COMMISSION DECISION

of 18 December 1985

relating to a proceeding pursuant to Article 85 of the EEC Treaty

(IV/30.739 — Siemens/Fanuc)

(Only the English and German texts are authentic)

(85/618/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 Greece, and in particular Article 3 (1),

Having regard to the Commission Decision of 10 December 1982 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, in accordance with Article 19 (1) of Regulation No 17 and Commission Regulation No 99/63/EEC of 25 July 1963 on the hearings provided for in Article 19 (1) and (2) of Council Regulation No 17 [2],

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

Whereas:

I. THE FACTS

The undertakings

1. Fanuc Ltd is a Japanese undertaking. It was formerly known as Fujitsu Fanuc Ltd, having been set up by Fujitsu Ltd in 1972 to conduct the business of its computer control division. Fujitsu Ltd owns 44,8 % of Fanuc's shares, Siemens AG owns 5,1 % [3] and others own 50,1 %. Fanuc's turnover in numerical controls in 1984/1985 was yen ... [4] world-wide and yen ... in the EEC. Fanuc has established several subsidiaries in the EEC: Germany (1976), France (1978), United Kingdom (1980). These subsidiaries were set up to service and maintain Fanuc NCs sold with machine tools into which they had been incorporated outside the EEC. In addition, Fanuc Mechratronics SA (Luxembourg) has now been established as a manufacturing facility.

2. Siemens AG is an undertaking incorporated in the Federal Republic of Germany with its head office in Munich. In 1984, Siemens' group turnover was DM .... Siemens' turnover in numerical controls in 1983 was DM ... world-wide and DM ... in the EEC. In 1979, Siemens' market share for numerical controls was 45 % in Germany, 8 % in Italy, 12 % in France and 10 % in the United Kingdom. Siemens produces a wide range of numerical controls which, in recent years at least, covers most customers' requirements.

The product

3. Numerical controls (NCs) are special-purpose computers used mainly in the machine-tool industry. They control the sequence of motions and operations of a machine-tool. The installation of the NC frequently requires extensive preparatory engineering and programming in close cooperation between the NC manufacturer or distributor and the purchaser. According to Siemens, an NC can amount to between 6 % and 18 % of the total cost of the machine-tool.

(1) OJ No 13, 21. 2. 1962, p. 204/62.

(2) OJ No 127, 20. 8. 1963, p. 2268/63.

(3) It has recently been announced that Siemens has sold most of its shares in Fanuc.

(4) Certain figures have been omitted in the published version of the Decision pursuant to Article 21 (2) of Regulation No 17.

The use of NCs in the machine-tool industry

The following Tables [1] show the growing importance of NCs in the Community's machine-tool industry:

TABLE 1

(in million US $)

EEC 10 (all machine-tools)	1971	1976	1980
Production	3 153	4 690	8 800
Consumption	2 478	2 948	6 300

TABLE 2

(in million US $)

EEC 10 (NC machine-tools)	1976	1980
Production	554	1 820
Consumption	338	1 560

TABLE 3

NC machine-tools as a percentage of all machine-tools

EEC 10	1976	1980
Production	12	21
Consumption	11	25

TABLE 4

Annual growth rates 1976 to 1980

EEC 10	All machine-tools	NC machine-tools
Production	17	35
Consumption	21	47

By way of comparison, Tables 5 and 6 give the same figures as Tables 3 and 4 for the USA and Japan:

TABLE 5

NC machine-tools as a percentage of all machine-tools

	1976	1980
Production:		
— USA	24	26
— Japan	19	41
— (EEC 10)	(12)	(21)
Consumption		
— USA	21	27
— Japan	34	30
— (EEC 10)	(11)	(25)

TABLE 6

	Annual growth rates All machine-tools	1976 to 1980 NC-machine-tools
Production:		
— USA	22	25
— Japan	42	63
— (EEC 10)	(17)	(35)
Consumption:		
— USA	27	35
— Japan	34	30
— (EEC 10)	(21)	(47)

The importance of NCs for new and succeeding generations of machine-tools can hardly be overstated. The European machine-tool industry has suffered from its delayed conversion to standardized NCs. In its communication to the Council on advanced manufacturing equipment in the Community of 21 March 1985 [2], the Commission found that as a result of the delayed introduction of new information technologies, European manufacturers of small machining centres and NC lathes have price handicaps in relation to their Japanese competitors of 10 to 40 % on the European market and as much as 60 % on the American market [3].

(1) See the Commission's statement on the machine-tool industry, 8 February 1983, SEC(83) 151.

(2) COM(85) 112 final; Bulletin of the European Communities, Supplement 6/85.

(3) Ibid., Annex I.

The situation of the NC market in the EEC in 1975

4. In 1975, almost twice as many NCs were produced in the EEC as in Japan. US production was slightly higher than EEC production. General Electric, a US corporation, was the world leader in NC production and had the strongest market position in terms of sales in the EEC. However, dramatic changes took places as a result of the development of standardized NCs and by 1977 Japan had taken the lead in the production of NC machine-tools. By 1981, Japanese producers accounted for 53 % of NC machine-tools manufactured in the West and Japanese production was double that of Western Europe. General Electric's share of NC sales in the EEC had fallen to . . . in 1981 and Fanuc had become the world market leader.

In 1975 Fanuc produced a complete range of NCs. In that year it sold 2 000 NCs world-wide, double the 1971 figure but only one-tenth of the 1980 figure. Fanuc's exports to the EEC amounted to . . . units, as against . . . in 1971, . . . in 1974 and . . . in 1980. Fanuc's indirect exports, i.e. NCs already attached to machine-tools, were . . . units in 1975 and . . . units in 1980.

In 1975, Siemens was a well-established market leader in the production, marketing and servicing of NCs in the EEC. In Fanuc's view, Siemens' range was deficient in lower level products. Fanuc was attracted to Siemens as an exclusive distributor for its products because of its familiarity with the needs of EEC machine-tool manufacturers and its established network of sales engineers and servicing facilities.

In the years following the 1975 agreements with Fanuc, Siemens steadily increased its share of the NC market in the EEC. In 1980, it had by far the largest market share, with a commanding presence in all the major national markets. The undertaking with the second largest market share, General Electric, was also present in major Community markets, but with a much smaller market share overall. Other undertakings with significant market shares in one or the other of the Member States were Allen Bradley, Bosch, Elsag, Gildemeister, NUM-Télémécanique, Philips and Posidata.

Although Fanuc is now the world's leading manufacturer of NCs, in 1975 it was a much smaller concern. It was, however, a subsidiary of Fujitsu Ltd, one of the largest Japanese conglomerates and had developed numerical controls with considerable success on the Japanese market. Fanuc had been selling NCs in the EEC through its exclusive distributor, Siemens, since 1972. The market for NCs in the EEC was in the early stages of development towards widespread use of computerized numerical controls and Fanuc wished to penetrate the market as effectively as possible. Although Fanuc began to establish subsidiaries to provide after-sales service for NCs already incorporated into machine-tools imported into the EEC from 1976 onwards, it chose in 1975 not to set up its own sales network, however initially modest it might have been, but rather to enter into reciprocal exclusive distribution and other agreements on 11 June 1975 with Siemens, a major competitor. There follows a summary of these agreements.

The agreements

5. Following the conclusion of earlier agreements in 1965 and 1972 by Siemens and Fujitsu, Siemens and Fanuc entered into a number of agreements on 11 June 1975. These consisted of a basic agreement and four individual agreements and were amended several times thereafter. They were finally abrogated on 19 April 1983.

6. By the 1972 agreement, Fujitsu granted Siemens exclusive selling rights for its (Fujitsu's) NCs (unless already combined with a machine-tool) in the whole of Europe except the USSR. Fujitsu also undertook not to grant manufacturing licences for NCs to any third party in that territory and to grant such licences to Siemens on request. Siemens agreed to sell a certain volume of Fujitsu NCs defined as a percentage of sales of its own NCs in any one fiscal year.

7. The basic agreement of 11 June 1975 stated in its preamble that cooperation in the marketing of NCs was in the parties' joint interest. Moreover, cooperation in the development of NCs was deemed necessary. Under the agreement, Siemens granted Fanuc exclusive selling rights for its NCs in Asia and Fanuc granted Siemens exclusive selling rights for its NCs in Europe. The parties agreed to aspire to 'balance the value of the mutual supplies of the various products covered by

the agreement on the condition of the requirements of each party's market'. Each party undertook to supply to the other all necessary technical data and information for the marketing, installation and servicing of the products concerned and to inform the other promptly of any improvements and modifications of the products and of any developments of new models or decisions to discontinue old models. Each party had the right to put its own trade mark on products supplied by the other for resale in the allotted territory. There were also provisions regarding sales rights in other parts of the world: they are not the concern of this Decision.

The parties also agreed to cooperate in research, development and production with a view to developing jointly new NCs, sharing information regarding research and development work and making available to each other all design and manufacturing information regarding controls to be manufactured in the future. An advisory committee was to be set up to decide on development projects and to distribute work between the parties in approximately equal proportions.

8. In addition to the basic agreement of 1975, a number of 'individual agreements' were concluded.

9. Individual Agreement I

The preamble to this agreement states that:

'In the areas of research and development the parties intend to coordinate their work in such a way as to

a) develop jointly new controls
b) inform each other in other respects with regard to their actual research and development work, and
c) make available to each other all design and manufacturing information with regard to all controls, the manufacture of which they shall start after the beginning of the cooperation.'

Individual Agreement I was divided into two sections. Section I, dealing with joint development contained, *inter alia*, the following provisions:

Article 1: Joint development

The parties agreed to develop numeric controls for machine tools as agreed upon by the advisory committee. Joint development would proceed according to clearly defined steps but in such a way as to ensure that the work was distributed to both parties 'in an approximately equal scope'. Each party was free to develop numerical controls by itself or, subject to previous discussion, under technical licence from third parties to satisfy the requirements of its own market from time to time, but this provision was subject to the obligation of general disclosure which was required to be made under Section II.

Section II of the agreement dealt with the coordination of the development and the exchange of information and included the following provisions:

Article 2: Definitions

For the purposes of the agreement, 'information' meant all results of developments, including the joint developments of the parties, technical information and technical documentation under which either party was entitled to grant licences. The only information excluded was information and documentation which either party was actually manufacturing and offering to the market at the time the agreement was made.

Article 3: Further cooperation in development

The parties agreed to make available to each other their research and development information in accordance with the principles of an 'open-door policy'. Each party would endeavour to communicate such information to the other as early as possible, particularly where the development of a new or more modern product or manufacturing process was beginning to take form.

Development work was to be coordinated and a joint 'committee for research and development' was to be established to control the exchange of information provided for by the agreement. In fact the committee never came into existence.

Article 4: Exchange of information

Each party agreed to transmit to the other, on request, technical information concerning the products covered by the agreement as it became available and in the manner provided for in the agreement.

Article 5: Performance of exchange of information

Unless otherwise agreed, neither party would disclose to third parties any information received from the other party under the agreement, even after the expiry of the agreement, unless such information had become public. Each party agreed to supply to the other as far as possible and at most-favoured prices and terms, all materials, components and other products which the other party required but did not itself manufacture. In fulfilling this condition the parties would endeavour 'to maintain a balance of the values of the products they supply to each other in such manner'.

Article 6: Licences for manufacture

The parties granted to each other non-transferable non-exclusive licences for the manufacture of the products covered by the agreement by Siemens in Germany and by Fanuc in Japan as well as for the use and sale of such products in all countries except those where an exclusive right had already been granted or might be granted to third parties.

Article 7: Agreements with third parties

The parties agreed that, in concluding agreements with third parties, no arrangements should be made which might adversely affect the cooperation provided for in the agreement. Any issues arising within this context would be raised in the advisory committee.

Each party should advise the other in good time of any plans which might influence the form and extent of the cooperation provided for under the agreement.

Each party should advise the other of any proposals to grant licences to third parties. The advisability of concluding such licences should be discussed beforehand if either party so desired.

10. Individual Agreements II and III

These two agreements under which Fanuc granted sales rights to Siemens in Europe and Siemens granted sales rights to Fanuc in Asia, were framed in substantially the same terms. The main provisions of these two agreements may be summarized as follows:

Article 1: Definitions

'Controls' meant all numerical control equipment, including drive units manufactured by either party and complete machine tools manufactured by Fanuc.

'Sales territory' meant Asia as regards Fanuc and Europe as regards Siemens.

'Machines' meant machine-tools and other machines.

Article 2: Grant of sales rights

Each party granted the other the right to sell its controls in the other's sales territory, where the controls were to be combined with machines in that sales territory. Neither party could offer or sell its own controls to third parties in the other party's sales territory unless the control had already been combined with a machine outside the territory.

Each party should use its best efforts to promote the sales in its own territory of the products of the other party in order to increase the parties' respective market shares.

Article 4: Cooperation

Each party should from time to time provide the other with all necessary technical data and information for the marketing, installation and servicing of the products.

Each party was to inform the other promptly of any improvements and modifications to the products and of any developments of new types or decisions to discontinue old types.

Article 5: Trade marks

Each party had the right to put its own trade mark in its own territory on the products supplied by the other party.

Article 6 of Individual Agreement III: Marketing information

Each party should on request supply the other with details of its marketing activities (including tender prices, delivery prices, supplies, delivery conditions etc.,) in the USSR and Bulgaria.

Article 6 of Individual Agreement II and Article 7 of Individual Agreement III

Neither party should disclose to third parties confidential information resulting from their cooperation under the agreements.

11. Individual Agreement IV

This agreement concerned sales rights conferred by one party on the other in other countries, except the United States where the parties marketed their products jointly through their jointly owned subsidiary. The principal provisions may be summarized as follows:

Article 1: Grant of sales rights

Siemens granted to Fanuc the right to sell Siemens controls in Australia and Fanuc granted Siemens the right to sell Fanuc controls in South America, India and South Africa.

Article 2: Applicability of provisions of other agreements

In so far as each party granted sales rights to the other, the provisions of Individual Agreement II or III should apply as appropriate.

Article 3: Modifications and further sales rights

At the request of either party the territorial assignments made in Article 1 could be modified.

12. With respect to other countries not dealt with in Individual Agreements II, III and IV, particularly in respect of the oil-producing countries, the United States of America excepted, the parties should make arrangements on a case-by-case basis before 31 December 1976.

13. The memoranda of 20 August and 6 October 1982

Following inquiries made by the Commission, Siemens and Fanuc signed a memorandum stating the parties' intention to modify certain provisions of their agreements. A second memorandum was signed on 6 October 1982 modifying certain provisions of the parties' agreements with effect from 5 October 1982.

14. Absence of notification

None of the abovementioned agreements was notified to the Commission in accordance with Article 4 of Regulation No 17.

15. The new agreements

The basic agreement was to remain in force until 1985. In the event, seven new agreements were concluded on 19 April 1983 and notified to the Commission on 1 July 1983. The agreements are to remain in force until 31 December 1992 and may be renewed for periods of two years. These new agreements are not the subject of this Decision.

16. On 19 April 1983, Siemens and Fanuc also concluded a memorandum abrogating the basic agreement of 11 June 1975 and Individual Agreements I to IV of the same date, as last amended on 6 October 1982, together with an agreement on robot systems of 12 May 1978, an agreement by letter of 5 February 1981, an agreement on general terms and conditions for Fanuc machine-tools of 1 September 1981 and a memorandum of 20 August 1982. It was provided that licences acquired and rights granted pursuant to Individual Agreement I of 11 June 1975 under information and patent rights filed before the end of the term of that individual agreement should continue in force.

17. The Commission's investigations and statements made by Siemens and Fanuc revealed the following facts:

— the technical nature of NCs is such that close cooperation between the manufacturer and the user is essential. Consequently, parallel imports are a less than satisfactory alternative to direct supplies for machine-tool manufacturers who are not themselves NC manufacturers and are thus unlikely to have the requisite technical skills and experience, particularly as Fanuc's subsidiaries established in the EEC from 1976 onwards were responsible for servicing NCs already incorporated into imported machine-tools,

— the selling price of Fanuc NCs was on average 34 % higher in the common market to EEC machine-tool manufacturers than in Japan to Japanese machine-tool manufacturers,

— the price at which Siemens sold Fanuc NCs in the common market was on average 163 % of the price at which Siemens purchased them from Fanuc,

— Siemens was not aware of Fanuc's selling prices for its NCs in the Far East and made no attempt to find out what they were,

— the cost of the NC can amount to between 6 % and 18 % of the total cost of a machine-tool.

II. LEGAL ASSESSMENT

Article 85 (1)

18. Article 85 (1) provides that all agreements between undertakings 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 shall be prohibited as incompatible with the common market.

19. Siemens and Fanuc are undertakings within the meaning of Article 85 (1) and their agreements are agreements within the meaning of that provision.

20. The agreements in question relate to the distribution of goods in the common market and to research, development and production arrangements for goods sold or to be sold in the common market. Article 85 applies to those agreements in so far as they concern the distribution of goods and the research, development

and production activities of undertakings active in the common market.

(a) *Distribution*

21. The agreements between Siemens and Fanuc provided for a *de facto* sharing of markets between them with the result in the EEC that Siemens was the exclusive distributor of Fanuc NCs. In the event, Fanuc did not sell many Siemens NCs in Asia, but the principle of exclusivity was adhered to. The agreements also provided for research, development and production: these provisions will be dealt with separately at (b) below.

Siemens was able to widen its range of NCs on sale in the EEC by the addition of Fanuc's products and to neutralize the direct impact of an important competitor. Fanuc's strategy of selling standardized NCs to a machine-tool industry which adapts its products accordingly, rather than producing custom-made NCs to meet each machine-tool's individual characteristics, was shown to be successful on a world-wide scale. The agreements between Siemens and Fanuc in the EEC helped to retard and make more expensive the competitive development of the European machine-tool industry.

22. From 1975 to 1983, Siemens was the exclusive distributor of Fanuc NCs for the whole common market, except for Greece, which was excluded from February 1981, while Fanuc was the exclusive distributor of Siemens NCs in Asia. In fact, there was little demand for Siemens NCs in Asia and very few were sold there. In the common market, on the other hand, a considerable demand arose for Fanuc NCs to which Siemens, as the sole distributor, was alone able to respond. The price at which Siemens sold Fanuc NCs in the common market was stated by Siemens at the hearing to be on average 163 % of the price at which Siemens purchased NCs from Fanuc. It is recognized that Siemens contributed by its efforts to the success of Fanuc NCs in the common market. Nevertheless, again on Siemens' own admission, the difference between selling prices of Fanuc NCs in the EEC and in Japan was on average 34 %. This difference was sufficient to encourage attempts to seek purchases direct from Fanuc. The agreement between Siemens and Fanuc was sufficient to thwart such attempts.

23. Siemens and Fanuc are and were at all material times competitors. Although Fanuc was at the outset a smaller company than Siemens, it was nevertheless a subsidiary of Fujitsu Ltd, a large Japanese undertaking, and had established a position of strength in the market for NCs in the Far East from which it was later able to expand to become a world market leader. When, in 1975, it concluded an exclusive distribution agreement for the common market with Siemens, Fanuc was already present in that market through its earlier agreements with Siemens and imported machine-tools carrying Fanuc NCs. In view of Fanuc's market position, its resources and expertise, Fanuc's argument that it could only expand in the common market by means of an exclusive distribution agreement with Siemens cannot be accepted.

Restrictions of competition within the common market and effect on trade between Member States

24. The agreement between Siemens and Fanuc whereby only the former could sell the latter's NCs in the EEC prevented all other undertakings in the common market from buying NCs direct from Fanuc, making Siemens the only practical source of supply of Fanuc NCs in the common market since the scope for parallel imports was in practice severely limited. This not only restricted the freedom of the parties to the agreement, but also affected the position of third parties, particularly machine-tool manufacturers in the EEC, who might have wished to purchase Fanuc NCs from suppliers other than Siemens. It would appear on the basis of the difference between the prices charged by Siemens for Fanuc NCs in the EEC and those charged by Fanuc itself for the same products in the Far East that there was a considerable saving to be made by purchasing from Fanuc direct. Several attempts were made to arrange such purchases and Fanuc referred inquiries from Europe to Siemens. A restrictive agreement between an undertaking in the common market and a competitor in a third country which brings about the isolation of the common market from a potentially cheaper source of a product essential to the development of a major Community industry, in this case the machine-tool industry, may be, and in this case is, of such a nature as to distort competition within the common market and to affect trade between Member States. The Court of Justice has acknowledged this principle in a case relating to trade mark rights [1] and it is equally applicable in the case at hand.

[1] Cases 51/75, 86/75 and 96/75 *EMI* v. CBS, [1976] ECR 811, 871 and 913.

As a result of the agreement and the factual context in which it operated, the flow of trade between Member States developed on lines other than those which would have prevailed otherwise. This is because, but for the agreement, EEC undertakings other than Siemens would have been able to buy NCs from Fanuc for use or resale in their own or another Member State (1).

In the light of the size of the undertakings involved and the importance of NCs as a new technology product for the Community machine-tool industry, the effect on trade between Member States was appreciable.

25. For these reasons, the agreement between Siemens and Fanuc whereby the former had exclusive distribution rights for the latter's NCs in the common market had an appreciable effect on trade between Member States.

26. In conclusion, the 1975 agreements infringed Article 85 (1) of the EEC Treaty in so far as they provided for exclusive distribution by Siemens of Fanuc NCs in the EEC.

Article 85 (3)

27. The 1975 agreements referred to above and found to have infringed Article 85 (1) were not notified to the Commission in accordance with Article 4 of Regulation No 17. They do not fall within the block exemption granted at all material times by Commission Regulation No 67/67/EEC (2), since Siemens and Fanuc were manufacturers of competing goods who entrusted each other with exclusive dealing in those goods (Article 3 (a)). In addition, the agreements provided for more than exclusive distribution arrangements, containing as they did restrictions regarding research and development. They therefore fell outside the scope of Article 2 (1) of Regulation No 67/67/EEC. In the absence of notification, therefore, the agreements are not eligible for exemption under Article 85 (3) of the EEC Treaty.

28. While in certain circumstances adequate improvements in distribution within the meaning of Article 85 (3) of the Treaty may occur where a manufacturer entrusts distribution of his goods to a competitor, in this case, where Siemens, a large company, and Fanuc, a member of a large conglomerate group of companies, concluded exclusive dealing and other agreements and parallel imports were not an attractive alternative to direct supplies for commercial and technical reasons, the serious anti-competitive impact of the arrangements between Siemens and Fanuc outweighs any possible improvements in distribution occasioned by Siemens' contribution to Fanuc's successful penetration of the common market. In any case, even if the agreements had been notified, an exemption could not have been granted. The application of the agreements gave rise to a market-sharing arrangement between the parties. Because of the price differences for NCs between the EEC and the Far East and bearing in mind the lack of parallel trade, users in the common market were prevented from gaining any appreciable benefit.

(b) *Research, development and production*

29. It is accepted that the provisions relating to research, development and production in the field of NCs were implemented in the case of one product only, the System 7. This project was a commercial failure and led the parties to realize that the necessary compromises between European and Japanese methods involved in joint work of this nature were unlikely to produce successful results in this field.

30. The object of the provisions in question (see paragraphs 7 and 9 above) was to restrict competition since the scope of the parties' cooperation and the commitment to share work between them entailed joint determination of how the products developed were to be manufactured, how the processes developed were to be applied and how intellectual property rights were to be exploited. Moreover, the parties agreed not to make any arrangements with third parties which might adversely affect their cooperation. These provisions, contained in agreements providing also for extensive cooperation in distribution between competing undertakings, therefore fell within Article 85 (1). The agreements did not have as their sole object the joint implementation of research and development projects, the joint placing of research and development contracts or the sharing of research and development projects. They do not therefore fall within the terms of the Commission's notice of 29 July 1968 concerning agreements, decisions and concerted practices in

(1) See Commission Decision 75/74/EEC, *Duro-Dyne/Europair,* OJ No L 29, 3. 2. 1975, p. 11.

(2) OJ No 57, 25. 3. 1967, p. 849/67.

the field of cooperation between enterprises [1]. Moreover, the agreements fall neither within the categories set out in Article 4 (2) of Regulation No 17 in respect of which notification is not necessary if they are to be eligible for exemption nor within the terms of any relevant block exemption Regulation. They were not notified and so cannot qualify for an exemption under Article 85 (3).

Article 15 of Regulation No 17

31. Under Article 15 (2) of Regulation No 17, the Commission may by decision impose fines of from 1 000 to one million ECU or a sum in excess thereof but not exceeding 10 % of turnover in the preceding business year on each of the undertakings infringing, either deliberately or negligently, Article 85 (1) of the EEC Treaty. In fixing the amount of the fine, regard shall be had to the gravity and the duration of the infringement.

32. In this case, it is not considered appropriate to impose fines in respect of the research, development and production provisions since they were never fully implemented and cannot be said to have had a serious impact on the market for NCs.

33. The distribution provisions in the agreements of June 1975, on the other hand, were applied in full and were to have remained in force until 1985. In the event, following the Commission's intervention and the memoranda of intent referred to in paragraph 13 above, they were abrogated in April 1983. With the exception of Greece which was excluded from Siemens' exclusive sales territory in February 1981, the distribution provisions applied throughout the common market for more than eight years.

34. The provisions granting Siemens exclusive sales rights for Fanuc NCs in the common market constitute a serious infringement of Article 85, since they denied the Community machine-tool industry immediate access at the best possible prices to a development of modern technology of the utmost importance for that industry [2].

35. The Commission considers it appropriate to impose fines on Siemens and Fanuc in respect of their 1975 agreements for the distribution of NCs in the common market, particularly since the parties are competitors and large undertakings in a sector of great importance for the Community machine-tool industry. The parties should have known that such exclusive distribution agreements forming part of wider arrangements may fall within Article 85 of the EEC Treaty. Indeed, perusal of Regulation No 67/67/EEC, which was in force at all material times, should have convinced them at least of the advisability of notification. In the circumstances, it may therefore be concluded that their infringement was intentional or at least negligent.

In considering the gravity of the infringement, the Commission has had regard to all the relevant circumstances. The infringement was of a serious nature since it prevented price competition for Fanuc NCs in the common market and placed users at a considerable disadvantage. The undertakings involved are major participants in an industry of great importance for future technological development and provide a crucial input for the machine-tool industry, itself a vital part of the Community economy. However, regard should also be had to the fact that the parties sought to bring their arrangements into line with the competition rules when the Commission intervened in this matter. Finally, Siemens and Fanuc bear the same responsibility for the infringement and should therefore be fined identical amounts.

HAS ADOPTED THIS DECISION:

Article 1

The provisions of agreements of 11 June 1975 between Fanuc Ltd and Siemens AG relating to exclusive selling rights for numerical controls in the comon market and to research, development and production of numerical controls constituted until their abrogation infringements of Article 85 of the EEC Treaty.

Article 2

1. For their involvement in the infringement relating to Siemens AG's exclusive selling rights in the common market for numerical controls manufactured by Fujitsu Fanuc Ltd and later by Fanuc Ltd, fines of one million ECU each, equivalent to Lfrs 44 744 900 (forty-four million, seven hundred and forty-four thousand, nine

(1) OJ No C 75, 29. 7. 1968, p. 3, as corrected by OJ No C 84, 28. 8. 1968, p. 14.

(2) The significance of the new technologies for the machine-tool industry and the importance of market competition and free trade in this context were stressed by the European Parliament in its resolution of 29 March 1984 on the European machine-tool industry, OJ No C 117, 30. 4. 1984, p. 92.

hundred) or DM 2 190 750 (two million, one hundred and ninety thousand, seven hundred and fifty), are imposed on Fanuc Ltd and Siemens AG.

2. These fines shall be paid within three months of the date of notification of this Decision into one of the three following accounts of the Commission of the European Communities:

(a) Kredietbank (Agence Schuman), 2 rond-point Schuman, B-1040 Brussels, account No 426-4403003-54 (for payment in ECU);

(b) Caisse d'Epargne de l'Etat, 1 place de Metz, L-2954 Luxembourg, account No 1/002/9906/6 (for payment in Lfrs);

(c) Sal. Oppenheim & Cie., Unter Sachsenhausen 4, D-5000 Cologne, account No 260/0064910 (for payment in DM).

Article 3

This Decision is addressed to:

1. Fanuc Ltd
   Oshinomura
   Minami-Tsurugun
   Yamanashi Pref. 401-05
   Japan
2. Siemens AG
   Postfach 103
   D-8000 Munich 1

This Decision shall be enforceable pursuant to Article 192 of the EEC Treaty.

Done at Brussels, 18 December 1985.

For the Commission

Peter SUTHERLAND

Member of the Commission