

COMMISSION

COMMISSION DECISION

of 12 December 1994

relating to a proceeding under Article 85 of the EC Treaty and Article 53 of the EEA Agreement

(Case No IV/34.891 — Fujitsu AMD Semiconductor)

(Only the English text is authentic)

(Text with EEA relevance)

(94/823/EC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Whereas :

Having regard to the Treaty establishing the European Community,

A. THE FACTS

Having regard to Council Regulation No 17 of 6 February 1962, First Regulation implementing Articles 85 and 86 of the Treaty ⁽¹⁾, as last amended by the Act of Accession of Spain and Portugal, and in particular Articles 2, 6 and 8 thereof,

Having regard to Article 53 and to Protocol 21 of the Agreement on the European Economic Area,

Having regard to the application for negative clearance of a joint venture agreement and five related agreements, and the notification for exemption thereof, submitted by Fujitsu Limited, pursuant to Articles 2 and 4 of Regulation No 17, on 21 October 1993,

Having regard to the request made by the parties on 11 February 1994 to extend the application and notification to Article 53 of the EEA Agreement,

Having regard to the summary of the application and notification published ⁽²⁾ pursuant to Article 19 (3) of Regulation 17 and to Article 3 of Protocol 21 of the EEA Agreement,

After consultation with the Advisory Committee on Restrictive Practices and Dominant Positions,

I. The notification

- (1) On 21 October 1993, Fujitsu Limited notified a joint venture agreement and five related agreements it had entered into with Advanced Micro Devices, Inc.

The related agreements include: a technology cross-licence agreement, a joint development agreement, a joint venture licence agreement and reciprocal investments agreements.

The notification has been made unilaterally by Fujitsu Limited with the consent and cooperation of Advanced Micro Devices, Inc. The Commission has been asked to issue a negative clearance or to grant an individual exemption pursuant to Article 85 (3) of the EC Treaty.

Following the entry into force of the EEA Agreement, the parties requested the Commission on 11 February 1994 to extend the notification so as to cover Article 53 of the EEA Agreement.

- (2) The joint venture company, Fujitsu AMD Semiconductor Limited ('the JV'), has been created under Japanese law and will design, construct and operate a plant in Japan to produce semiconductor wafers of certain types of non-volatile memory ('NVM'), namely Electrically Programmable Read Only Memories ('Eeproms') and flash memories.

⁽¹⁾ OJ No 13, 21. 2. 1962, p. 204/62.

⁽²⁾ OJ No C 153, 4. 6. 1994, p. 11.

II. The parties

- (3) Fujitsu Limited ('Fujitsu') is the ultimate parent of a group of companies that manufacture and sell information-processing equipment, telecommunications equipment, and electronic devices.

The consolidated turnover of the Fujitsu group in the fiscal year 1992 was approximately US \$ 29,8 billion. Although an important producer of Eproms, Fujitsu sold practically no flash memory before 1993, for which calendar year it had a very limited turnover in this market segment.

- (4) Advanced Micro Devices, Inc. ('AMD') is a US company specialized in the production and sale of semiconductors and related devices, particularly known for its production of Intel 386 (and recently 486) 'clone' microprocessors. AMD's 1992 turnover was approximately US \$ 1,5 billion.

III. The agreements

The Joint Venture Agreement

- (5) The JV will be a company with limited liability established under Japanese law. Fujitsu will hold 50,5 % and AMD 49,5 % of the JV's capital stock. The maximum authorized capital of the JV will be ¥ 40 billion (approximately ECU 325 million).

Fujitsu will hold a majority of the seats on the board of directors. Most decisions require a simple majority vote: however, some major business decisions [...] ⁽¹⁾ require qualified majority approval.

- (6) The parties may not sell their shares in the JV for five years. Thereafter, if either party sells its shares, it must grant the other party the right of first refusal to purchase them. So long as the parties hold shares in the JV, they will be precluded from manufacturing NVMs that are or may be competitive with the JV, or employing or soliciting for employment any person employed by the JV.
- (7) The agreement will be valid for so long as the JV remains in existence, unless terminated earlier by mutual agreement. If either party breaches the

agreement, becomes insolvent, changes ownership/management, or ceases to be a one-third shareholder of the JV, the other party will have the option, among other things, of purchasing the first party's shares, dissolving the JV, or terminating the JV agreement and either or both of the investment agreements.

- (8) The JV, which is expected to come on-line by 1995, will produce in Japan wafers of Eproms and flash memories through processes with geometries of 0,5 micron or less (meaning that the finest line on the circuits are 5/10 000 000 of a metre in width or less, corresponding to 1/200 of a human hair) that will be used by the JV or the parties to make NVM devices. In fact, wafers are unfinished products which must be cut into chips (dice) which (i) are assembled into packaged devices that are then incorporated into electronics equipment or (ii) are incorporated into memory cards. These NVM devices (the packaged devices and the memory cards) will be produced either by the JV or by the parent companies (or their subsidiaries). Each party shall be entitled to purchase 45 % of JV's total production. The remaining 10 % is to be allocated by the board of directors of the JV which may decide to sell it directly on the market; in that case, according to the JV Licence Agreement (see recital 17 below), the JV can sell its production only in certain Asian countries. The parent companies (or their subsidiaries) will sell NVM devices to OEMs or will use them for their own production of information technology and electronic consumer goods. According to the notification, wafers account for more than half of the final product price.

- (9) Although both Eproms and flash memory are existing products, the highest performance wafer currently in commercial use is produced through processes with geometries of 0,8 micron. Therefore, the product of the JV will be a new generation of product.

- (10) For the entire duration of the agreement, the parties are prohibited from competing with the JV. The agreement also contains an *ex-post* non-competition provision. According to this provision, if either party sells its shares in the JV for any reason within 10 years from the date on which the JV Agreement becomes effective, that party will be precluded for two years following the date of such sale from (i) engaging in manufacturing any NVM that is, or may be competitive, with the JV and that embodies, incorporates or is subject to any intellectual property right owned by the other party or developed pursuant to the Joint Development

⁽¹⁾ In the published version of the Decision, some information has hereinafter been omitted, pursuant to the provisions of Article 21 of Regulation No 17 concerning non-disclosure of business secrets.

Agreement or the Joint Venture Licence Agreement, or (ii) employing or soliciting for employment any person employed by the JV. Nonetheless, under the terms of the Technology Cross-Licence Agreement, the party will be able to continue its research and development efforts based on the licensed technology, which it can use to manufacture NVMs after the two-year period has passed.

- (11) The notification contains five supplemental agreements related to the establishment of the JV.

Technology Cross-Licence Agreement

- (12) The parties grant each other reciprocal non-exclusive and non-transferable licences under their respective intellectual property rights ('IPRs') to make and dispose in any possible way of semiconductive materials and semiconductor products anywhere in the world, with the exception of NVMs and memory cards. For these latter products, the parties grant each other reciprocal licences to make, assemble, package, test, or use them worldwide; but the reciprocal licence to sell, lease or otherwise dispose of them is limited to certain specified territories. In Europe, for five years from the first sale in the EEA market of each new NVM or memory card, Fujitsu is granted a licence to sell in the United Kingdom and Ireland, and AMD to sell in the rest of the EEA. Unsolicited sales are allowed. After the five-year period each party can sell throughout the EEA. Outside the EEA territory, the Asian countries are essentially reserved to Fujitsu and the American countries to AMD.

- (13) This agreement remains in effect for the longer of 10 years or until the date of any of the following 'transitional events':

- termination or expiration of the Joint Venture Agreement,
- dissolution of the JV,
- or
- Fujitsu or AMD ceasing to be a shareholder of the JV.

Upon the occurrence of a 'transitional event', the agreement automatically terminates and the licences relating to NVMs and memory cards will become worldwide licences.

The parties are also given the right to terminate this Agreement on grounds of non-performance,

insolvency, or a change in control of the other party.

Joint Development Agreement

- (14) Through a Joint Development Committee the parties will collaborate in the development of product and process technologies necessary to manufacture NVMs. Each party will bear its costs of joint development. The IPR developed by either or both of the parties under the Joint Development Agreement will be jointly owned by the parties. If either party independently develops patented IPR, without access to confidential information of the other party, that party will solely own that IPR. That party will grant the JV and, where appropriate, the other party a licence to use the IPR developed under the Joint Development Agreement, whether jointly or individually owned.
- (15) The Joint Development Agreement will terminate automatically on the termination of the Joint Venture Licence Agreement or on the occurrence of a 'transitional event'. Each party is also given the option to terminate if the other party breaches the Agreement, becomes insolvent, changes ownership/management, or ceases to be a one-third shareholder of the JV.
- (16) Upon termination of the Agreement for any reason, the parties will continue to own jointly the jointly developed IPR and to have the unlimited right to use and license that IPR. Although the parties may freely license the jointly-developed technology after termination of the JV, they may not assign their ownership interests in the jointly-developed IPR without permission from the other party.

Joint Venture Licence Agreement

- (17) Fujitsu and AMD each grant the JV a non-exclusive, non-transferable licence to use their IPR to make, have made, and use NVMs anywhere in the world and to sell, lease or otherwise dispose of NVMs in certain Asian countries and, in the case of AMD's licence to the JV, in Japan.

Fujitsu and AMD will be paid by the JV a royalty of [...] % on net sales (to them) of the JV's products.

The JV grants the parties a non-exclusive, non-transferable, worldwide licence to use its IPR.

- (18) The Agreement will terminate on the occurrence of a 'transitional event'. Each party has the option to terminate the Agreement if the other party breaches the Agreement, becomes insolvent, changes management/ownership, or ceases to be a one-third shareholder of the JV.

Reciprocal Investments Agreements

- (19) Fujitsu and AMD will enter into reciprocal investment agreements. under the terms of these agreements, Fujitsu is obligated to purchase direct from AMD a certain number of AMD shares, not to exceed 5 % of AMD's outstanding common stock. AMD for its part must purchase a much smaller amount of Fujitsu stock on the open market. The parties are free to sell their reciprocal investments after [...] years.

IV. The market

The relevant product market

- (20) According to the parties, wafers do not constitute a separate market from the market for semiconductor devices because they are products rarely put on the market before being cut into chips and incorporated into NVM devices. Therefore, they claim that the relevant product market in this case is the market for NVM devices which is composed of Eeprom and flash memory devices. This question may remain open since the assessment of this case would not change if wafers constituted a separate market.
- (21) An Eeprom is a non-volatile semiconductor memory device that is programmable electrically and erasable using ultraviolet light. Flash memory, on the other hand, is a non-volatile semiconductor memory device that is both electrically programmable and electrically erasable, permitting speedier erasure than is the case with an Eeprom. As indicated above, the JV's products will be produced

using a new-generation product technology, the 0,5 micron (or less) technology. This process technology will narrow the space between various circuit elements in the wafer, allowing it to hold more transistors and, therefore, to store more information and to process it faster.

- (22) The main characteristic of NVMs is their ability to retain stored data even after the power supply is cut. Among NVMs, flash memory devices have advantages over Eeproms because they are erased more quickly, without removing the memory device from the system. For the time being the price of flash memory is considerably higher than that of Eeprom. This is why flash memory is currently used only in the high end of the product market using NVMs.

The relevant geographical market

- (23) Generally speaking, NVM devices are freely traded in substantial volumes all over the world. There are neither particular price differences nor national barriers to entry. Costs of transport are negligible. Therefore, the relevant geographical market for this case should be considered the world as a whole.

The existing structure of the market

- (24) The worldwide value of the segment for Eeproms was US \$ 1 358 million in 1991 and 1 253 million in 1992. For flash memory there are no data available for 1991 (or before); for 1992 the worldwide value was US \$ 239 million, but this segment is expected to grow almost 10 times by 1996 (see recital 26 below). The values of the European sub-markets in 1992 were US \$ 293 million for Eeproms and US \$ 71 million for flash memory respectively.
- (25) Revenues in 1991 and 1992 and worldwide market shares of the major companies active in the two market segments under consideration are summarized in the following tables (source : Dataquest Inc., 24 May 1993):

Table 1

Eeproms

Company	Revenue (US \$ million)		Market share (%)	
	1991	1992	1991	1992
AMD	225	207	16,6	16,5
Intel	205	122	15,1	9,7
SGS-Thomson	158	180	11,6	14,4
Texas Instrument	136	197	10,0	15,7
Fujitsu	86	71	6,3	5,7
Mitsubishi	67	56	4,9	4,5
Toshiba	68	48	5,0	3,8

Table 2

Flash memory

Company	Revenue (US \$ million)		Market share (%)	
	1991	1992	1991	1992
Intel	NA	167	NA	69,9
AMD	NA	46	NA	19,2
Mitsubishi	NA	3	NA	1,3
SGS-Thomson	NA	2	NA	0,8
Texas Instrument	NA	2	NA	0,8
Toshiba	NA	1	NA	0,4

On the European market, the situation is as follows (source : *idem*) :

Table 3

Eproms

Company	Revenue (US \$ million)		Market share (%)	
	1991	1992	1991	1992
SGS-Thomson	74	75	24,4	25,6
AMD	53	56	17,5	19,1
Intel	55	37	18,2	12,6
Texas Instrument	33	39	10,9	13,3
National Semiconductor	21	23	6,9	7,8
Fujitsu	9	9	3,0	3,1

Table 4

Flash memory

Company	Revenue (US \$ million)		Market share (%)	
	1991	1992	1991	1992
Intel	NA	55	NA	77,5
AMD	NA	11	NA	15,5
SGS-Thomson	NA	2	NA	2,8

Dynamic characteristics of the market

- (26) During the next three to four years, the market for NVMs is forecast to be a very dynamic one; the gradual process of shifting away from Eproms towards flash memory initiated by Intel in late 1991 will be followed at a much faster rate by all producers of semiconductors.

According to the trade press, the worldwide demand for flash memory is double the current manufacturing capacity, due to explosive growth in markets for products requiring this technology such as cellular phones, computer disk drives, mobile and desktop personal computers and others.

According to Dataquest, the worldwide sales are expected to grow from US \$ 239 million in 1992 to 2,5 billion by 1996, the year in which flash is expected to outnumber Eproms.

Intel is clearly leading this contest to meet the shortage of flash memories. By the end of 1994, Intel expects to have increased eight-fold its production capacity of flash memories. Intel recently entered into alliances concerning flash memories with Sharp and Nippon Steel Semiconductor.

To follow Intel, even aside from Fujitsu and AMD, several companies have formed JVs in the flash memory market: Mitsubishi and SGS-Thomson; IBM and Toshiba; Toshiba and National Semiconductor; Toshiba and Samsung; Hitachi and Mitsubishi; Sanyo and Silicon Storage Technology; and SunDisk and Matsushita.

According to market analysts, this widespread effort to increase production capacity of flash memory will possibly generate overall over-capacity in about five years if not before. This extra capacity will bring the prices down, contributing to the spread of the use of this product to the manufacturing of less expensive electronic consumer goods, such as cameras.

V. Observations from interested third parties

- (27) The Commission has received no observations from interested third parties following the publication of the notice pursuant to Article 19 (3) of Regulation No 17.

B. LEGAL ASSESSMENT**I. Article 85 (1) of the EC Treaty and Article 53 (1) of the EEA Agreement**

- (28) Article 85 (1) and Article 53 (1) prohibit, *inter alia*, all agreements between undertakings which may affect trade between Member States (contracting parties under the EEA Agreement) and which have as their object or effect the prevention, restriction or distortion of competition.

The establishment of the JV

- (29) The establishment of the JV falls within the scope of Articles 85 (1) and 53 (1) because it has the effect of restricting competition among the parties, which are actual competitors in the NVM market. This is not altered by the fact that Fujitsu has an insignificant part of the segment for flash memories. If it is true that Fujitsu — as it claims — has insufficient experience in designing flash memory devices, it is also true that it has sufficient financial, managerial and technical resources to increase its own production.

The fact that the JV restricts competition between competitors is not called in question either by AMD's supposed lack of sufficient resources to develop more cost-effective process technology so as to bring flash memories onto the market in a competitive time frame. In this respect it is sufficient to note that AMD (the JV not yet being active) increased its worldwide market share for this product by 40 % in 1993, which represented a growth in sales from US \$ 46 million in 1992 to US \$ 232 million for 1993 (Source: *Electronic Buyers News*, 7 March 1994).

- (30) The JV will to a certain degree compete with its parent companies inasmuch as it can sell directly on the market up to 10 % of its total production. However, according to the Joint Venture Licence Agreement, the territory in which the JV is allowed to sell NVMs is limited to certain Asian countries. This territorial limitation takes on the form of a restriction of competition in so far as it represents a partition of the worldwide geographical market. However, it seems unlikely that — given the current undercapacity in flash memories — the JV will proceed to such sales until after the parent demand has been entirely satisfied (that is, possibly four to five years in the future). Considering the probably limited quantity of products involved, and the unlikelihood that this provision will appreciably affect trade within the EEA, the Commission

takes the view that this provision will not give rise to any appreciable restriction of competition within the meaning of Article 85 (1) and Article 53 (1). Therefore, Articles 85 (1) and 53 (1) are not applicable.

Restrictive provisions

- (31) The Commission takes the view that the following provisions in the notified agreements are restrictive of competition.

1. Territorial partition of the EEA market

- (32) Pursuant to the terms of Attachment B of the Technology Cross-Licence Agreement, in the EEA, Fujitsu is granted a non-exclusive licence to sell in the UK and Ireland, and AMD to sell in the rest of Europe. This territorial restriction is limited to active sales and only applies for five years from the first commercial sale of each new NVM chip or card in the EEA. The restriction does not apply to electronic products incorporating those NVMs.

This covenant constitutes a clear partition of the EEA market, prohibited by Article 85 (1) (b) and (c) and Article 53 (1) (b) and (c).

2. Non-competition clauses

- (33) So long as the parties participate in the JV, they will be precluded from manufacturing any NVMs that are or may be competitive with those of the JV.

If either party sells its shares in the JV within the first 10 years of the life of the JV, that party will be precluded from manufacturing competing NVMs for two years.

- (34) The first clause above is a restriction of competition which is ancillary to the JV in so far as it has to be considered necessary to the setting up and proper operation of the JV. In view of the difficulties, risks and costs involved in successfully developing NVMs, this non-competition clause is necessary to allow each party to obtain the benefit of its investment. Since the JV will require substantial investment of financial and technological resources from both parties, the parties would not enter into the JV agreement if they could also be subjected to competition from their partner. This is particularly true in this case, where the businesses of the JV's parent companies are highly complementary in nature : on the one hand, Fujitsu has limited expe-

rience in designing flash memory devices but disposes of a substantial production technology and expertise, whereas AMD, on the other hand, has the necessary expertise to design the next generation of flash memories but lacks sufficient resources to develop more cost-effective fine-process technology so as to bring these devices onto the market in a competitive time frame, and lacks the resources required to design and bring onto the market the product variations required by the market.

- (35) Using the same test, the Commission is of the opinion that the second clause too (*ex-post* competition ban) may be seen as ancillary to the JV because :

- the 10-year period during which, if one party leaves the JV it will be bound by the two-year competition ban, starts to run from the date of the JV agreement that is, at least two years before the first commercial sale of the JV's products,
- an effective protection from competition during a maximum of seven to eight years seems necessary in order to compensate for the very significant investment of financial and technological resources, and to offset the risks involved in successfully developing NVMs, particularly in view of the complementary areas of expertise of Fujitsu and AMD.

3. Assignment of jointly-developed IPRs

- (36) Neither party may assign its ownership interests in the jointly-developed IPRs without permission from the other party. Such jointly-developed technology being based in large part on a combination of existing technology belonging to either party, the parties would never contribute the rights to the JV if they were not allowed to control the ownership of those rights after termination. Therefore, this clause has to be considered ancillary to the JV.

Appreciability of the restrictions

- (37) The inter-parent restrictions of competition stemming from the creation and operation of the JV will be appreciable because the field of activity of the JV falls entirely within those of both the parties : as far as the manufacturing of wafers (but not assembly or marketing of final products) is concerned, the JV will entirely supplant potential activities of both parties in the manufacture of essential components for NVM devices.

- (38) The agreements will affect trade within the EEA in that the relevant products are traded in large volumes across the whole territory of the EEA.

Non-restrictive provisions

- (39) The Commission considers the following provisions in the notified agreements as non-restrictive of competition.

1. Indefinite duration of the technology cross-licence

The cross-licence will remain in force for 10 years or the life of the JV whichever is the longer. Therefore, the licences for the different technologies are of a potentially indefinite duration. However, as they are non-exclusive licences, the Commission considers that their indefinite duration is not caught by Articles 85 (1) and 53 (1).

2. Cross-investment Agreements

The provisions of the Cross Investment Agreements fall outside the scope of Article 85 (1) and Article 53 (1) because they will not allow either party to take control or to influence the competitive behaviour of the other. The parties' investment in each other is minimal: Fujitsu will not own more than 5 % of AMD's outstanding shares and AMD will own only about 0,5 % of Fujitsu's outstanding shares. These acquisitions of minority interests in each other are not accompanied by any form of cross-representation in the boards of directors.

3. Territorial partition of the market outside the EEA

The Commission takes the view that, since the contractual provisions defining the parties' respective sales territories outside the EEA do not limit the parties' ability to trade on the EEA market for the products which are the subject of the agreements, they do not restrict competition and/or affect trade within the EEA. Therefore Articles 85 (1) and 53 (1) are not applicable.

II. Articles 85 (3) EC Treaty and 53 (3) EEA Agreement

- (40) As has been demonstrated above, the Joint Venture agreement and the territorial provision included in the Technology Cross-Licence Agreement are

caught by the prohibition in Article 85 (1) and Article 53 (1).

However, the Commission considers that these agreements fulfil the conditions governing the applicability of Article 85 (3) and Article 53 (3).

Improvement of production of goods or of promotion of technical or economic progress and benefits for the consumers

- (41) The wafers produced by the JV will be used either by the JV or by the parties (or their subsidiaries) to produce highly sophisticated new semiconductor devices, which will in turn make possible the development of increasingly smaller, faster, more reliable, and more energy-efficient electronic system products, ranging from computers to consumer products such as portable telephones and voice electronic mail. This will lead to technical and economic progress that will directly benefit consumers through the dissemination of higher-performance innovative products.

Indispensability of the restrictions

- (42) In the semiconductor industry, success with new products largely depends on timely entry into the market. New product lines require considerable investment. This investment is risky, considering the short lives of these products. The JV will allow each parent substantially to reduce these costs and risks. In its turn, this sharing of costs and risks will allow both parents to continue to invest part of their financial and technical resources in the development of a variety of semiconductor products other than NVMs. This continued production is essential for the overall success of the parties in the semiconductor market. Therefore, the Commission takes the view that the restriction of competition inherent in the formation of the JV is indispensable in so far as it represents the most efficient and quick way to bring to the market a new generation of high-technology products which combines the parties' complementary areas of expertise. Furthermore, the Commission takes the view that the cooperation between Fujitsu and AMD does not extend further than is necessary to obtain the benefits of the JV. Each of the parties will continue to compete in a range of other product markets, limiting their cooperative efforts to the development and manufacture of the NVMs. The conditions of competition in these markets rule out the possibility of any coordination of competitive behaviour between the parties.

- (43) As for the independent territorial restriction (see recital 12) it has to be noted that it is not absolute. Although the parties may only engage in active sales in their licensed territories for five years from the date of the first commercial sale, unsolicited sales, leases and other dispositions of NVMs and memory cards are allowed throughout the EEA at any time. Moreover, customers are completely free to export NVMs, memory cards, and all other products that are the subject matter of the licences anywhere in the world. This means that customers from outside the territory can engage purchasing organizations and agents within the territory to purchase NVMs for export anywhere in the world. Customers from outside the territory can also travel to the territory to purchase NVMs and memory cards for export. Finally, customers from outside the EEA are free to export to the EEA for sale here.

In the light of the foregoing, and considering that the customers of the parties will be major manufacturers of electronic products having facilities in several countries, such passive sales are a real possibility, thereby minimizing the anticompetitive effect of the ban on active sales.

- (44) Furthermore, the Commission accepts the parties' claim that limiting for an initial period the parties' active sales territories to those where they already have an established infrastructure (Fujitsu is particularly strong on the United Kingdom and Irish markets where it has manufacturing facilities; AMD has a strong presence in the rest of Europe), will increase the chances of success in what is, in effect, a new product introduction, in that they will be able to offer customers faster deliveries, better service and lower cost.

In particular, as far as memory cards are concerned, the Commission agrees with the parties that, at least at the beginning, Fujitsu and AMD will have to invest a significant amount of effort in tailoring these products for their customers. These products will be sold to a variety of manufacturers which will incorporate them as components in their own electronic products. For this to be done successfully, the customers will need advice, back-up and some adaptation of the products. This can be done more efficiently by Fujitsu and AMD in the areas where they have established after-sales networks.

Accordingly, in the circumstances the restrictions can be justified as being necessary to ensure the

successful launch of the products and thus the success of the parties' overall investment.

No substantial elimination of competition

- (45) In accordance with Article 85 (3) (b) and Article 53 (3) (b), the JV will not afford AMD and Fujitsu the opportunity to eliminate competition in a substantial part of the market for NVMs. By the time the JV is expected to come on line, flash memory devices will have replaced Eproms for many applications. This segment of the market is currently dominated by Intel. The appearance on the market of the JV's products will increase the competition on the market. In addition, the parties will also face strong competition from other recent alliances. Neither AMD nor *a fortiori* Fujitsu is likely to acquire, as a result of the JV, a dominant position in the EEA market for flash memories.

C. DURATION OF THE EXEMPTION

- (46) Pursuant to Article 8 of Regulation No 17, a decision under Article 85 (3) of the Treaty is to be issued for a specified period. Pursuant to Article 6 of that Regulation, the date from which such a decision takes effect cannot be earlier than the date of notification. The same principles apply for the decisions under Article 53 (3) of the EEA Agreement. In accordance with those Articles, in the present case, the decision, in so far as it grants exemption, should take effect from the date of notification and last for 10 years, that is from 21 October 1993 to 20 October 2003,

HAS ADOPTED THIS DECISION :

Article 1

On the basis of the information at its disposal, the Commission has no grounds for action under Article 85 (1) of the EC Treaty or Article 53 (1) of the EEA Agreement in respect of the following notified agreements entered into by Fujitsu and AMD :

- the Joint Development Agreement dated 26 March 1993,
- the Joint Venture Licence Agreement dated 16 April 1993,
- the Investment Agreement of Fujitsu Limited investing in Advanced Micro Devices, Inc. dated 26 March 1993,

- the Investment Agreement of Advanced Micro Devices, Inc. investing in Fujitsu Limited, dated 26 March 1993,
- the Technology Cross-Licence Agreement dated 26 March 1993, with the exception of the territorial provision concerning the EEA contained in its Attachment B.

Article 2

In accordance with Article 85 (3) of the EC Treaty and Article 53 (3) of the EEA Agreement, the provisions of Article 85 (1) and Article 53 (1) are hereby declared inapplicable for the period from 21 October 1993 to 20 October 2003 to the Joint Venture Agreement entered into by Fujitsu and AMD on 30 March 1993 and to the territorial provision concerning the EEA included in Attachment B of the Technology Cross-Licence Agreement entered into by Fujitsu and AMD on 26 March 1993.

Article 3

This Decision is addressed to :

1. Fujitsu Limited,
1015 Kamikodanaka,
Nakahara-ku,
Kawasaki-shi,
Kanagawa-ken 211,
JAPAN.
2. Advanced Micro Devices, Inc.,
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PO Box 3453,
Sunnyvale,
California 94088-3453,
USA.

Done at Brussels, 12 December 1994.

For the Commission

Karel VAN MIERT

Member of the Commission
