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## Numéro

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4306660131 Brussels - Leeds - UK Signé par : IBBETSON  
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## 4306660131 - Rapport détaillé

Date	Heure	Agence desservant la zone	Points de contrôles
Mars 26, 2004	12:28	Brussels - Belgium	Envoi enlevé
Mars 26, 2004	22:13	Brussels - Belgium	Envoi traité à l'agence DHL d'origine
Mars 26, 2004	23:35	Brussels - Belgium	Envoi enlevé du centre de service DHL de Brussels - Belgium
Mars 27, 2004	02:43	Brussels - Belgium	Envoi enlevé du centre de service DHL de Brussels - Belgium
Mars 28, 2004	16:57	Bergamo - Italy	Envoi arrivé au centre de service DHL de Bergamo - Italy
Mars 29, 2004	09:24	Leeds - UK	Programmé pour livraison
Mars 29, 2004	12:44	Leeds - UK	Signature



COMMISSION OF THE EUROPEAN COMMUNITIES

Brussels, 25.03.2004  
SG-Greffe(2004)D/ 201176

**BY COURIER SERVICE**

Ms Wilson  
Euromax Association  
National Museum of Photography,  
Film & Television  
Pictureville, Bradford,  
UK - West Yorkshire - BD1 1NQ

**Subject: Case COMP/C-2/37.761 - Euromax v/ IMAX**

Dear Ms. Wilson,

I refer to the complaint by the Euromax Association (Euromax) of 10 January 2000 pursuant to Article 3(2) of Council Regulation N° 17 regarding alleged infringements within the meaning of Article 82 of the Treaty by the IMAX Corporation (IMAX). I furthermore refer to the Commission's subsequent correspondence<sup>1</sup> with Euromax and IMAX.

In view of the information submitted by you and on the basis of the facts in its possession, the Commission informed you by letter of 1 July 2002 pursuant to Article 6 of Commission Regulation N° 2842/98 that it takes the preliminary view that there are insufficient grounds for pursuing your complaint under Article 82 of the Treaty.

The Commission has now decided to finally reject your complaint on the grounds set out below. In taking this decision the Commission has fully taken account of your comments set out in your letter of 13 September 2002 in reply to the Commission's Article 6 letter of 1 July 2002.

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<sup>1</sup> Summary of the main elements of the correspondence between the Commission, IMAX and Euromax: IMAX was given a non-confidential version of the complaint and submitted its preliminary response to the complaint on 4 April 2000. Euromax replied to IMAX preliminary response on 23 November 2001. Following the Commission's pre-Article 6-letter of 5 March 2001, Euromax submitted further comments on 9 July 2001 and 21 August 2001. The Commission subsequently sent a formal request for information to IMAX on 18 September 2001 pursuant to Article 11 of Regulation 17 to which IMAX responded on 9 November 2001. IMAX made a further submission on 7 December 2001 and Euromax submitted a summary of their claims on 11 March 2002. This gave rise to a number of questions that were sent by email to IMAX and which replied in submissions of 26 March 2002 and 9 April 2002. In addition there has been several exchanges of emails, faxes and letters.

## **1. THE ALLEGED INFRINGEMENTS**

The alleged infringements concern an abuse by IMAX of a dominant position within the meaning of Article 82 of the Treaty in the supply and maintenance of the 15/70 mm format IMAX system for the projection of films on giant screens. The complaint is focused on two points:

- (1) IMAX charges an excessive rental payment for the IMAX system, and
- (2) IMAX is tying maintenance services to the supply of the IMAX system.

## **2. ECONOMIC DATA**

The IMAX theatre network currently consists of more than 220 IMAX affiliated theatres in 30 countries. Approximately 60 percent of the theatres are located in North America, while the remaining 40 percent are spread internationally.

In 2002 IMAX' revenues from IMAX systems amounted to US \$ 70 959 000 while IMAX' total revenues amounted to \$ 130 650 000. In 2002 the net earning of IMAX were \$ 11 972 000.

IMAX' European revenues in 2002 amounted to \$23 846 000 *i.e.* approximately a third of IMAX' revenues for the IMAX systems

In 2002, 43 IMAX systems were installed in Europe. For comparison, there were about 22 000 conventional screens. IMAX could therefore be considered to be a minor player in the theatrical film industry.

## **3. THE TECHNOLOGY**

The technology of the IMAX system combines an advanced high-resolution film projection system, a sound system and a giant screen for the projection of a certain category of films in special movie theatres.

### **3.1. The IMAX technology and its development**

IMAX develops, manufactures and licenses giant screen projection systems for the 15/70mm film format, which enables the showing of images that are substantially larger and exhibit significantly higher picture resolution than any other film format.

The 15/70 mm format is the largest commercially exploited film format. The dimensions of the film format used poses particular and extraordinary requirements to the film transportation system of the projection equipment. The film is 70 mm wide and has 15 perforations per frame. A normal feature film is 35 mm wide and has 4 perforations per frame. The projection equipment for the 15/70 mm format differs substantially from conventional 4/35 mm format projection equipment. While 4/35 mm film run vertically through projectors, the 15/70 mm uses a special advancing technology the 'rolling-loop-process' by which the film is led horizontally through the projector. The 'rolling-loop-process' is a technology, which IMAX originally developed and patented. Due to the large film format, the film rolls are very heavy and if the conventional film advancing

system were used, a film would become unusable after very few performances because the perforation is destroyed.

The 15/70 mm films are projected in the 2D or 3D formats giving the audience *'the feeling of being in the scenery'*. A dual projection system is required for 3D films. Spectators must carry special glasses to benefit from the 3D experience. Some theatres are equipped with a 'Dome' technology meaning that they have a cupola installed into which the film is projected. The 15/70 mm projection equipment is produced to support specific construction requirements and is therefore generally built in new tailor-made buildings, since existing buildings usually require substantial modifications.

The screens used for the IMAX projection system is large (29 m x 38 m) compared to an ordinary movie theatre screen (14.7 m x 7.1 m).

Films in the 15/70 mm format differ significantly from conventional films in length and content. The large film format has the consequence that the maximum running time of a 15/70 mm format film should not exceed 75 minutes. The films normally feature popular documentary scientific or nature issues for entertainment purposes, rather than pure fiction. Although their appeal is distinct from general fictional feature films, the films are nevertheless directed at a general audience for entertainment purposes.

Commercial large format theatres use 15/70 mm IMAX projection systems. However, there are other types and formats of projection equipment for large format theatres than the 15/70 mm format. They are the 8/35 mm; 8/70 mm and 10/70 mm formats but these formats have not achieved a commercial success.

Euromax is comparing the 15/70 mm format to the 8/70 mm format, although no European commercial theatre seems to be using the 8/70 mm format. The 8/70 mm format customers are typically theme park operators or science museums and are not regarded as a substitute by purchasers establishing theatres for a general audience.<sup>2</sup> The 8/70 mm format is not interchangeable with the 15/70 mm format because it only allows projection on screens that are 50% smaller than the screens for the 15/70 mm format (16 m x 22 m compared to 29 m x 38 m). The 8/70 mm system is technically much simpler – for instance, it does not require a rolling loop process, which is an essential element of the IMAX 15/70 mm projection technology.

### 3.2. IMAX' IPRs

The original basic technology and design of the IMAX system, which was originally protected by a patent, is now in the public domain. Before the expiry of the basic patent, IMAX experienced problems with industrial espionage. There are now competing producers of 15/70 mm projectors, although none has yet sold any 15/70 mm projectors in Europe. In the US, the competitors have installed very few 15/70 mm systems. IMAX has a number of patents on improved versions of its projector system technology and is continuing its R&D for the perfection and development of the technology. The calibration of the IMAX projection system which is required for its correct functioning requires access to secret know-how, which is in the possession of only IMAX.

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<sup>2</sup> Page 25 of the complaint.

IMAX' inventions cover various aspects of its proprietary technology and many of such inventions are protected by letters of patent or applications filed throughout the world. IMAX currently holds 43 patents, has 15 patents pending in the United States, and has corresponding patents or patent applications filed in many countries throughout the world including Canada, Japan, Korea, France, Germany and the United Kingdom. The subject matter covered by these patents and applications encompasses electronic circuitry and mechanisms employed in film projectors and projection systems (including 3D projection systems), a method for synchronizing digital data systems and a process for digitally re-mastering 35mm films into the 15/70 mm format.

While IMAX considers its patents to be important to the overall conduct of its business, it does not consider any particular patent essential to its operations. Certain of the IMAX' patents in the United States, Canada and Japan for improvements to the IMAX projector, IMAX 3D Dome and sound systems expire between 2008 and 2018.<sup>3</sup>

IMAX owns or otherwise has rights to trademarks and trade names used in conjunction with the sale of its products, systems and services. The following trademarks are considered significant by IMAX in terms of the current and contemplated operations of the Company: IMAX®, *The IMAX Experience*®, *An IMAX Experience*®, IMAX® DMR™, IMAX® 3D and IMAX® Dome. These trademarks are widely protected by registration or common law throughout the world. IMAX also owns the service mark IMAX THEATRE™.

#### **4. THE RELEVANT MARKET**

Although the product characteristic are likely to suggest that there could exist a separate relevant product market for 15/70 mm large screen projection equipment and that IMAX's share of that market could suggest that IMAX would hold a dominant position, the findings thereof may be left open as the Commission considers that there is no abuse as explained below.

#### **5. ALLEGED EXCESSIVE PRICING**

##### **5.1. IMAX' business model**

Originally IMAX used to sell the IMAX systems. However, in the early nineties IMAX changed its business model and began renting the IMAX systems instead. IMAX therefore remains the owner of the systems installed in the theatres. Under the rental system, the lessees pay a onetime Initial Rent plus a monthly Additional Rent.

When a theatre owner opts for the installation of an IMAX system, IMAX does not simply deliver the hardware: IMAX supervises the installation of the IMAX system in the theatre. IMAX undertakes the run-in testing in the theatre and the training of the theatre staff as operators of the IMAX system. IMAX advises the theatre with respect to the optimal cinematic and acoustic design and construction of the theatre.

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<sup>3</sup> IMAX's 2002 annual report, p. 12.

During the term of the rental agreement IMAX grants to the theatre a non-exclusive and non-transferable license to use the trademark "IMAX®".

## **5.2. Initial remarks**

Before the subject matter of the complaint is discussed, certain initial remarks regarding issues raised in this case are appropriate:

- (1) The Commission considers that the Initial and the Additional Rent are the items that are relevant to consider when assessing whether this case involves excessive pricing and are those items against which the complaint is made.
- (2) It is not contrary to EC law that an undertaking switches its business model from that of selling its equipment to renting it instead. IMAX justifies its switch of business model with a desire to increase protection of its know-how after an industrial espionage event, lower the burden of up-front financing for theatres, a risk sharing with theatres and ensuring the quality of presentation of movies on which the value of the IMAX' trademark depends.
- (3) A payment system for the renting / licensing of equipment, services and IPR consisting of an initial payment plus a continuous usage-based charge is not as such contrary to European competition law.

## **5.3. Euromax' allegations regarding excessive pricing**

Euromax bases its excessive pricing allegation on the fact that a lessee pays a one time up-front Initial Rent, which is payable when the IMAX system is delivered and in addition the lessee pays an Additional Rent which is calculated on the basis of the number of theatre admissions (turnover). A minimum level of the Additional Rent is set, which is calculated on the basis of the seat capacity of the theatre.

Euromax argues that the Initial Rent is equivalent to or exceeds the fair market value of the IMAX system and that it is equivalent to what should be the purchase price of the system. Euromax bases its allegation with reference to a comparison with the prices of IMAX's competitors for 15/70 mm projectors and 8/70 mm projectors.

Euromax furthermore argues that the combination of the Additional Rent and the Initial Rent leads to excessive pricing for the IMAX projection system. Euromax considers that the requirement to pay the Additional Rent means that IMAX theatres over the entire term of the lease will have paid a rent for the system, which is significantly above the actual value of the system. Euromax argues this is only made possible because IMAX holds a dominant position, which it abuses.

## **5.4. Comparison of the IMAX system with those of its competitors' systems**

### **5.4.1. Consistency of Euromax' comparison of the IMAX system with other projection equipment**

According to the case-law of the Court of Justice, a finding of excessive pricing requires an objective comparison of the price of the product in question and the cost of development and production and other costs over the life of the system. A comparison with prices of similar products is allowed as a fallback possibility. Any such comparison must, according to the Court of Justice, be "consistent", that is to say, involve the same

products with similar quality and functionality, in the same volumes, and subject to the same terms and conditions.<sup>4</sup>

Euromax has compared the IMAX system with the projection equipment manufactured by IMAX' competitors – both 8/70 mm projectors and 15/70 mm projectors. The Commission has noted the following in respect of Euromax' comparisons:

#### 5.4.1.1. Comparison with competitors' 15/70 mm projectors

Euromax has obtained prices from two of IMAX' competitors: IWERKS and MEGA-systems. According to Euromax' complaint<sup>5</sup> the prices of the competitors' equipment are roughly comparable with that of the Initial Rent charged by IMAX. However, the prices given are provided for comparison purposes by the competitors and are thus not actual prices. It is moreover indicated that the actual bid prices will vary with specific requirements of the purchaser *i.e.* the competitors' systems are also tailor-made just as those of IMAX. Consequently, the competitors' prices are off-the-shelf prices and do not reflect the prices for installed tailor-made systems which by their nature are likely to be significantly higher. Moreover, the competitors' indicated prices do not contain any element of payment for the use of any brand label such as IMAX® (most likely because they have not invested in building up a brand and are not associated with any proprietary brand recognition) or additional services, such as those provided by IMAX.

The differences in type of contracts and performances compared are therefore too great to allow a sufficiently qualified and appropriate comparison. The competitors' offers concern system purchases plus installation, whereas the IMAX system lease agreement is a mixed contract, consisting of the IMAX system lease plus additional services, including in particular the trade-mark license, the 98% uptime guarantee, advice concerning the best cinematographic and acoustic design, and technical support.

A consistent comparison can therefore not be made on this basis. If nevertheless an attempt would be made to compare the IMAX systems with that of its competitors, it would seem likely that it would not be to the disadvantage of IMAX considering the value of the IMAX brand<sup>6</sup> for which a payment by the licensees (theatre owners) is a normal part of such a business relationship.

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<sup>4</sup> *United Brands*, above. See also *SACEM III* [1989] ECR 2811, referring to "a comparison of the fee levels ... on a consistent basis." and similar wording in *Bodson v. Pompes Funèbres* [1988] ECR 2479.

<sup>5</sup> Complaint of 10 January 2000, page 16 and Euromax fax of 22 March 2002.

<sup>6</sup> The Commission has in particular found the following passage from the White Oak study (White Oak Associates, Inc., March 2002 "Competitive Issues, 8/70 and alternative 15/70 Industry Equipment Suppliers and Theatres") compelling:

"IMAX's royalty is justifiable, based on the considerable effort and expense put forth by the company [IMAX] to create a recognizable trade name, and a perception of consistent, known quality. It is easy for other vendors to comment unfavorably about this fee, but, of course, they can only do so in isolation of everything else, *i.e.*, they would have people believe that this is simply a line item cost, and that no benefit whatsoever is conveyed by the brand. It is doubtful that anyone with even the least degree of marketing acumen would agree that a weak brand is superior to a strong one."

5.4.1.2. Comparison with 8/70 mm projectors – the Chemnitz report

Euromax considers that the 15/70 mm format displays unique features, as stated in the submission of 23 November 2000, Points III, 3 and 4, page 14:

*"As made abundantly clear...the 15/70mm format offers unique features to customers which make it different from any other cinema experience. It also shows distinct features in terms of technology, pricing, industry structure, films offered, audience etc.*

*...  
It suffices to reiterate Euromax' position that these specific features make 15/70mm projection systems...unique in every respect and – thus – comprising a market of its own. This view...has been upheld on various occasions by the Federal Cartel Office and competent German Cartel Courts.*

*...  
Already in light of these locations it becomes abundantly clear that the markets for 8/70 mm and 15/70 mm systems are not reasonably interchangeable..."*

In decisions of the Bundeskartellamt and the Berlin Cartel Court, which were attached to the complaint, it appears that these authorities consider the 15/70 mm projection equipment to display distinct product characteristics. The Bundeskartellamt stated<sup>7</sup> that

*"...the IMAX 15/70mm projection systems are by far the best projection systems in terms of quality, to which no equivalent alternative exists."*

The findings of the Bundeskartellamt and the Berlin Cartel Court,<sup>8</sup> which was also involved in the case, was emphasised by Euromax in its complaint of 10 January 2000:

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In reality, the owner of Brand X has to start almost from scratch - promoting the giant screen concept first, then the theater and, finally, the film. Of course, this process is time-consuming and expensive. Often, the process involves people saying, "Well, it's like an IMAX theater."

*Presently, North American average ticket prices (ATP) are in the range of \$5.00-\$6.00. If the royalty amount owed is \$100,000, and ATP is \$6.00, attendance of 16,667 is required to pay the fee, taxes and other fees excluded. Then, the question is, will the IMAX brand allow for capture of 16,667 more people than a non-IMAX brand? White Oak's theater attendance database -- which compiles figures for both IMAX theaters and those of other brands -- suggests that, in many cases, IMAX-branded theaters are better attended than those of other brands: often significantly so under similar market circumstances and association with comparable host institutions. This might not apply in every instance, but it is frequently true.*

Thus, if attendance at a Brand X theater is more than 16,667 below potential, income will be lost, compared with an IMAX theater. If attendance declines by a greater amount than this, actual income lost exceeds the royalty payment rather quickly. Assuming an ATP of \$6.00, attendance potential losses of 25,000 and 50,000 results in income shortfalls of \$150,000 and \$300,000, respectively. Why would anyone want to lose up to \$200,000 to save \$100,000 and face an uphill battle to get their off-brand established – a battle that would include additional costs not accounted for here?"

<sup>7</sup> On page 12, §3 of its decision.

<sup>8</sup> Entscheidung Landesgericht Berlin, 14 September 1998.



*"...the FCO (Bundeskartellamt) and the Berlin Court have analysed in depth the question of whether 15/70mm projection systems are sufficiently distinct from other projection systems to form a separate product market for the purposes of assessing IMAX' anti-competitive behaviour. Both the FCO and the Berlin Court came to the conclusion that the 15/70mm projection systems comprise a separate product market and are not reasonably interchangeable in use by the consumer with other special format projection systems."*

Nevertheless later on, when the Commission did not follow Euromax' allegations concerning the abuse of a dominant position, Euromax proceeded to compare the IMAX system with 8/70 mm projectors.

In its submission of 11 March 2002 Euromax included a private expert report commissioned by a Euromax member (the Chemnitius report of 28 January 2002) which compares the price charged for the customised IMAX system installed in the Berlin Potsdamer Platz IMAX theatre, which features a 3D projection system including the DOME option, with the prices of IMAX' competitors for 8/70mm systems.

The Chemnitius report - the conclusions of which IMAX strongly disputes - attempts to establish a fair market value for the IMAX system using the list price of an 8/70 mm system as the lowest common denominator.

The Chemnitius states in its initial remarks that the DOME projection wall is not included in the comparison, as it is built on-site. Regarding the sound-system Mr Chemnitius considers that 60% of the installed sound-system is used for the DOME projections. It has not been indicated why the level is 60%.

In comparing the prices of the 8/70 mm projector, Mr Chemnitius adds on 35% on the top of the basic price of the 8/70 mm projector to compensate for the rolling loop systems which the IMAX system is equipped with. He adds 10% for the water-cooling which the IMAX system is equipped with compared to the competitors' air cooling system. He adds 5% for the fact that IMAX is equipped with a 15kW "Xenon-Kurzbogenlampe" compared to the less powerful lamps which the competitors' projectors are equipped with. Moreover, Mr Chemnitius remarks that the Xenon-Kurzbogenlampe gives a superior image quality and more light which is a crucial issue in view of the big surface that the projectors has to light up.

There is no explanation or documentation given for the levels of the add-ons.

The comparison therefore leaves the clear impression of being based on a number of subjective elements, which are not verifiable such as in particular the adjustments made by Dr Chemnitius for the prices for various items to compensate for the significant technical differences among the 8/70 mm and 15/70 mm systems in terms of performance and quality. Moreover, one competitor's prices, which have been used, have been labelled by that competitor as "estimated" prices.

Furthermore, and very importantly, the Chemnitius report only compares the cost of hardware (the various technical elements of the projection equipment). The comparison disregards the value of the IMAX brand, which is a major feature of the IMAX-system. Also the other additional services, which IMAX supplies in connection with the establishment of the theatre project, attributable to theatre design, project management,

installation supervision and warranty, 98% uptime guarantee, designs and training, are disregarded.

For example, in a submission of 9 July 2001 Euromax acknowledges that IMAX provides a maintenance service, which the competitors do not, that IMAX is a brand name and that additional service in the form of basic training is provided.

The Commission notes that subsequent to the Commission drawing its own preliminary conclusions in the present case in its Article 6 letter of 1 July 2002, the Landgericht Nürnberg-Fürth 4. Kammer für Handelssachen in a decision of 20 December 2002 concluded that prices of the IMAX system could not be compared to its competitors' prices because, as the Landgericht stated, the competitors sell their systems instead of leasing them, they offer 8/70 mm systems in contrast to IMAX' 15/70 mm systems and they do not license any brand as IMAX does. The Landgericht decided that a comparison of IMAX's prices with those of its competitors could not take place already because of the branding issue. The Landgericht considers the value of the brand, which was not quantified in its procedure, to be a significant factor in the cinema business.

As emphasised by the Landgericht Nürnberg-Fürth, IMAX is an established brand, which is known world-wide. IMAX' competitors enjoy no such brand recognition. In a situation where there are alternative suppliers of 15/70 mm projection equipment present, which unlike IMAX do not grant licenses to exploit any brand, theatre owners could lease or buy such equipment instead and avoid incurring the additional expense of paying for the IMAX brand. However, branding is a feature, which seems to have a significant value to the theatre owner. The fact that branding is very important to Euromax' members is illustrated by an email of 21 March 2001 from Euromax' legal advisor where he states that cinemas continue to buy IMAX equipment:

*"...for a variety of reasons, the most important being that (i) Imax has the better brand...(iii) neither Iwerks nor Megasonics - at least at that time - had maintenance capabilities in Europe...and (iv) neither Megasonics nor Iwerks at that time had any installations in Europe which could demonstrate that they could handle it (and they still don't have)."*

On 24 July 2003, the Oberlandesgericht München rejected Siewerts anti-trust defence, which was mounted as a justification for Siewert's refusal to pay rent to IMAX, and found that there was no evidence of excessive pricing. Siewert's argumentation was based on an argumentation similar to the one made in the present case.

The Commission concludes that Euromax has not provided a consistent comparison of the IMAX system with other projection equipment - that is to say, a comparison that involves the same products with similar quality and functionality and subject to the same terms and conditions. This is the standard, which is required by the Court of Justice.

#### *5.4.2. Reasonableness of the level of the rent for the IMAX system*

When considering whether IMAX's prices are excessive regard must be had to the test as set by the Court in the *United Brands* case. The Court stated that a price can be considered excessive *"because it has no reasonable relation to the economic value of the*

*product supplied*<sup>9</sup>. The Court further explained that the questions to be determined are: (i) whether the difference between the costs actually incurred and the price actually charged is excessive and, if the answer to this question is in the affirmative (ii) whether the price is unfair in itself or when compared to the price of competing products.

This is in principle a twofold test where the first part would require a cost/price analysis. However, for the purposes of analysing the factual and legal elements brought forward by the complainant, the Commission bases its analysis only on the second part of the test, because, even under the assumption that the first part would be met, the second part of the test is not fulfilled.

First, the non-reasonableness of IMAX's rent has not been proven when compared with other projection equipment. The argument about the reasonableness of IMAX' rent level – as brought forward by the complainant in its submissions – seems to be based on a comparison with other projection equipment. The evidence presented to the Commission by Euromax does not point to circumstances which permit the Commission to draw the conclusion that a consistent comparison of the IMAX system has been made with other projection equipment. It is appropriate to note here that according to the case law of the Court of First Instance that the Commission is not obliged to take into account circumstances that have not been brought to its attention by the complainant and that it could only have uncovered by an investigation of the case.<sup>10</sup> The Commission cannot therefore conclude on the basis of the evidence presented to it by the complainant that IMAX's rent exceeds what is reasonable in relation to the economic value of the IMAX system.

In this context, it must moreover be added that the Commission considers that the division of the rent into an Initial Rent and an Additional Rent does not change the appreciation of the overall rental level. The Commission does not find that the elements brought forward by the complainant demonstrate that the Initial Rent is equivalent to a purchase price for the individual system and that the Additional Rent, which is charged on top of the Initial Rent, is to be considered as an additional purchase price. The same applies to the argument that it constitutes a monopoly profit, since over the period of the lease an amount double or triple of the actual value of the system is paid, because the complainant has not provided evidence that IMAX's rent exceeds what is reasonable in relation to the economic value of the IMAX system, as the complainant has not provided a consistent comparison of the IMAX system with other projection equipment.

While the comparison of the Initial Rent with the purchase price of the competitors' equipment cannot be made on a consistent basis – any attempt to do so in any event would be likely to suggest that IMAX Initial Rent is lower than what would be the purchase price for a competitors' system displaying the same characteristics as that of IMAX (that is including the trademark, brand and additional services).

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<sup>9</sup> Case 27/76 *United Brands v Commission* ECR [1978] 207.

<sup>10</sup> Judgment of the Court of First Instance of 4 March 2003 in case T-319/99, *Federación Nacional de Empresas de Instrumentación Científica, Médica, Técnica y Dental (FENIN) v Commission of the European Communities*. (Not yet published).

Euromax also requests the Commission to reconsider the reasonableness of the level of IMAX' rent using the principles stated in the *TetraPak II* case<sup>11</sup>.

However, there are factual differences between the *Tetra Pak II* case and the present case, which obliges a different assessment of the two sets of facts. There are significant factual differences between the two sorts of machines in question e.g. in respect of their life span. The TetraPak machines have a much shorter life span than IMAX projection equipment and the Tetra Pak lease agreements in some cases even exceeded the physical life of the Tetra Pak machines. The situation is quite different in respect of IMAX projection equipment.

If the level of Initial Rent is compared to the Additional Rent over a 10 year period the Initial Rent constitutes 65% of the total payments made.<sup>12</sup> If the period of comparison is made over a 20-year period, which is at least the useful life of the IMAX system according to IMAX, the Initial Rent only constitutes 40-50% of the payments made.<sup>13</sup> Both calculations show that the value of the Initial Rent of IMAX system is considerably lower than the 98% *base rental fee* recorded in the Tetra Pak case.

In addition in the Tetra Pak case the Commission considered the timing of the payments. In the Tetra Pak case the lessees were charged

*"...a base rental fee virtually equal to the selling price and amounting to almost the entire sum of present and future rental charges..."*

The Commission concluded in the Tetra Pak case that:

*"The charging of this base rental completely distorts the nature of the lease contract since it requires the leaseholder to pay in advance, at the time the machine is placed at his disposal, almost the entire sum of present and future rental payments (up to 98%). Such a requirement makes the lease contract equivalent to a purchase contract in terms of the financial commitment required of the user, but does not confer ownership rights on that user. Conversely, the transaction gives Tetra Pak the benefit of sale by providing an equivalent and immediate financial return and guaranteeing that the transaction is virtually irrevocable: the financial loss to the leaseholder would be too great for him to consider terminating the lease before the end of the machine's useful life. In particular, this enables Tetra Pak to receive income from the system of tied sales of cartons throughout that life, but the group avoids having to transfer ownership of the machine.*

As stated above, no evidence has been produced which justifies drawing the conclusion that the Initial Rent is equivalent to or exceeds the fair market value of the system nor that it is equivalent to a purchase price of the system.

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<sup>11</sup> Official Journal, L 72 of 18.3.1992, p. 1.

<sup>12</sup> Page 7, section 1.3 of Euromax's submission of 9 July 2001.

<sup>13</sup> See page 47, §112, of IMAX's reply to Euromax's complaint.

The proportion constituted by the Initial Rent of the total payments made to IMAX does not permit the drawing of a conclusion similar to that which the Commission drew in the Tetra Pak case. That is that the base rental (Initial Rent) charged by IMAX completely distorts the nature of the lease contract since it required the leaseholder to pay in advance, at the time the machine is placed at his disposal, almost the entire sum of present and future rental payments. This is far from the situation in the present case.

It can therefore not be concluded that the IMAX lease contract is equivalent to a purchase contract in terms of the financial commitment required of the theatre. It is therefore not an issue that the commercial relationship between IMAX and the theatre does not confer ownership rights on the theatre. IMAX does not get the benefit of a sale in terms of providing an equivalent and immediate financial return.

The Commission therefore concludes – on basis of the analysis of the circumstances brought to the commissions attention by the complainant – that there is no evidence that the price for the leasing the IMAX system is un-reasonable in relation to the economic value of the system. Consequently, it is not abusive within the meaning of Article 82 of the Treaty.

#### **6. TYING OF MAINTENANCE SERVICES AND SUPPLY OF THE IMAX SYSTEM**

Euromax complains that the licensing agreements entered into between IMAX and the theatres contain provisions pursuant to which the theatres agree for IMAX to provide for maintenance services for the IMAX system.<sup>14</sup> Maintenance services may not under this scheme be purchased on a case-by-case basis but the individual theatre must rather subscribe to IMAX' Full Service Program. Euromax considers this requirement to be an illegal tying of licensing of IMAX technology to maintenance services.

IMAX offered theatres a new Shared Customer Service Program in May 2001 as an alternative to IMAX' Full Service Program involving training of in-house technical expertise and a reduced annual service fee. Euromax stated that the proposal of IMAX for the new Shared Customer Service Program was 'commercially uninteresting'<sup>15</sup>. Euromax also complained that the acceptance by the theatres of the new Shared Customer Service Program was linked to the signing by the theatres of a 'release' whereby the theatres would undertake to withdraw their support of the present complaint. IMAX waived the requirement of the signing of the 'release' on 16 June 2003 and the acceptance of the Shared Customer Service Program is now unconditional.

Although Euromax, states that it does not find the new Shared Customer Service Program commercially very interesting, the Commission has taken note of the fact that at least 12 of the ca 40 existing European theatres have signed up to the new Shared Customer Service Program. This suggests that at least these theatres find that the Shared Customer Service Program is an acceptable alternative.

Regarding the requirement by IMAX that it undertakes the maintenance of the IMAX system, such requirement may be justified by the fact that the equipment remains the

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<sup>14</sup> Euromax' complaint of 10 January 2000, p. 3.

<sup>15</sup> Euromax' letter of 21 august 2001, p. 1.

property of IMAX. It is not illegal - even for a dominant - lessor to insist on maintaining its own equipment as a means to protect its patents or know-how, to maintain leased equipment in good condition as he retains property of the equipment.

Both IMAX' Full Service Program and IMAX' Shared Customer Service Program includes confidentiality provisions and minimum quality specifications including training obligations. Both programs are thus designed to preserve the IMAX system integrity (in particular know-how) and operations quality such as the 98% up-time guarantee provided by IMAX.

The Commission therefore concludes that IMAX' requirement regarding maintenance may be justified by the fact that the equipment remains the property of IMAX and IMAX' legitimate right to protect its know-how and to maintain leased equipment in good condition. Therefore, even if Imax were to be considered to hold a dominant position in the market for large film format equipment, the requirement by IMAX of theatres being obliged to get maintenance from IMAX or alternatively subscribe to the Shared Customer Service Program does not in itself constitute any abuse for the purposes of Article 82 of the Treaty.

#### **7. COMMUNITY INTEREST - PARALLEL NATIONAL COURT PROCEDURES**

The Commission notes that, in parallel with this complaint to the Commission, members of Euromax have brought or are involved in a number of court proceedings with IMAX before German courts. These proceeding are likely to have substantial direct actual or foreseeable effects on the competition situation in Germany, the results of which are likely to reflect on the situation for the non-German Euromax members, as the competition law issues at stake are largely the same as those at issue in the present procedure.<sup>16</sup>

In the same manner as the Euromax members have gone to national courts to protect their rights under Article 82 of the Treaty, this is a way that is likewise open to the formal complainant in this case, Euromax.

The Commission's action in this case is therefore not necessary or indispensable for a resolution of the competition law aspects of the cases, which could appropriately be resolved by the national courts. The German courts are ruling on the same competition law issues, as those in the present procedure, and these courts would be able to award damages, if a breach of Article 82 were to be identified. The national courts therefore fully have the power to protect the complainant's rights under Article 82 of the Treaty.

The assessment of the lack of Community interest should be seen in the context of the Euromax member's ability to get full and appropriate protection from national courts together with the fact that IMAX has ceased require that theatres sign a release when

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<sup>16</sup> Most recently, on 24 July 2003, the Oberlandesgericht München (Court of Appeals) in a case between IMAX and the Euromax member Siewert, who has refused to pay IMAX' fees, Siewert's antitrust arguments, which are essentially based on the same arguments as those in the Euromax complaint, were rejected by the Oberlandesgericht München. The Oberlandesgericht München finds that the evidence submitted by Siewert does not prove abusive exploitation or any other abuse of a dominant position by IMAX according to German law.

signing up to IMAX's alternative maintenance program which was one of Euromax' complaints. Moreover, it should also be seen in the context that the Commission's finding in the case so far is that IMAX does not abuse a dominant position, as explained above.

## 8. CONCLUSIONS

As it has been explained above, the Commission concludes that Euromax has not provided a consistent comparison of the IMAX system with other projection equipment respecting the standard required by the Court of Justice.

The Commission is moreover of the opinion that it has not been established that the rent is un-reasonable in relation to the economic value of the system. The Commission therefore concludes that there is no evidence that the price for leasing the IMAX system is excessive and consequently abusive within the meaning of Article 82 of the Treaty.

Regarding IMAX' requirement that IMAX itself undertakes the maintenance of the projection equipment *via* IMAX' Full Service Program or *via* IMAX' Shared Customer Service Program, the Commission concludes that such requirement may be justified by the fact that the equipment remains the property of IMAX and IMAX' legitimate right to protect its know-how and to maintain leased equipment in good condition. Therefore, the requirement by IMAX of theatres being obliged to subscribe to either system does not in itself constitute any abuse for the purposes of Article 82 of the Treaty.

The Commission notes that the competition law issues dealt with in the present procedure are also subject to court procedures which have been decided in favour of IMAX and some which are ongoing in Germany and which will eventually decide on the matter. The Commission furthermore notes that this case which seems to be part of a commercial conflict can very appropriately be decided by national courts.

Yours sincerely,

For the Commission

Mario MONTI  
Member of the Commission

