II

(Acts whose publication is not obligatory)

COMMISSION

COMMISSION DECISION

of 22 December 1987

relating to a proceeding under Article 85 of the EEC Treaty
(IV/32.306 — Olivetti/Canon)

(Only the English and Italian texts are authentic)

(88/88/EEC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Economic Community,

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 4, 6 and 8 thereof,

Having regard to the application for negative clearance and notification by Ing. C. Olivetti & C, SpA, on the one hand, and Canon Inc., on the other hand, of joint venture agreements and related agreements, concerning mainly designing, developing and manufacturing certain co pying machine products, laser beam products and facsimile products,

Having regard to the summary of the application and notification published (2) pursuant to Article 19 (3) of Regulation No 17,

After consulting the Advisory Committee on Restrictive Practices and Dominant Positions,

Whereas:

I. THE FACTS

A. The notification

(1) On 1 April 1987 the companies Ing. C. Olivetti & C, SpA and Canon Inc. requested the Commission to give negative clearance for, or, alternatively, to exempt under Article 85 (3) of the EEC Treaty certain agreements between them concerning the formation of Olivetti-Canon Industriale SpA ('OCI'), a joint venture incorporated in Italy.

(2) The scope of OCI is to develop, design and manufacture copying machine products, laser beam printer products and facsimile products. The activities of OCI are to develop in two phases. During Phase I it will mainly manufacture copying machine products in the speed-range of 10 to 20 copies per minute. In Phase II, the parties may decide to produce, in addition to copying machine products, other office automation products such as laser beam printer products and facsimile products. The production of higher-speed copying machines may also be considered. Phase II is expected to start in early 1989.

B. The parties

(3) Ing. C. Olivetti & C SpA, Ivrea, Italy heads the Olivetti Group ('Olivetti'). This is a multinational group whose activities include data processing and office automation (word processors, personal computers, terminals, printers, telecommunications equipment) and office products such as typewriters and copying machines.

(1) OJ No 13, 21. 2. 1962, p. 204/62.
(2) OJ No C 282, 20. 10. 1987, p. 2.

In 1985 its turnover was Lit 6 140 billion, the net profit Lit 503 billion, and the R&D expenditure 284 billion (4,6 % of the turnover). The workforce was 48 944 people.

In 1985, the trend of the previous years had been confirmed, i.e. the proportion of data processing and office automation in total turnover had increased (84,8 % ; 1984 : 80,6 %) especially for personal computers (29,5 % ; 1984 : 16,9 %) and printers (7,2 % ; 1984 : 4,9 %). The R&D proportion had increased some 24 % compared with 1984. Copying machines represented 2,3 % in 1985 (2,4 % in 1984).

(4) Canon Inc., Tokyo, is the head of a multinational group ('Canon'). The group's turnover in 1986 was Yen 889 billion (—7 % compared with 1985). Its main activities are business machines (*circa* 74 % of the turnover) (copying machines *circa* 42 %, other business machines *circa* 32 %), cameras and optical products. R&D expenditure represented 6,2 % of turnover in 1986 (5,2 % in 1985). The workforce is 35 498 people (10 % fully employed in R&D activities). 70 % of Canon sales are outside Japan.

C. The markets affected by the joint venture

(5) For all the products involved the EEC represents an area in which the conditions of competition are similar for all suppliers. National laws do not make trade between Member States difficult, nor do costs of transport or consumer preferences. The EEC market is situated in the context of a worldwide market with a high number of competitors mainly from third countries.

(a) *Copying machines*

(6) For the customers, copiers are not all sufficiently interchangeable to compete with each other in terms of price, speed (copies per minute), physical characteristics and additional facilities (sorter, etc.). Manufacturers and suppliers use some forms of market segmentation.

(7) Dataquest analysis of the plain-paper copier market (1), which is the most widely-used, breaks down the sector into seven ranges, according to the number of copies per minute which the machine can produce : personal copiers (PC) (1 to 12 cpm) and segments 1 to 6 (the latter from 91 cpm upwards). Between PC products and segment 6 products average prices vary between roughly $1 000 and $130 000. For the purposes of this proceeding three representative relevant markets may be considered, each of them embracing substantially interchangeable copiers : low-end range (PC to segment 2 : up to 30 cpm), mid-end range (segments 3 and 4 : 31 to 75 cpm) and high-end range (segments 4 to 6 : from 70 cpm upwards). This does not preclude a certain interchangeability between these three segments.

(8) The copying machines currently manufactured by OCI (10 to 20 cpm) belong to segment 1 (1 to 20) and to the low range market. In the EEC market there are many competitors.

(9) In the low-end range market the number of units sold and market shares for Western Europe were as follows (2) :

1986	Units sold ('000)	Market shares (%)
Canon	196,0	23,7
Rank Xerox	74,5	9,0
Minolta	64,3	7,8
Olivetti, Triumph Adler	60,8	7,3
Mita	54,2	6,6
Toshiba	54,0	6,5
Sharp	45,0	5,3
Nashua	39,1	4,6
Ricoh	37,0	4,3

Source : Dataquest, September 1987.

More than 10 manufacturers followed with market shares varying down to less than 1 %.

As to the products sold on an OEM basis (i.e. to Original Equipment Manufacturers), they are included in the market shares of the OEM vendors and not in those of the OEM manufacturers.

(10) In the mid- and high ranges, to which the joint venture activity may be extended in the future, Olivetti has had no significant activity except a sale of 3 000 units many years ago. Canon has a market share of 6,7 % for mid-range and 1,4 % for high-range machines.

(1) Only plain-paper copying process machines are considered, as this process has practically replaced all the others.

(2) No data for EEC is available but the main areas of sale are all in the EEC, to such an extent that for the purposes of this proceeding Europe's market shares can be taken into account in the place of EEC ones.

(11) From the 1970s, when plain paper copiers started to be manufactured in the EEC, the number of EEC manufacturers has progressively diminished. The main producers Rank Xerox (United Kingdom) and Océ (Netherlands) apart, some of the smaller companies in terms of number of models manufactured were unable to keep pace with innovation and reducing prices in office copying, which have mainly come from Japanese companies. Most converted their business (totally orpartially) to Original Equipment Manufacturers' (OEM) distribution of Japanese machines (distributors under their own brand name of OEM products). Olivetti and Develop (Germany) continued to manufacture, in the low range only. In addition, Olivetti's subsidiary Triumph Adler (Germany) currently distributes, on an OEM basis, copiers of the Japanese company Mita.

(12) Japanese companies have progressively set up manufacturing points in the EEC. As to their sales of imports from outside the EEC an anti-dumping duty [1] under Council Regulation (EEC) No 2176/84 [2] was imposed. Canon had previously set up two plants, one in Germany in 1972 (for high speed machines) and the other in France in 1984 (for PCs). Toshiba has formed a 60/40 % joint venture with Rhône-Poulenc. Minolta has acquired the control of the German company Develop. Ricoh has set up a plant in the United Kingdom, and subsequently decided to add a new production facility.

Olivetti's OEM sales represented about 60 % of its turnover for copiers in 1986 and 46 % in the first half of 1987 (as an effect of the joint venture which started operating in March 1987). The two remaining major manufacturers in Europe are Rank Xerox (United Kingdom, Netherlands and France) and Océ (Netherlands). Rank Xerox manufactures the full range and Océ the upper range.

(13) Canon in the past has introduced major innovations in the field of copying machines. In 1986 it launched the largest number of new products in its 20 years' activity in that field : in every segment at least one new model was introduced. A new model (NP-8000) has strengthened its position in the high-speed copiers. Canon has also introduced new products in the three major fields where it is a leader : personal copiers, colour and digital technologies (full colour copiers).

[1] This was imposed provisionally on 21 August 1986, and definitively on 23 February 1987 (OJ No L 54, 24. 2. 1987, p. 12) on copiers of up to 75 cpm. An antidumping duty of 20 % was imposed on Canon.

[2] OJ No L 201, 30. 7. 1984, p. 1.

(b) *Facsimile*

(14) The facsimile market is expanding greatly in the EEC. The units sold in 1986 were 200 000. The growth rate in 1986 and 1987 ranged from 9 to 17 % in the various countries. The compound annual growth rate forecast for 1987 to 1991 is 46 %. The market shares of the main suppliers in 1986 were as follows :

1986	Market shares (%)
Panasonic	21,4
Canon	19,7
Telic Alcatel	10,1
NEC	11,5
Kalle-Infotec	8,6
Toshiba	5,5
Olivetti	2,5

Source : Dataquest.

(15) The Olivetti group's facsimile sales of 5 050 units in 1986 were limited to Italy and Spain. In 1985 sales of the Olivetti group in Italy represented 24 % of all sales in that country (Canon 7,9 %). All sales of the Olivetti group are on an OEM basis, from Sharp Co. of Japan. By virtue of the joint venture agreement, the Olivetti group is prepared to switch from Sharp to Canon equipment.

(16) Canon has a full line of products, from desk-top models to sophisticated broadcasting facsimile and G4 machines, which makes it one of the EEC leaders in this field. In 1986/87 Canon introduced the G4 machines to serve the digital telecommunication systems which are used in certain countries not only for their pilot project of Integrated Services Digital Network (ISDN) but also for existing digital networks, and the Multimedia Phone MMP-10, a telephone which can transmit images from PC computers and word processors to facsimile transceivers.

(c) *Laser beam printers*

(17) The laser beam printer is considered as the ideal computer printer for today, and especially for the future. It presents many advantages over the traditional computer printer in terms of the variety of functions it can fulfil, speed, print quality, ease of use and cost. Sales are growing very rapidly everywhere (in Europe 4 400 units in 1984 and 26 300 units in 1985 ; average annual growth in units sold 1988 to 1990, 48 % ; 1985 to 1991, 69,7 %). Prices are diminishing. Many companies are entering the market, including most of the main computer companies. Laser printers vary in speed from six to 120 pages per minute.

(18) Despite the number of competitors (mostly Japanese companies, Ricoh, Hitachi, Kyochene, Fujitsu, Toshiba and Mita), the two most significant laser printer manufacturers in the world are Canon for the low-end range and Xerox for the medium and high range. Canon has now the basic technology to produce the colour laser printer which has been introduced in 1986. Canon has sold for OEM resale in europe ans in North America (to Hewlett-Packard, Apple and others).

(19) The estimated market shares (in value) of the main vendors of non-impact printers under 20 pages per minute in Western Europe (EEC data is not available) are as follows:

1985		
Vendor	Turnover ($ million)	Share (%)
Hewlett-Packard (Canon engine)	41,5	30
Canon	25,0	18
Apple	16,2	12
Ricoh	14,8	11
Xerox	13,3	10

Source: International Data Corporation.

(20) The Olivetti group only sold a few units in 1984 and 1985, procured from Hitachi Co. Ltd (a machine with an Olivetti proprietary interface for Olivetti's captive market). The Olivetti subsidiary concerned has recently started procuring laser printer engines from Canon on an OEM basis.

D. The main issues of the cooperation

(21) The Canon-Olivetti joint venture company, OCI (hereafter 'the JVC'), is a manufacturing operation owned by Olivetti as to 50 % plus one share and by Canon as to 50 % minus one share. It is based at Olivetti's reprographic factory in Aglié (Italy), which employs 350 people and which currently produces 42 000 copiers yearly. It is planned to treble this amount in two years. The products manufactured by the joint venture are sold independently by the two partners, mainly through their own distribution networks. Olivetti is transferring both its copier research and production activities to the JVC. Canon will make a substantial investment in the JVC over 1987 and 1988 and will transfer technology to the joint company. A large majority of components for the products manufactured by the joint venture are currently supplied by Olivetti; the rest are supplied by Canon and by third companies.

E. The content of the agreements

(22) The agreements notified are as follows:

— Master business agreement,

— Licence agreement for copying machines (Olivetti),

— Technical assistance and licence agreement for copying machines (Canon),

— Non-disclosure agreement,

— Subscription agreement,

— Shareholders' agreement and by-laws.

(23) The main content of those agreements is as follows.

(a) *Master business agreement* (dated 17 December 1986)

This is the principal agreement which sets up the principles of the joint venture, its scope and functioning. Its main provisions are as follows:

— the scope of the JVC is to develop, design and manufacture copying machine products, laser beam printer products and facsimile products (section 2.1),

— in phase I, the JVC shall manufacture the models of copying machines manufactured by Olivetti copiers division and certain Canon models with a speed of 10 to 20 cpm. Such manufacture will be covered by licences from Olivetti and Canon. Currently, the JVC has exclusive manufacturing rights for Europe with respect to the copying machines which will be manufactured by the joint venture (sections 2.2 and 4.1.1),

— in phase II it is envisaged that the JVC shall manufacture, in addition to copying machines, the other products within its scope, as determined by the parties. Higher-speed copiers may also be considered (sections 2.2 and 4.2.1). The PC segment is not within the scope of the JVC,

— the parties give to the JVC their respective development expertize in the field covered by the company that is necessary to achieve the best results in terms of product specifications and quality and price (section 4.1.1),

— the parties shall cause the JVC to maintain a close cooperative relationship between the Olivetti Group and the Canon Group in order to reduce, to the largest possible extent, the purchase cost of the parts and components for the products manufactured by the JVC (section 4.2.3),

— components for the products will be procured by the JVC from the parties or external sources and the JVC shall give preference to components purchased from the parties if the parties' terms and conditions of sales are competitive. Sales by the parties to the JVC of components for the products, and price and other terms and conditions of sales, shall be on an 'arm's-length' basis (preliminary master business plan attached to the agreement),

— each party shall use its best endeavours (i) to promote and sell the products manufactured by the JVC through its respective sale channels and (ii) to purchase from the JVC at least the volumes of products indicated in a master business plan, provided that they are competitive with those sold by other vendors (section 4.3.1),

— the products manufactured by the JVC and marketed in the EEC and elsewhere shall be differentiated in their appearance and other features that the parties may agree to (section 4.3.2),

— the products manufactured by the JVC (i) developed by Canon or based on Canon's technology, and (ii) developed by Olivetti or the JVC, can be provided respectively by Olivetti and Canon under trademarks designated by them to designated companies outside their groups only by mutual agreement (section 4.3.3),

— except for the products sold under the foregoing paragraph with the prior consent of the licensor party, the trademarks used in the products to be distributed through the Olivetti and Canon networks shall be brand names belonging respectively to Olivetti and Canon (section 4.3.4),

— the Agreement shall continue as long as each of the parties owns a share interest in the JVC, unless terminated by agreement of the parties (section 6.1).

(b) *Licence agreement for copying machine (Olivetti)* (dated 26 February 1987) and

(c) *Technical assistance and licence agreement for copying machines (Canon)* (dated 26 February 1987)

(24) Under these agreements, the parties grant to the JVC a personal, non-transferable, non-sub-licensable licence under their patents and technical information and know-how relating to the manufacture of copying machines to be manufactured in Italy and to use, sell or lease such machines in all countries of the world.

— The Canon licence is limited to certain copying machines in the 10 to 20 cpm speed range (section 2.2).

— Those licences are exclusive for manufacturing in respect of the EEC countries and non-exclusive for using, selling or leasing (section 2.1 of both agreements).

— Under the Canon agreement, Canon also provides a training programme within the scope of the agreement (3.2). From time to time, Canon shall expose its product plans to the JVC, so that the JVC's manufacturing plans and related investments for the purpose of extending the agreement to other copying machines of 10 to 20 cqm or of a higher speed may be made timeously (section 2.2).

— Under the Canon agreement, each party (Canon and the JVC) shall promptly disclose to the other any improvement made by it to the licensed products. The JVC shall have the right to use such disclosure as a part of the information, know-how or patent rights covered by the licence agreement and subject to the terms of that agreement. Canon shall have a royalty-free licence to utilize the JVC's improvements in its own production, outside the licensed territory, of licensed products (section 3.3).

— The agreements contain provisions for the differentiation of the products (respectively sections 3.2 and 4.2) and the use of brand names (respectively sections 3.1 and 4.1) similar to those of the master business agreement aforementioned.

— Both agreements contain an obligation for the licensee not to disclose the confidential technical information and know-how covered by the agreements, before or after the termination of the agreements (respectively sections 2.2 and 2.3).

(d) *Non-disclosure agreement* (dated 5 November 1986)

Canon and Olivetti agree not to disclose to third parties any confidential information to which they have had access in the course of the discussions regarding the formation of Olivetti-Canon and in the course of the implementation of the joint venture agreement.

(e) *Subscription agreement* (dated 17 December 1986)

(25) The main provisions of this agreement concern the schedule of the different phases of the formation of the joint venture, the capitalization, funding and initial capital of the joint venture. The joint venture initially had a share capital of Lit 200 million, consisting of 200 000 shares of Lit 1 000, 100 001 subscribed by Olivetti and 99 999 by Canon.

(f) *Shareholders' agreement and by-laws* dated 17 December 1986)

(26) The board of directors of the JVC is composed of six members. The board of auditors is composed of three regular auditors and two alternate auditors. The president of the JVC is designated by Olivetti. The executive vice-president is designated by Canon. Olivetti and Canon agree to each designating three members of the board of directors and one member and one alternate member of the board of auditors (Article II of the shareholder agreement).

(27) The shareholders' meeting acts by absolute majority of shares on all the matters *(inter alia* approval of balance sheet, election of director and auditors, resolution on matters pertaining to the management and submitted to it by the board) except sales of all or almost all the assets and the acquisition of its own shares by the joint venture, merger or consolidation, dissolution of the JVC, or disposition of profit, where it acts by more than 70 % of the shares (articles 13 and 14 of by-laws). The board of directors is granted the broadest powers for the ordinary and extraordinary administration of the JVC. It acts by the majority vote of the directors in office.

F. Third parties' observations

(28) Further to the publication in the *Official Journal of the European Communities* of a notice pursuant to Article 19 (3) of Regulation No 17, the Commission received comments (a) jointly from two export-import undertakings, VIHO-Europe (the Netherlands) and ISA (France), and (b) from the Committee of European Copier Manufacturers ('CECOM').

(29) (a) The export-import undertakings took the view that the cooperation in question between Olivetti and Canon brings restrictions of competition which outweigh its benefits for the Community competition policy, if any. They put forward several views, *inter alia :*

- the creation of the joint venture will lead to an oligopoly between OCI and Rank Xerox as to the relevant photocopiers,
- there is and will be no price competition between the partners and the joint venture will lead to a sharing of the markets between them,
- the OEM competition which plays an important role in moderating the price level is unduly restricted, especially by the clause requiring the agreement of partners for OEM sales of the joint venture products,
- the partners carry out restrictive practices which prevent the independent traders from purchasing on non-discriminatory conditions, competing in prices and trading between Member States.

(b) The Commission has taken these comments into account in assessing the risk that OEM competition by third parties is excessively restricted. At its request the parties have stated that the consent of one partner to the OEM sales of JVC products by the other is meant to be required only for a product based essentially on the technology of the former.

(c) Other allegations of the undertakings were considered as not relevant in this proceeding and/or at present substantiated. They therefore cannot alter the Commission's appreciation of the notified agreements in this proceeding, although the Commission reserves the possibility of examining those matters should this be justified by changes in the facts; such an examination could be made in, *inter alia,* the context of Article 8 of Regulation No 17.

(30) The CECOM, whilst not contesting the definition of the relevant product markets adopted by the Commission in the context of this proceeding, has emphasized that that definition should not prejudice the appropriate market definition for other purposes.

II. LEGAL ASSESSMENT

A. Article 85 (1)

(31) The agreements notified have to be considered as a whole and not separately. They are agreements within the meaning of Article 85 (1). They are caught by that Article as they are restrictive of competition and likely to affect trade between Member States.

(32) The restrictions in question are those resulting from the formation of the joint venture in itself and from other restrictive provisons contained in several agreements notified.

Restrictions resulting from the formation of a joint venture

(33) These agreements have set up a joint venture, OCI, i.e. an undertaking which is jointly controlled by the two parents Olivetti and Canon.

(a) OCI is an undertaking, i.e. a set of staff and material resources organized to carry on the business of designing, developing and manufacturing certain products.

(b) OCI is controlled jointly by the parent companies. Neither of the parents can take important decisions on its business without the participation of the other. The board of directors, which is granted the broadest powers for the administration of OCI, is composed of an equal number of members from Olivetti and Canon and acts by the majority vote of directors in office. There is no casting vote. In the shareholders' meeting Olivetti has 50 % plus one share; however, (i) this meeting has the power to deal with matters of management only if they are submitted by the board of directors, and (ii) important matters pertaining to the life of OCI and the disposition of profits are decided by more than 70 % of the shares.

(34) It is considered that the products within the scope of the joint venture pertain to different relevant product markets: copying machines respectively of low, medium and high-speed ranges, facsimile and laser beam printers. As to copying machines, although a certain amount of interchangeability can sometimes be found also for machines in non-adjoining segments, a substantial interchangeability in terms of characteristics, use and price exists between machines belonging to adjoining segments. It is appropriate to consider three relevant markets, which, in spite of the inevitable arbitrariness inherent to the tracing of boundaries, are sufficiently representative for the purpose of evaluating Olivetti's and Canon'a market positions and the impact on competition of their cooperation: low, medium and high-range (see paragraph 7). Within each of those ranges, one can consider that a broad interchangeability exists, and that copying machines meet different reproduction needs in speed, other features (e.g. sorting), and robustness according to those three ranges. The conversion of manufacturing plants from one to another of those ranges requires financial resources and a certain amount of time. The structure of the supply is different according to the three ranges. In the low-end range the number of suppliers is high whereas it is lower in the medium-end range and goes down to six in the high-end range.

Taking these markets into account for the purpose of the present proceedings does not prejudice the definition of 'like product' in the anti-dumping Regulation referred to in the foodnote to paragraph 12. It was not the purpose of that Regulation to determine whether there are different relevant markets within the copiers sector and to define them, but merely to establish what could be considered a like product as defined in Article 2 (12) of Regulation (EEC) No 2176/84 mentioned in paragraph 12.

(35) Facsimile products, because of their characteristics and price, are clearly a separate group of products for separate needs. Laser printers can be considered to constitute already (and in the near future) a separate product market, presumably split into three different markets according to size (low, medium and high range). The advantages they present in price and number of uses effectively marke them little interchangeable with other printers.

(36) The geographical market is the EEC market. Within it, the conditions of competition are similar. Demand is mobile and the supply can move across the national frontiers. National laws, transport costs and customer habits constitute no obstacles.

(37) The joint venture has been formed between competitors for copying machines of low and medium range and facsimile, and non-competitors for high-range copying machines and laser printers.

(38) Olivetti and Canon are actual competitors for copying machines of the low-end speed range. Both manufacture and sell these machines.

(39) They are potential competitors in copying machines of the medium range. Canon is already on that market. Olivetti which long ago had an insignificant activity on that market, which is adjacent to that of the low range for a short time, could re-enter it and stay there alone. Olivetti's skills and technology for coping machines could be extended to higher-range models. The input products are largely the same. Demand is sufficient to support such business and mid-range machines permit higher revenues and higher profits. Olivetti is a profitable and healthy group (as shown by its turnover and profits for 1985). It could, therefore, bear alone the technical and financial risks associated with the production of mid-range machines.

(40) In the market for facsimile products, Olivetti and Canon are actual competitors. Canon is an important manufacturer. Olivetti is a supplier on an OEM basis with an important volume in Italy (24 % of all sales there).

(41) By contrast, Olivetti and Canon are not competitors for high-range copying machines. Canon has a negligible market share and Olivetti no activity. This range is very far from that in which Olivetti is currently doing business.

Neither are the parent companies competitors in the laser printer market. Canon is a main manufacturer on that market; but Olivetti is neither an actual nor potential competitor. Olivetti would need a certain amount of time to reach the necessary skills and technology and to convert plants. The conversion would need substantial investments in machines and plant extension. At the speed of the technological progress in this sector, Olivetti could not reasonably risk entering the market with an out-of-date product, while many competitors are already well established in that market and in a position to keep pace with the technology. In spite of its financial means, it does not appear that Olivetti could reasonably bear alone the high financial risks associated with the production of laser printers.

(42) The setting-up of the joint venture restricts competition between the parent companies. These will no longer compete at the production stage (a) as to copying machines, for a segment which accounts for more than one-half of the low-range market, and (b) in future possibly also for the mid range and facsimile. This will result in identical production costs for both, with an inevitable influence at the sales stage. The products sold will be substantially the same, in spite of a cosmetic and trademark differentiation. Each party will have less autonomy in determing its sale prices than it would have if its production costs were different from those of the other parent company. The scope for competition at the sales stage is thus limited as a result of the joint venture.

Competition in terms of investment is also appreciably reduced. It is most unlikely that either of the parties, after having put substantial financial resources into the joint venture, will undertake costly investments in capacities competing with those of the joint venture.

Moreover, the joint venture restricts competition in terms of development and designing of the relevant products. Because of the common development and design within the joint venture, the parties no longer have any interest in investing financial, manpower and time resources independently in the same matter.

Other restrictions of competition contained in the agreements

Master business agreement

(43) The obligation on the parties to endeavour to promote and sell the products of the joint venture, and even more to purchase a minimum volume from the latter, (a) reduce the independence of the parties in their sales policy and their possibility to compete with each other with products other than those manufactured by the joint venture, and (b) distorts competition of third manufacturers who supply or could supply the parties on an OEM basis. These restrictions are appreciable. Olivetti's sales of copying machines were OEM as to a majority and still as to a substantial proportion after the start of the joint venture and sales of facsimile are totally OEM. Apart from its production outside the EEC, Canon has two plants in the EEC manufacturing copying machines, one in direct competition with the production of the joint venture.

(44) The requirement of mutual agreement for supplies of each partner outside its group and under trademarks designated by it with joint venture products based on the technology of the other partner or of the joint venture (if Canon is the supplier), constitutes a two-fold restriction. It limits the competition (i) of the supplier *vis-à-vis* the other partner and (ii) of third undertakings which could be interested in purchasing the joint venture products from the partners in order to sell them on an OEM basis. This effect is already tangible in the case of Canon, which has such OEM relationships.

(45) The obligation on each partner to sell the joint venture products under its brand name and in its own network (apart from on an OEM basis) limits the independence of its sales and trademark policy.

It also eliminates the possibility for third companies to obtain the distribution of the joint venture products from partners or for these to grant licences to them for their trademarks.

(46) The obligation on the parties to differentiate the image of their products also limits the independence of their sales policy and their ability to compete by offering a product as similar as possible to each other's. However, to the extent that this differentiation can also result in competition, there is little evidence that the obligation in question has appreciable negative effects on competition.

(47) The preference the joint venture has to give to the parent companies in purchasing its components could be considered a restriction of the competition of third suppliers of those components. However, this restriction is not appreciable, as the preference will be given only if the components supplied by the parent companies are competitive with those of third suppliers.

Licence agreements

(48) The exclusivity for manufacturing in the licensed territory limits competition *vis-à-vis* the joint venture from each licensor, which cannot manufacture there, and from third companies which cannot be licensed in the same territory. In a highly competitive and large EEC market, there could be some undertakings interested in manufacturing in the licensed territory in order to sell there or in other parts of the EEC. This assessment extends to the obligation on the parties to the technical assistance and licence agreement (Canon) to comunicate to one another improvements of their licensed technology, to the extent that this communication to the joint venture is made under the terms of the licence agreement, i.e. under an exclusivity of manufacturing.

The limitation of the licensed products and territory restricts the competition that the joint venture could bring at the production stage.

(49) The following obligations pursuant to the licensing agreements do not constitute appreciable restrictions of competition: (i) the obligation not to assign or to sublicense the licence, and, (ii) the obligation of confidentiality in respect of the technical information and know-how even after the termination of the agreement.

(50) Finally, the licence agreements contain similar provisions to those of the master business agreement concerning sales outside the groups of the partners, trademark and differentiation of the products.

The restrictions are appreciable

(51) All the restrictions of competition mentioned in paragraphs 42, 43, 44, 45 and 48 above have an appreciable affect on most of the markets involved. For low-range copying machines, Canon is the leader in the EEC market with a 23,7 % market share and Olivetti has a 7,3 % market share.

In mid-range machines Canon has a market share of 6,7 %, which is not negligible. Olivetti is currently only a potential competitor in that market, but it could be expected that if it re-entered it would rapidly acquire a market share of a few points, on the strength of the name it already has in this sector.

In the facsimile market Canon is the second supplier with 19,7 % (Panasonic 21,4 %) and Olivetti has a 2,5 % market share.

Finally, the parties are both large in size and main suppliers of office automation products. Because of the tight link between the products involved in that sector the formation of a joint venture between them has an impact in the several markets involved irrespective of the parties' shares in each of these markets.

The effect on trade between Member States

(52) The agreements in question are likely to affect trade between Member States. The products manufactured by the joint venture are for marketing *inter alia* throughout the EEC. The licence agreements also concern the EEC territory.

B. Article 85 (3)

(53) The notified agreements quality for an exemption under Article 85 (3) as they offer benefits for the Community competition policy which outweigh the effects restrictive of competition.

The benefits of the cooperation

(54) The joint venture contributes to improving technical and economic progress for the following reasons:

(a) on all the markets involved, and in which the parties are competing, the technology is fast-moving and the degree of competition high. In order to compete efficiently, the undertakings on those markets have to offer products which are the result of the most up-to-date technology, at competitive prices. Up-to-date technologies, however, require large investments in research and development. The expansion of production in the EEC which is the effect of the joint venture enables the parties to spread the costs of these investments over a larger numer ofproducts: otherwise the costs of those products would be too high for producers to be able to sell them at a competitive price.

The joint venture is therefore apt to avoid duplication in costs of development.

Research does not fall directly within the scope of the joint venture. However, by virtue of the obligation on the partners to communicate to the JVC the continuing flow of their expertize, and on Canon the improvements of the research carried out independently, this research is tightly linked to the activity of the joint venture. Research will also be stimulated by avoiding the duplication of its costs.

(b) The joint venture enables a transfer of the benefit of advanced technology to Olivetti, a Community undertaking, in markets where technology is of crucial importance. An important part of the transferred technology comes from an undertaking, Canon, which is a leader of innovation and whose policy is R&D-oriented, as is shown by the percentage of the turnover and work force involved in R&D and its significant past and present achievements. It is within the scope of the joint venture that this transfer be extended to such highly sophisticated products as facsimile and, even more, laser printers (which are considered products for the future). It is reasonable to expect that the combination of this technology with that of an also R&D-oriented EEC undertaking will contribute to improving the technological patterns of the EEC industry and ultimately its competitivity. This will result in improving production and distribution and technical progress.

Consumers' share of the benefits of the agreements

(55) Consumers will benefit from the introduction into the markets involved of new products which are the result of the improvement of the technology excepted from the joint venture will finally be passed on to the consumers in terms of competing prices, as the markets involved are highly competitive.

Indispensability of the agreements to achieve those benefits

(56) The benefits of the increase of research and development, the improvement of technology dand the strengthening of the competitivity of the European industry through the transfer of technology could not be achieved without the joint venture. Without that cooperation, costs of R&D and production would be spread over a smaller number of units, and this would result in either an insufficient improvement of the products manufactured by one or both of the companies, or higher prices of those products. The grant of a licence would not have allowed the transfer of technology to the same extent as in allowed by a joint venture. The major involvement of the partners inherent in a manufacturing joint venture permits a permanent and intense flow of technology.

(57) The following restrictions are economically connected with the joint venture and therefore indispensable for its correct functioning:

(a) the obligation to endeavour to promote and sell the products of the joint venture and to purchase a minimum volume from the latter. The investments in development and production capacities in the framework of a joint venture and the transfer of technology to it would not be conceivable if the partners themselves could, by purchasing substantially elsewhere, hamper the necessary return on capital;

(b) the obligation of mutual agreement for each partner's sales outside its group and under trademarks designated by it and essentially based on the other's technology. This obligation is intended to prevent the technology developed by a partner being used in manufacturing a product which through the other partner would be sold by a third undertaking in competition with the former. As the joint venture is set up to manufacture 'captive' products for the parties, it would be against its purpose for it to manufacture products for the partners's competitors;

(c) the obligation on each partner to sell under its brand name and in its own network. It has the purpose of making the identification of the product coincide with that of the partner's network and therefore to maintain the distinction between the production within the joint venture and the separate distribution by the partners. It is also apt to avoid the linkage of joint venture products with third competitors through any distribution or trademark licence agreement;

(d) the exclusive nature of the licence to the joint venture for manufacturing. The risks of setting up the joint venture along with the financial investments and transfer of technology could not be reasonably undertaken if the parties could not rely on that exclusivity;

(e) the limitation of the licensed products and territory. Such restriction should enable the joint venture to concentrate its manufacturing efforts on those products and its exclusive territory.

No elimination of competition

(58) Competition is restricted to an appreciable extent by the notified agreements which bring together a leader in the EEC relevant market and another important supplier. However, they do not eliminate competition in respect of a substantial part of the products in question. As to the low-range copiers market, in which the partners' market shares are important, the partners' production structures other than those related to the segment jointly manufactured are not affected, especially those for the PC segment. (This segment accounts for a substantial part of the relevant market and thus influences considesrably the partners' market shares, especially Canon's). More than half of Olivetti's sales wesres on an OEM basis. As to facsimile, Olivetti is an OEM supplier, not a manufacturer. The markets involved are competitive in the EEC because of the number and size of suppliers who cannot be deemed to cease being a sufficient counterweight. As the parties are independent in regard to sales, there is no significant risk of on appreciable increase of the degree of concentration.

Duration of the exemption

(59) In accordance with Article 8 (1) of Regulation No 17, a decision in application of Article 85 (3) of the Treaty is issued for a specified period.

(60) In the case of production joint ventures requiring substantial long-term investments and concerning a new product not yet fully established on the market, a period of 12 years appears indispensable to enable the parties to rely on the enforceability of the agreements and to obtain a satisfactory return on their capital.

(61) Due to the fact that an important benefit expected for the purpose of exemption is the transfer of advanced technology as indicated in paragraph 54 and that as to some of the products covered by the exemption the joint venture will operateonly in a second phase, it is appropriate to enable the Commission to satisfy itself that the conditions of Article 85 (3) continue to be fulfilled.

For that purpose, in application of Article 8 (1) of Regulation No 17, the present decision will impose on its addressees an obligation.

(a) to provide the Commission, at the latest on 30 March every two years of the exemption period starting from 30 March 1988, with a report on the overall asctivities of the joint venture and the overall application of the exempted agreements;

(b) to inform the Commission of any new agreement in relation to the exempted agreements and of any modification or extension of those exempted agreements,

HAS ADOPTED THIS DECISION:

Article 1

1. The provisions of Article 85 (1) of the EEC Treaty are hereby declared inapplicable, by virtue of Article 85 (3), to the joint venture agreement and related agreements concluded between Ing C. Olivetti & C, SpA and Canon Inc. and notified by them.

2. Paragraph 1 shall apply in respect of each agreement from the date of its notification (1 April 1987) to 1 April 1999.

Article 2

The following obligations are hereby imposed on the addresses of this Decision:

1. to provide the Commission, at the latest on 30 March every two years of the exemption period starting from 30 March 1988, with a report on the overall activities of the joint venture and the overall application of the exempted agreements,
2. to inform the Commission of any new agreement in relation to the exempted agreements and of any modification or extension of those exempted agreements.

Article 3

This Decision is addressed to:

(i) Ing. C. Olivetti & C, SpA, Via G. Jervis 77, I-10015 Ivrea,

(ii) Canon Inc., 30-2 Shimomaruka 3 — Chome, Ohta-ku, Tokio, Japan.

Done at Brussels, 22 December 1987.

For the Commission

Peter SUTHERLAND

Member of the Commission