more unacceptable.
- (226) As to the shredding of documents, Sony has claimed that it was done by a junior employee acting contrary to the company's policy of full compliance with antitrust laws. The Commission notes in this respect that it is the undertaking's responsibility to employ, instruct and control its employees, and to ensure that none of them obstructs

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<sup>60</sup> Case COMP/C.35.691 *Pres-insulated Pipes*, Commission decision of 21 October 1998, OJ L 24 of 30.1.1999, p. 1; Case COMP/C.34.466 *Greek Ferries*, Commission decision of 9 December 1998, OJ L 109, 27.4.1999, p. 24 and Case COMP/C.36.490 *Graphite Electrodes*, Commission decision of 18 July 2001, OJ L 100 of 16.4.2002, p. 1.

<sup>61</sup> OJ L 319, 29.11.1974, p. 1.

<sup>62</sup> See Joined Cases C-189/02 P, C-202/02 P, C-205/02 P to C-208/02P and C-213/02 P *Dansk Rorindustri A/S v Commission (Pre-insulated pipes)*, [2005] ECR I-5425, paragraph 348 and following, and the judgment in *HFB Holdings and others v Commission*, cited in footnote 10, paragraphs 555 and following. See also Joined Cases T-236/01, T-239/01, T-244/01 to T-246/01, T-251/01 and T-252/01, *Tokai Carbon and others v Commission*, [2004] ECR II-1181, paragraph 313.

or hampers the Commission's work during an inspection. Furthermore, in this case it is not contested that the relevant employee acted with precisely that intention.

- (227) To conclude, Sony's behaviour constitutes an aggravating circumstance that justifies, in the case in point, an increase in the basic amount of the fine to be imposed on Sony of 30%.

#### 8.4.2. *Mitigating circumstances*

##### 8.4.2.1. Early termination of the infringement

- (228) Fuji has submitted that the fact that it ceased the conduct at issue after the onsite inspections constitutes a mitigating circumstance.
- (229) This claim cannot be accepted. Cartel infringements are by their very nature very serious infringements of Article 81 of the Treaty. Participants in these infringements normally realise very well that they are engaged in illegal activities. In such cases of deliberate illegal behaviour, the circumstance that a company terminates this behaviour as soon as the Commission intervenes does not merit any particular reward other than that the period of infringement of the company concerned is shorter than it would otherwise have been. Indeed, if the infringement had continued after the intervention of the Commission, this would have constituted an aggravating circumstance. The fact that an undertaking voluntarily puts an end to the infringement before the Commission has opened its investigation is sufficiently taken into account in the calculation of the duration of the infringement period and does not constitute an attenuating circumstance<sup>63</sup>. This is also reflected in point 29, first indent, of the 2006 Guidelines.

##### 8.4.2.2. Limited involvement in the infringement

- (230) Maxell has argued that its involvement in the infringement was limited in as much as implementation of the understanding had a limited impact on actual prices. In this respect, Maxell points to the following factors: its structure of supply, through either national sales offices or exclusive independent distributors, made it very difficult for Maxell to control the resale price and therefore to implement the cartel; Maxell was losing sales to competitors as a consequence of the cartel; and by late 2001 it was moving to its own independent pricing policy and only continued to attend meetings in order to appear to be still participating in the cartel.
- (231) Similarly, Sony contends that it could not implement the agreements fully, due to contractual constraints, rebates and other pricing policies and initiatives, and extensive deviation from agreed arrangements.
- (232) The circumstance that an undertaking which participated in an infringement with its competitors did not always behave on the market in the manner agreed between them is not a matter which must be taken into account as a mitigating circumstance when determining the amount of the fine to be imposed. An undertaking which, despite colluding with its competitors, follows a more or less independent policy on the

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<sup>63</sup> Joined Cases T-236/01 etc., *Tokai Carbon and others v Commission*, cited in footnote 45, at paragraph 341.

market may simply be trying to exploit the cartel for its own benefit<sup>64</sup>. The mere fact of cheating at the expense of the other cartel members cannot therefore be admitted automatically as a mitigating circumstance.

- (233) In order for the Commission to be able to appreciate the existence of a mitigating circumstance, each undertaking must demonstrate that, during the period in which it was party to the offending agreements, it actually avoided implementing them by adopting competitive conduct on the market or, at the very least, that it clearly and substantially breached the obligations relating to the implementation of the cartel to the point of disrupting its very operation.<sup>65</sup>
- (234) In this case, neither Maxell nor Sony have provided any conclusive evidence that they refrained from applying the agreement and thus adopted truly competitive behaviour. Furthermore, Maxell's arguments contradict each other to a significant extent, insofar as, on the one hand, it is contended that Maxell's distribution system would not allow the implementation of the cartel agreement and, on the other, that Maxell was losing sales because of adhering to the cartel. This latter contention is also contradicted by the data on the evolution of market shares (...) and specific evidence in the file of full implementation of the cartel by Maxell. Besides, Maxell's contention that it stopped implementing the cartel in late 2001 cannot be accepted, as explained in recital (197),
- (235) In addition, neither Maxell nor Sony have shown that they clearly and substantially opposed the implementation of the cartel, to the point of disrupting the very functioning of it, or avoided giving the appearance of adhering to the agreement so as not to incite other undertakings to implement the cartel. As they did not clearly distance themselves from what was agreed at the anti-competitive meetings which they attended, they retained responsibility for participation in the cartel. It would otherwise be too easy for undertakings to reduce the risk of being required to pay a heavy fine if they were able to take advantage of an unlawful cartel and then benefit from a reduction in the fine on the ground that they had played only a limited role in implementing the infringement, when their attitude encouraged other undertakings to act in a way that was more harmful to competition<sup>66</sup>.
- (236) In view of the foregoing the alleged limited involvement in and/or the limited implementation of the infringement by Sony and Maxell cannot be considered as mitigating circumstances.

#### 8.4.2.3. Effective co-operation outside the 2002 Leniency Notice

- (237) Fuji has argued that its effective co-operation before the leniency application, (...), should be regarded as an attenuating circumstance.

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<sup>64</sup> See judgment in Case T-308/94, *Cascades v Commission*, [1998] ECR II-925, at paragraph 230; judgment in Joined Cases T-71/03 etc., *Tokai Carbon and others v Commission*, cited in footnote 45, at paragraph 297; judgment in Case T-44/00, *Mannesmannröhren-Werke AG v Commission*, [2004] ECR II-729 at paragraphs 277-278, and judgment in Case T-327/94, *SCA Holding v Commission*, [1998] ECR II-1373, at paragraph 142.

<sup>65</sup> T-26/02, *Daichii v Commission*, paragraph 113. See also point 29 of the 2006 Guidelines.

<sup>66</sup> Case T-44/00 *Mannesmannröhren-Werke AG v Commission*, cited in footnote 64, at paragraphs 277-279 and Joined Cases T-259/02 to T-264/02 and T-271/02, *Raiffeisen Zentralbank Österreich a.o. v Commission*, 14 December 2006, paragraph 491.

- (238) To the extent that Fuji's cooperation merits a reduction, this will be considered when applying the 2002 Leniency Notice<sup>67</sup>. Taking into account all the facts of this case, there are no exceptional circumstances present in this case that could justify granting Fuji a reduction for effective cooperation falling outside the 2002 Leniency Notice<sup>68</sup>.
- (239) Sony has pleaded for a 10% reduction of the fine applicable to it for not contesting the facts, citing a series of precedents. In none of the cases cited by Sony was the 2002 Leniency Notice applied. As the 2002 Leniency Notice is applicable in this case, Sony's co-operation will be considered when applying the 2002 Leniency Notice<sup>69</sup>. Taking into account all the facts of this case, there are no exceptional circumstances present in this case that could justify granting Sony a reduction for effective cooperation falling outside the 2002 Leniency Notice.

#### 8.4.2.4. Other circumstances

- (240) Sony has argued that the fact that the infringement resulted from isolated and unauthorised conduct of (...) without Sony France's senior management knowledge should be regarded as a mitigating circumstance. However, Sony's claim is fundamentally unsubstantiated, as Sony does not provide any conclusive evidence concerning the alleged "isolation" and lack of seniority of the individuals concerned. (...) Also it is not credible that (...) could have acted independently from the higher management of the Sony group for nearly three years. In any event, it was the company's responsibility to employ, instruct and control its employees. Failures to do so necessarily engage the liability of the employer.
- (241) Sony has further argued that it should receive a reduction of the fine for having introduced a compliance programme and a series of measures to increase staff awareness in respect of competition law in 2005. Whilst the Commission welcomes measures taken by undertakings to avoid the recurrence of cartel infringements in the future, such measures cannot change the reality of the infringement and the need to sanction it in this Decision, the more so as the infringement concerned is a manifest breach of Article 81 of the Treaty<sup>70</sup>.

#### 8.4.3. Specific increase for deterrence

- (242) In determining the amount of the fine, the Commission pays particular attention to the need to ensure that fines have a sufficiently deterrent effect; to that end, it may increase the fine to be imposed on undertakings which have a particularly large turnover beyond the sales of goods or services to which the infringement relates.

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<sup>67</sup> See recitals (251) to (256) below. See also Case T-15/02, *Basf v Commission*, [2006] ECR II-497, at paragraph 586.

<sup>68</sup> See Commission decision of 20 October 2005 in case C. 38281 *Raw Tobacco Italy*, recital 385. See also Joined Cases C-189/02 P, C-202/02 P, C-205/02 P, C-208/02 P and C-213/02 P *Dansk Rørindustri and Others v Commission* [2005] ECR I-5425 paragraphs 380-382 and Case T-15/02 *BASF v Commission*, [2006] ECR II-497, paragraphs 585-586.

<sup>69</sup> See recitals (251) to (256) below. See also Case T-15/02, *BASF v Commission*, cited in footnote 68, at paragraph 586.

<sup>70</sup> See Joined Cases T-236/01 etc., *Tokai Carbon and others v Commission*, cited in footnote 45, paragraph 343.

- (243) In the financial year ending 31 March 2007, the total turnover of the undertakings in this proceeding was as follows: Sony, EUR 55 300 million; Fuji, EUR 18 548 million, and Maxell, EUR 1 348 million. It is observed that Sony has a particularly large turnover beyond the sales of goods or services to which the infringement relates, and that such turnover is, in absolute terms, much larger than Fuji's or Maxell's.
- (244) In its reply to the Statement of Objections, Sony has argued that in this case there is no need to increase the fine because the gains of the cartel were modest and likely to be offset by the basic amount and the entry fee.
- (245) In cartel cases there may be a need to apply a specific increase for deterrence in consideration of the size of the undertaking's turnover beyond the sales of goods or services to which the infringement relates (point 30 of the 2006 Guidelines), even if it is not possible to estimate the amount of gains improperly made as a result of the infringement (point 31 of the 2006 Guidelines), as the fine imposed must fulfil its objective of disciplining the infringing undertaking having taken into account its overall size.
- (246) Accordingly, and in order to ensure that fines have a sufficiently deterrent effect in this case, it is decided to increase the fine to be imposed on Sony by 10%.

#### **8.5. Application of the 10 % turnover limit**

- (247) Article 23(2) of Regulation (EC) No 1/2003 provides that *“For each undertaking and association of undertakings participating in the infringement, the fine shall not exceed 10% of its total turnover in the preceding business year”*.
- (248) In this case, such ceiling is not attained in respect of the fine to be imposed on any of the undertakings to which this Decision is addressed.
- (249) The amounts of the fines to be imposed on each undertaking before application of the 2002 Leniency Notice are therefore the following:

All amounts are in EUR

|        |            |
|--------|------------|
| Sony   | 47 190 000 |
| Fuji   | 22 000 000 |
| Maxell | 18 000 000 |

#### **8.6. Application of the 2002 Leniency Notice**

- (250) As indicated in section 3, Fuji and Maxell have filed applications for a reduction of fines under the 2002 Leniency Notice.

##### **8.6.1. Fuji**

- (251) During its on-site inspections on 28 and 29 May 2002 (see recital (44)) the Commission copied documents (...) which constituted clear evidence of the infringement. Fuji was the first undertaking to approach the Commission shortly afterwards (...) on 28 June 2002 (see recital (47)).

- (252) (...) The information supplied by Fuji thus provided the Commission with a clear understanding of the case at an early stage and enhanced the Commission's ability to pursue its investigation in a successful manner.
- (253) The evidence provided by Fuji therefore represented significant added value for the purposes of points 21 and 22 of the 2002 Leniency Notice.
- (254) In addition, according to the evidence in the Commission's possession, Fuji terminated its involvement in the infringement at the latest at the time at which it first submitted the evidence.
- (255) In determining, pursuant to point 23 of the 2002 Leniency Notice, the percentage of reduction of the fine for which Fuji qualifies within the band of 30% to 50%, the Commission takes into account the extent to which the evidence submitted by Fuji represents added value, as well as the time at which Fuji submitted this evidence. In assessing the value of the evidence provided by Fuji, it should be pointed out that at the time Fuji approached the Commission, the Commission already possessed compelling evidence which would have allowed it to find an infringement from (...) onwards even in the absence of further corroboration. However, the further information supplied by Fuji allowed the Commission to establish facts which the Commission could not have otherwise established (...) and corroborated various instances for which the incriminating value of the available evidence was not obvious (...) The details offered by Fuji also proved useful in advancing the investigation successfully (...).
- (256) In view of the foregoing, Fuji should be granted a reduction of 40% of the fine that would otherwise have been imposed on it.

#### 8.6.2. *Maxell*

- (257) Maxell submitted (...) 22 October 2004 (...). In that context, Maxell explained (...) certain documents which were copied at its premises during the inspections. Maxell's reply corroborated to a very significant extent the interpretation of the facts and the additional details which were offered by Fuji, thus strengthening the Commission's ability to prove the infringement.
- (258) The evidence provided by Maxell therefore represented significant added value for the purposes of points 21 and 22 of the 2002 Leniency Notice.
- (259) In addition, according to the evidence in the Commission's possession, Maxell terminated its involvement in the infringement at the latest at the time at which it first submitted the evidence.
- (260) In determining, pursuant to point 23 of the 2002 Leniency Notice, the percentage of reduction of the fine for which Maxell qualifies within the band of 20% to 30%, the Commission takes into account the extent to which the evidence submitted by Maxell represents added value, as well as the time at which Maxell submitted this evidence. In this respect, Maxell submitted the relevant evidence more than two years after the Commission had successfully carried out surprise inspections at its premises. The added value of Maxell's submission is mainly linked to those instances for which corroboration was still necessary, even after Fuji's submission, (...), the interpretation

of the documents which were copied at Maxell's premises and the further details that it confirmed or disclosed (...).

- (261) In view of the foregoing, Maxell should be granted a reduction of 20% of the fine that would otherwise have been imposed on it.

**8.6.3. Sony**

- (262) Sony's contribution to this case was limited to not contesting most of the facts after the two other participating undertakings' admission and the documents copied by the Commission during the inspection had already provided corroborated evidence of the infringement. Sony's admission cannot therefore be regarded as constituting additional added value within the meaning of point 21 of the 2002 Leniency Notice.

**8.7. The amounts of the fines imposed in this proceeding**

- (263) The fines to be imposed pursuant to Article 23(2) of Regulation (EC) No 1/2003 should therefore be as follows:
- (a) Sony France SA, Sony Europe Holding BV and Sony Corporation, jointly and severally liable for the payment of EUR 47 190 000;
  - (b) FUJIFILM Recording Media GmbH, FUJIFILM Corporation and FUJIFILM Holdings Corporation, jointly and severally liable for the payment of EUR 13 200 000;
  - (c) Maxell Europe Limited and Hitachi Maxell, Ltd., jointly and severally liable for the payment of EUR 14 400 000.



HAS ADOPTED THIS DECISION:

*Article 1*

The following undertakings infringed Article 81 of the Treaty and Article 53 of the EEA Agreement by participating, from 23 August 1999 until 16 May 2002, in a complex of agreements and concerted practices with a view to increasing and to maintaining or stabilising prices for Betacam SP and Digital Betacam videotape in the EEA market:

- a) Sony Corporation;
- b) Sony Europe Holding BV;
- c) Sony France SA;
- d) FUJIFILM Holdings Corporation;
- e) FUJIFILM Corporation;
- f) FUJIFILM Recording Media GmbH;
- g) Hitachi Maxell, Ltd., and
- h) Maxell Europe Limited.

*Article 2*

For the infringement referred to in Article 1, the following fines are imposed:

- a) Sony Corporation, Sony Europe Holding BV and Sony France SA, jointly and severally: EUR 47 190 000;
- b) FUJIFILM Holdings Corporation, FUJIFILM Corporation and FUJIFILM Recording Media GmbH, jointly and severally: EUR 13 200 000;
- c) Hitachi Maxell, Ltd. and Maxell Europe Limited, jointly and severally: EUR 14 400 000.

The fines shall be paid in Euros, within three months of the date of the notification of this Decision, to the following account:

Account of the European Commission with:

**Citibank, N.A.**  
Citigroup Centre  
Canada Square  
Canary Wharf  
UK – LONDON E14 5LB

Code IBAN: GB43CITI18500811850415  
Code SWIFT: CITIGB2L

After the expiry of that period, interest shall automatically be payable at the interest rate applied by the European Central Bank to its main refinancing operations on the first day of the month in which this Decision is adopted, plus 3.5 percentage points.

### *Article 3*

The undertakings listed in Article 1 shall immediately bring to an end the infringement referred to in that Article, insofar as they have not already done so.

They shall refrain from repeating any act or conduct described in Article 1, and from any act or conduct having the same or similar object or effect.

### *Article 4*

This Decision is addressed to:

**Sony France SA**  
20-26, rue Morel  
92110 Clichy  
France

**Sony Europe Holding BV**  
Schipholweg 275  
1171PK Badhoevedorp  
The Netherlands

**Sony Corporation**  
1-7-1 Konan  
Minato-ku  
Tokyo 108-0075  
Japan

**FUJIFILM Recording Media GmbH**  
Fujistrasse 1  
47533 Kleve  
Germany

**FUJIFILM Corporation**  
26-30 Nishiazabu 2-chome  
Minato-ku  
Tokyo 106-8620  
Japan

**FUJIFILM Holdings Corporation**  
26-30 Nishiazabu 2-chome  
Minato-ku,

Tokyo 106-8620  
Japan

**Maxell Europe Limited**  
Multimedia House, High Street  
Rickmansworth  
Hertfordshire WD3 1HR  
United Kingdom

**Hitachi Maxell, Ltd.**  
2-18-2, Iidabashi  
Chiyoda-ku  
Tokyo 102-8521  
Japan

This Decision shall be enforceable pursuant to Article 256 of the Treaty and Article 110 of the EEA Agreement.

Done at Brussels, 20 November 2007

*For the Commission*

*Neelie KROES*  
*Member of the Commission*