COMMISSION

COMMISSION DECISION

of 12 July 1989

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

(IV/30.566 — UIP)

(Only the English and Dutch texts are authentic)

(89/467/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 the notification for exemption, submitted under Articles 2 and 4 of Regulation No 17 on 11 February 1982 by United International Pictures BV on behalf of Paramount Pictures Corporation, MCA Int., and Metro-Goldwyn-Mayer Film Co., of joint venture agreements and related agreements concerning mainly the production and distribution of feature motion pictures,

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

(1) On 11 February 1982 United International Pictures BV i.o. (hereinafter referred to as 'UIP') notified to the Commission, pursuant to Articles 2 and 4 of Regulation No 17 and on behalf of Paramount Pictures Corporation (Paramount), MCA Inc. (MCA), and Metro-Goldwyn-Mayer Film Co. (MGM), a series of agreements, parties to which are the above undertakings, United Artists Corporation (UA) and Cinema International Corporation NV (CIC), with a view to obtaining negative clearance or alternatively an exemption pursuant to Article 85 (3) of the Treaty.

(2) After a preliminary examination, the Commission considered that the agreements contained a number of clauses that could not be exempted pursuant to Article 85 (3). On 21 May 1985 it therefore opened proceedings and on 20 June 1985 sent the applicants a statement of objections prior to a decision under Article 3 (1) of Regulation No 17.

(3) On 4 November 1985 UIP submitted its reply to the statement of objections requesting an oral hearing in accordance with Article 7 of Regulation No 99/63/EEC (3). The hearing took place on 29 and 30 January 1986.

(4) Following discussions with the Commission, UIP presented in December 1987 and July 1988 two memoranda including several undertakings and setting out a number of amendments to the notified agreements.

A. The parties and the market concerned

(5) Paramount is a company with its registered offices in the State of New York; MCA is situated in California and is the parent company of Universal City Studios Inc. (Universal); MGM is also situated in California and wholly owns UA, a New York company, since July 1981; CIC is a Netherlands company created in 1970 and owned in equal shares by MCA and Paramount. On 1 November 1981 Paramount, MCA and MGM, hereinafter referred to as 'the parent companies', agreed to form UIP as a corporation under Netherlands law.

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

(2) OJ No C 286, 10. 11. 1988, p. 4.

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

(6) The parent companies are all engaged directly, or indirectly through their subsidiaries, in the financing, production and distribution of feature films and other entertainment programmes for exhibition in cinemas, on television and through other media.

(7) The object of UIP is the distribution and licensing on an exclusive basis — principally for exhibition in cinemas — of feature motion pictures, short subjects and trailers produced and/or distributed by Paramount, MCA or MGM/UA or any of their respective parents, subsidiaries, related companies or concessionaries, franchisees or sub-licensees.

(8) The distribution and licensing rights of UIP are geographically described as the entire world other than the United States, United States territories, Puerto Rico and Canada. In the Community, UIP has subsidiaries acting as local distributors in all Member States except Portugal, where it currently distributes its films through a licensee.

(9) Originally, Paramount, MCA, MGM and UA distributed their own films within the Community through their own separate organizations as they still do in the USA. Paramount and MCA founded CIC, in 1970, as a joint venture to merge their separate distribution organizations outside the USA and Canada. CIC had the same object, for them, as UIP. In 1973, MGM decided to abandon its separate distribution organization. On 27 October 1973 it made an agreement with CIC, guaranteed by Paramount and MCA, appointing CIC as its exclusive agent for theatrical and public teledistribution of all its pictures within the same territory. From 1973 until 1981, therefore, CIC engaged in the same activities for Paramount, MCA and MGM as are now undertaken by UIP for Paramount, MCA and MGM/UA.

UA continued to distribute its own films within the Community through its own separate organization until the formation of UIP in November 1981.

(10) The structure of arrangements for financing and for the physical production of theatrical feature films varies greatly from film to film. Films are commonly produced (that is the creative function of arranging for the artistic inputs and supervising the making of the picture itself) by independent persons or companies. These independent persons or companies are financed in whole or in part by production companies such as Paramount, MCA or MGM/UA. When the film is completed and delivered, all rights pass to the producer in the special sense, here Paramount, MCA and MGM/UA, which thereafter markets the film through distributors who take from the producer concerned a licence to distribute the film in certain territories.

(11) This distribution function is generally exercised either in two stages, where the producer licenses the distribution rights for one country or territory to a local distributor, or in three stages, where an international distributor acquires the rights for several countries, or even world-wide, and sub-licenses these rights to a local distributor in individual countries. Local distributors sub-license the exhibition right to exhibitors, in other words to cinema operators. The function of the local distributor is to negotiate film rental agreements with exhibitors, advertise and promote the film, collect and disburse rental fees, and arrange for the physical production of an adequate number of prints and their delivery (rental) to local cinemas. The amount of licence fee paid by the exhibitor to the distributor is usually a fixed percentage of net box-office takings to which a break clause is attached allowing the percentage to rise as box-office returns rise over an agreed ceiling.

(12) There are many possible measures of the size of the market for the exhibition of films in cinemas: the number of films; admissions (the number of tickets sold); box-office receipts; or rentals (the part of box office receipts paid by the cinemas to the distributors for the right to show a film). Of these, box-office receipts (the amount paid by the public to see a film) seems to be the most generally meaningful although completely comprehensive figures are not available.

(13) Taking into consideration the limited availability of statistics, the figures provided by the parties and by the relevant national trade associations indicate that the parent companies account for approximately 22 % of Community box-office receipts although averaging, in the last few years, a higher share in some Member States (UK: ± 35 %) and lower in others (Greece: ± 13 %; France: ± 16 %).

It should be stressed however that market share figures also vary widely from year to year depending on the success of the films available. Taking, by way of example, the first four years of operation of the joint venture, UIP's estimated market share in the then Member States was as follows:

(in %)

Country	1981	1982	1983	1984
Belgium/Luxembourg	25	17	31	18
Denmark	23	23	33	22
France	16	13	17	14
Germany	21	16	30	19
Italy	15	21	25	31
United Kingdom	34	35	56	36
Ireland	22	23	37	21
Netherlands	26	14	26	21

Later figures confirm this finding:

(in %)

Country	1985	1986	1987	1988
Belgium/Luxembourg	20	23	21	23
Denmark	21	31	23	24
France	11	13	12	11
Germany	20	22	21	25
Italy	14	20	16	20
United Kingdom	21	29	26	33
Ireland	15	15	12	19
Netherlands	29	38	31	30

B. The agreements as originally notified

1. *Enumeration*

(14) The agreements comprise:

— an agreement called the joint venture agreement (JVA) dated 5 October 1981 and an amendment thereto dated 1 November 1981, under which the parent companies agree to set up and run UIP,

— four franchise agreements (FA) dated 1 November 1981, signed between subsidiaries of the parent companies and UIP, which regulate the various relationships arising from the JVA:

  — agreement between Paramount Pictures Corp. International BV and UIP,

  — agreement between MCA International BV and UIP,

  — agreement between MGM International BV and UIP,

  — agreement between CIC NV and UIP,

— four guaranties all dated 1 November 1981, signed by each parent company to UIP in relation to the FA,

— two further agreements, dated 5 October and 1 November 1981 respectively, concerning the expansion of UIP's activities to include the exclusive distribution of films for exhibition on pay television,

— two agency agreements, dated 1 November 1981 and appointing CIC and UA as UIP's agents for the distribution of feature films for the period 1981 to 1991; that is to say during the currency of the franchise agreements,

— an agreement dated 5 October 1981 mahing the effectiveness of the joint venture agreement in any particular jurisdiction conditional upon the satisfaction of any required filings or approvals in such jurisdiction.

2. *Purpose in forming UIP*

(15) According to the parent companies, the sole purpose in forming UIP was to reduce fixed overhead expenses. UIP was conceived as a means of avoiding maintaining the duplicate organizations of CIC and UA. In this context it is further the purpose of UIP to maximize for each parent company the gross receipts from the pictures distributed (Article 3 (d) FA).

3. *Relevant provisions*

The JVA and FA provide *inter alia* for the following:

Organization

(16) Under the notified agreements, each parent company appoints an equal number of directors to the board of UIP (the number of directors is decided by the parent companies jointly from time to time). The board may only act unanimously (Article 1.4 (b) JVA). UIP was to be managed jointly by two co-presidents: one co-president appointed by the directors representing MCA and Paramount, acting together, and the other by the directors representing MGM/UA. As far as possible, the co-presidents were to consult each other on all material matters before taking action with respect thereto (Article 1.4 (c) JVA). However, since the filing of the notification, UIP has replaced the co-presidents with a single chief executive officer. Any action of the stockholders of UIP, other than the election of directors, shall be by unanimous consent of the parent companies (Article 1.4 (d)). The parent companies shall at all times maintain equal rights and interests in UIP (Article 1.4 (a) JVA).

Subsequently, a partners committee was formed, authorized to direct and supervise the board of directors of UIP and empowered with the ultimate authority to manage UIP. A quorum of this committee must include representatives of all three parent companies and in practice it acts unanimously. Those members of the partners committee who also serve on the partners operating committee have full responsibility for overseeing the day-to-day operations of UIP. Among the matters subject to the approval of the partners committee are individual proposals to acquire local products.

Exclusivity

(17) The parent companies grant to UIP an exclusive licence under copyright or otherwise to distribute all feature-length pictures, short subjects and trailer films produced and/or distributed by each parent company or any of its parents, subsidiaries, affiliates and related companies (Article I 1.1 JVA — Article 1 (A) FA).

This exclusivity is granted for the period commencing 1 November 1981 and ending 31 October 1991, and from year to year thereafter, until the agreements be terminated.

The exclusivity is world-wide, except for the USA and Canada. The exclusive licence is granted for the distribution of films for general theatrical and non-theatrical exhibition and for exhibition by pay television, i.e. all exhibition other than by broadcast television and on videocassettes, and other than to some specified customers (e.g. military installations, airlines) (Article IV 4.1 (b) JVA — Article 3 FA).

(18) The parent companies offer UIP their respective rights to all feature-length motion pictures produced, supplied and/or distributed by each of them and for which they own international distribution rights. Under the notified agreements, UIP is not required to distribute all the films offered by the parent companies; it may decline for commercial reasons to distribute a film in one or more Member States. The parent companies may distribute any refused film through other distributors on their own account (Article 3 (d) FA).

However, according to a resolution of UIP's partners committee, UIP is obliged to distribute any picture designated by the respective parent company in any area outside the United States and Canada. Moreover, should a parent company not require UIP to distribute a film, preferring to exercise its right to distribute on its own account, it shall consult UIP regarding the terms of the independent offer to distribute.

(19) Further to the exclusive right for distribution, the parent companies have given UIP the exclusive right to produce, finance and distribute for them non-English-language foreign local product, which means films intended to be distributed primarily in the territory where produced. This right extends to the acquisition (picking up) for distribution by UIP of local films already produced: decisions on such acquisitions are taken by the partners committee. The parent companies retain the right to produce non-English-language pictures for wider distribution but must notify UIP before doing so (Article 5 FA).

Distribution

(20) Prior to the release of any film, UIP has to consult the respective parent company as to the general plans for distribution (including the advertising campaign, dates for release and estimated distribution costs); similar consultations can take place during the release of the film (Article 3 (e) FA). UIP has a duty to use its best efforts to maximize the gross receipts for a film (Article 3 (d) FA).

(21) According to the notified agreements, the parent companies retain control over the manner in which their pictures are produced and financed (save that, before producing non-English-language product for wider distribution, the parent companies must notify UIP). They also reserve the right to control, at their sole discretion, the number of prints of the film, the laboratory to produce them and the amount of advertising expenditure for the pictures to be distributed by UIP, provided, however, that the parent companies agree to the provision of sufficient prints and adequate advertising in order to put UIP in a position to obtain maximum profits from distribution. The cost of advertising, dubbing and printing a film is borne by the respective parent company. The ownership of all prints and advertising material remains with the parent companies.

(22) The general expenses of UIP, i.e. the operating and overhead expenses involved in maintaining its distribution organization, are to be borne by the parent companies in equal shares (Article IV 4.5 (a) JVA). Those expenses are recouped through a distribution fee payed by each parent company to UIP based upon the gross receipts (rentals) derived from the distribution of each parent company's pictures up to the point where such fees equal that parent company's one-third share of UIP's general expenses. After that point, UIP is entitled to a lower distribution fee of any further film rentals earned on that parent company's films.

(23) According to Article 15 (d) FA, '. . . UIP shall pay to the licensor (parent company) as directed all monies then due or reasonably estimated to be due, pursuant to the terms of this agreement'. In addition, the parent companies agree that the profits of UIP will be paid to each parent company in equal shares as dividends on a regular basis subject to the availability of cash and the requirements of law (Article I 1.4 JVA).

C. The agreements as amended following the Commission's intervention

(24) At the Commission's request, UIP and its partners agreed, in their memorandum dated 2 December 1987, to modify the notified agreements in the following manner:

1. *Exclusivity*

(25) Each parent company electing to distribute a picture outside the United States and Canada must grant a right of first refusal, (i.e. the parent company must offer its product for distribution first to UIP) on a territory-by-territory basis, of the theatrical distribution rights to UIP. For these purposes, the Community will be considered one territory. If UIP elects not to exercise its right to distribute a picture, UIP nevertheless must distribute such picture if the

individual party holding the distribution rights in any territory, at its sole discretion, so directs. In these two cases, if UIP elects to distribute a picture or is directed to do so by the individual party holding the distribution rights in a territory, the party holding distribution rights to such picture must grant UIP an exclusive licence to such picture in such territory. It is understood that if UIP advises a party that UIP elects not to distribute a picture theatrically in a territory and the party accepts that determination, UIP loses all further right and interest in the theatrical distribution of such picture and it may be distributed theatrically by some other means in that territory.

Neither the partners committee nor the operating committee nor any other committee of UIP composed of representatives of the parties will participate in UIP's decision whether to exercise its right of first refusal; such responsibility shall be the responsibility solely of UIP's chief executive officer.

(26) As far as pay cable television is concerned, UIP and its partners agreed to delete the agreements dated 5 October and 1 November 1981 relating to pay television from the list of agreements submitted in UIP's notification. UIP and its partners reserve the right to submit a separate notification of those agreements contemporaneously with the deletion of those agreements from the original UIP notification.

2. *Availability of UIP and its partners for the distribution of non-partner films*

(27) UIP and its partners agreed to provide an undertaking to the Commission that UIP shall make itself available, based upon its commercial judgment, to produce, finance, acquire distribution rights to, or distribute feature films of third parties in the Community, and that each partner shall also be available individually, based upon its individual commercial judgment, to produce, finance or acquire distribution rights to local products in the Community which are offered to UIP.

3. *Non-English-language foreign local product and co-production agreements*

(28) UIP and its partners agreed to amend the FA so that the partners retain the right individually to produce, finance or acquire distribution rights to non-English-language foreign local product and to offer such product to UIP for distribution. If UIP declines to distribute such product, each partner retains the right individually to do so through any alternative means.

(29) With regard to co-production agreements, each party retains the right not to acquire any or all foreign area (territories outside the United States and Canada) distribution rights to any picture produced under the terms of a co-production or co-financing agreement with a third party. If any or all foreign area rights are so acquired by a third party, such foreign area rights as have been acquired by a third party may be exploited without regard to UIP. This is to apply to all kinds of co-production agreements irrespective of the terms of the acquisition agreement.

4. *Cost sharing*

(30) At the Commission's request, the partners agreed to modify the clause referred to in paragraph 22 above so that this additional fee paid to UIP in a given year will be applied as a credit against each licensor's obligation to pay one-third of UIP's total operating and severance costs in the subsequent year.

5. *Undertakings*

(31) UIP and its partners agreed to provide an undertaking to the Commission that no committee of UIP composed of representatives of the UIP partners shall consider or discuss plans to release, distribute or market the individual films of any partner.

(32) UIP and its partners agreed also to provide an undertaking to the Commission that UIP or its partners, as appropriate, will maintain records sufficient to show: (i) the title of local product of third parties produced, financed or distributed by UIP in the Community; (ii) the identity of local product of Community origin for which a formal written offer is made by third parties to UIP for production, financing or distribution by UIP in the Community; (iii) feature films of the UIP partners for which they hold the Community theatrical distribution rights that are not distributed by UIP in the Community; and (iv) co-productions of the UIP partners for which they hold Community theatrical distribution rights that are not distributed by UIP in the Community.

(33) By letter dated 27 July 1988 UIP provided the Commission with an undertaking relating to the establishment of an arbitration procedure (see Annex), and the standard forms necessary to implement the arrangements for resolving disputes with exhibitors.

D. Third parties' observations

(34) The Commission did not receive any observations from interested third parties following publication of the notice required by Article 19 (3) of Regulation No 17.

II. LEGAL ASSESSMENT

A. Article 85 (1)

(35) Article 85 (1) of the EEC Treaty prohibits as incompatible with the common market all agreements between undertakings, decisions by associations of undertakings and concerted practices which may

affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the common market.

(36) The basic agreement between Paramount, MCA and MGM/UA, providing for the formation of a joint venture company (UIP) to distribute and license feature motion pictures principally for exhibition in cinemas, together with the accompanying agreements are agreements between independent undertakings falling within the scope of Article 85 (1).

(37) The notified agreements have to be considered as a whole having particular regard to their economic consequences. The restrictions of competition are those resulting from the formation of the joint venture itself and from restrictive provisions contained in the other notified agreements.

(38) The overall relevant geographical market is the Community. The agreements produce their effects more widely, but for the purposes of assessing the applicability of Article 85 (1) the Commission is only concerned with effects within the Community. In evaluating these effects, the Commission bases its analysis on the concept of a Community market made up of sub-markets corresponding to the various Member States, the cinematographic environment of which varies from one to the other.

The product markets affected by these agreements are in part the market in which the parent companies compete with other production companies in financing and producing feature films, but primarily the market in which distributors compete with each other to obtain the best terms and viewing slots from exhibitors for these films.

(39) As far as the horizontal relationship between Paramount, MCA and MGM/UA is concerned, Article 85 (1) applies since these undertakings are to be considered at least potential competitors on the market in question. Originally Paramount, MCA, MGM and UA distributed their own films within the Community with their own separate organizations, and, at present, they continue to compete with each other in the production of feature films, as distributors of films for theatrical exhibition in the USA and Canada, and as distributors to broadcast television and to publishers of videocassettes. By joining forces in the Community, UIP's parent companies have ceased distributing films independently from and in competition with each other.

(40) The creation of UIP itself has entailed a loss of decision-making autonomy which the parent companies would otherwise have enjoyed. Pursuant to the provisions referred to in paragraph 16 above, the parent companies are bound to cooperate with each other in the decision-making process on important matters affecting the operation of the joint venture.

(41) The agreements also bring about a degree of consensus in the distribution of the parent companies' films as regards place and timing of release which reinforces the restrictive nature of UIP. Prior to the release of any film, UIP has to consult and advise the respective parent company as to the general plans for distribution including the advertising campaign, estimated distribution costs and dates for release. In so doing, UIP is bound to adapt its advice to the interest of all parents. Since UIP is required to maximize each of the three parent companies' profits, UIP and the parents must agree the place and timing of release of all their films to their overall advantage and in such a way that no one film will damage the prospects of other UIP films.

(42) The agreements contain express obligations which are considered by the parties to form an indispensable part of their arrangement and which restrict the parent companies and UIP in their competitive behaviour.

Pursuant to the agreements each parent company electing to distribute a film in the Community must grant a right of first refusal of its theatrical distribution rights to UIP. The functioning of this provision (as detailed in paragraph 25 above) implies the acceptance of two restrictions of competition by the parent companies. Firstly, they can no longer themselves appear as wholly independent distributors in the market for feature films as they did before the formation of UIP. Secondly, the agreements limit them from entrusting the distribution of their films within the Community to other distributors. Of similar restrictive effect is the right of first refusal granted by the parent companies to UIP in respect of the distribution of non-English-language foreign product (see paragraph 28 above).

(43) The agreements concerned have an appreciable effect upon trade between Member States. The parent companies account for almost a quarter of the gross box-office receipts from theatrical feature films and are among the largest producers and distributors of films in the Community. The pooling of their distribution for the whole Community in one jointly owned distributor located in one Member State which controls the licensing of films throughout the Community, replaces three independent suppliers who might otherwise have used the services of one or more independent distributors. This necessarily means that trade will develop under conditions different from those which could have existed in the absence of such pooling of functions.

B. Article 85 (3)

(44) In view of the changes implemented by the parent companies in the originally notified agreements and of the undertakings provided by them to the Commission, and taking into account the specific characteristics of the cinema industry, the agreements notified by UIP on behalf of Paramount, MCA and MGM/UA satisfy the conditions for exemption laid down in Article 85 (3).

(45) The cooperation established in the agreements entails economic benefits for the production and distribution of motion pictures and for consumers, which could not be achieved in the absence of the joint venture and which outweigh its disadvantages.

(46) The creation of UIP makes possible a more effective and rationalized distribution of the product of the parent companies and thereby ensures the maintenance of an economically viable distribution network in a deteriorating market where high financial risks are present.

(47) Particular importance is to be attached to the fact that the cinema industry has witnessed a remarkable decline in admissions and in box-office receipts in the years prior to the agreements. Cinema admissions declined by an average of 40 % in the Community from 1970 to 1986, levelling out since 1987. Box-office revenue fell also by approximately 26 % during the 1970 to 1986 period although it has shown signs of recovery since 1987. A relevant factor in this process has been the impact on the industry of new technologies associated with television, i.e. cable and satellite television and videocassettes, the role of which as media for film presentation has been continuously growing to the detriment of cinemas. In addition to this, production costs and both variable and fixed operating costs (i.e. prints and advertising, offices and specialized personnel) required to maintain a distribution organization have risen sharply.

(48) Within this environment, the UIP agreements have allowed the parent companies to achieve greater efficiency by avoiding the duplication of distribution organizations and by reducing to a considerable extent the distribution costs at central-office level and at the level of local operating branches. Such efficiency has increased film availability in the Community and stimulated production therein, especially taking account of UIP's and each parent company's right to finance local products in the Community, and the right of the parents to enter into co-production agreements and agreements concerning non-English-language foreign local product in this territory.

(49) The agreements as modified also allow consumers (exhibitors, and ultimately the public) a fair share of the resulting benefit by improving both quality and the service offered, bearing in mind the specific characteristics of the sector concerned. A less costly distribution organization will result in a more efficient network of branch offices which will ensure exhibitors both ready access to films and regularity of supplies. Moreover, such improvements will permit UIP to develop closer ties with regional and small exhibitors so that it can better respond to their needs and demands. Finally, an increased supply of films will also benefit cinema viewers by widening the range of choice.

(50) The agreements contain no restrictions which are not indispensable to the attainment of the said objectives for the duration of the exemption.

(51) The formation of the joint venture itself is indispensable to continuation of the international distribution of the parent companies' films. Alternatives less restrictive of competition, such as relying on independent distributors throughout the Community for their international distribution, would not provide the benefits expected of UIP.

(52) There does not exist any independent non-integrated distribution organization covering the entire Community, and at national level the few distributors large enough to offer economies which could approach those realized by UIP are integrated upward. This is the case in Italy with Cidif, Medusa, DLF, Cannon, Columbia, Warner Bros and Twentieth Century Fox (the last three using the same agent); in the United Kingdom with Columbia-EMI-Warner Distributors Limited, Cannon Film Distributors Limited and United Kingdom Film Distributors Limited; in France with Gaumont, UGC and Parafrance; in the Netherlands with Cannon-Tuschinski and Warner Columbia; in Germany with Warner-Columbia, Fox-Disney and Tobis-Constantin; in Belgium with Warner Columbia, Fox-UGC, Gaumont and Dream World; in Ireland with Abbey Films; and in Denmark with Nordisk Film.

(53) Certain characteristics of the film commodity also decrease the likelihood of a too-close collaboration between the parent companies derived from the creation of UIP. Feature films should not be considered necessarily as homogeneous products, each film having its own merits and commercial

appeal which determine its success or failure. Moreover, it is very difficult to predict accurately the commercial success of a given film prior to its screening. The price paid by exhibitors for each film is a rental fee stated as a percentage (in Belgium and France the fee is fixed by government regulation) or as a set of percentages of box-office receipts which obviously vary depending on the film's performance. In this sense, mutual agreement on prices and licence conditions is not called for and any sales revenue quota is difficult to implement in the absence of a profit-sharing clause. Such a clause existed in the agreements originally notified but has been subsequently amended at the Commission's request. Before the Commission's intervention this clause obliged the parent companies to pay a certain percentage of any additional rental income derived from their films to UIP after each party had covered one-third of UIP's annual total costs. Since at the end of the year each parent receives one-third of the profits UIP has generated, competition was restricted in that the clause imposing the additional fee gave each parent an interest in the receipts of the others. After the amendments the additional fee paid to UIP in a given year will be applied as a credit against each licensor's obligation to cover one-third of UIP's total costs in the subsequent year.

(54) Moreover, the restrictive character of the joint venture is limited by the fact that parameters vital for competition in the film industry are still determined by the parent companies: they control the number of prints to be made, the selection of the film laboratory, and they bear their own costs for prints, dubbing and advertising. The independence of the parties concerning the release and marketing of their respective films has also been reinforced by an undertaking provided to the Commission according to which no UIP committee may discuss plans in that respect (see paragraph 31 above).

(55) The right of first refusal granted to UIP by the parent companies regarding their respective distribution rights and defined in the modified agreements is necessary to ensure that a sufficient flow of product reaches UIP so that the joint venture can achieve the economies of scale sought by the partners. The negative effects ordinarily associated with exclusive distribution arrangements of this kind are substantially limited here for two reasons. In the first place, each parent company retains the right to impose on UIP the distribution of a particular film should the joint venture freely elect not to distribute the film in the entire Community, or may distribute the film on its own or through a third party. Secondly, the parent companies and UIP itself will make themselves available, based upon their commercial judgment, to distribute third parties' films in the Community.

(56) The agreements do not afford the parties the possibility of eliminating competition in respect of a substantial part of the products in question.

(57) UIP has an average market share of 22 % in the Community. However, competition in the film business tends to be localized due to existing differences in the structure of the industry in the various Member States such as language barriers, governmental regulations and different patterns of distribution and exhibition, all of which makes the economic analysis of the impact of this joint venture based on Community-wide market shares less meaningful. As previously indicated, UIP's local offices compete in some Member States with distributors of approximately the same size and with integrated concerns covering production, distribution and sometimes exhibition. As a result it may reasonably be expected that the position in the market-place of the other distributors will not be jeopardized by UIP.

Moreover, the value of measuring UIP's power in the market by calculating overall market shares is also limited by the fact that annual rentals earned by a distributor vary widely depending on the success of its films. The figures contained in paragraph 13 above are illustrative of such variations. Accordingly, in the first years of operation of the joint venture, UIP's market shares in Germany were 17 %, 21 %, 16 %, 30 % and 19 % respectively. Similar fluctuations had taken place in Belgium during that period, 19 %, 25 %, 17 %, 31 % and 18 %, and in the other Member States. Consequently, any such fluctuations do not necessarily reflect changes in economic power directly attributable to the functioning of the distribution organization but reflect the chance of having, at least for that year, more appealing films.

(58) UIP's possibilities of eliminating competition are also diminished by the countervailing economic power which is exercised by exhibitors in the Member States, some of which hold prevalent positions in key locations. In the United Kingdom, for instance, the exhibition market is dominated by two powerful circuits, Rank and EMI, that control ± 40 % of the screens and ± 65 % of box-office revenues. Four national circuits in France represent ± 55 % of box-office receipts and similar examples may be found in other Member States. Even larger percentages of screens and box-office receipts appear if the main cities, which usually generate the greatest percentage of revenue, are considered.

(59) Finally, the establishment of an arbitration procedure as requested by the Commission, which takes into account existing obligations under mandatory arbitration systems in the Member States, for the resolution of disputes relating to film allocation or access to exhibitor screenspace gives additional assurance as to the effective reach and operation of the distribution network in the market place.

Duration of the exemption and obligations

(60) Pursuant to Article 6 (1) of Regulation No 17, the Commission is required to specify the date from which an exemption is granted.

The agreements as notified on 11 February 1982 contained several provisions which prevented the granting of an exemption in this case. Following discussions with the Commission, the notifying parties presented a number of amendments to the agreements in order to meet the Commission's objections. Accordingly, the date on which the exemption takes effect will not be the date of the notification but 27 July 1988, the date on which the parties to the agreements presented their last amendments.

(61) Article 8 (1) of Regulation No 17 provides that exemptions under Article 85 (3) may be granted only for a specific period and that conditions and obligations may be attached to them.

In view of the nature of the market concerned, the duration of the exemption should be fixed at five years. However, so that the Commission can perform its supervisory functions pursuant to Article 8 (3) of Regulation No 17, the undertakings to whom this Decision is addressed must be under an obligation to notify to it any amendment or addition to the agreements as well as all awards by arbitration tribunals settling disputes regarding film allocation and access to screenspace between UIP and exhibitors in the Community,

HAS ADOPTED THIS DECISION:

Article 1

Pursuant to Article 85 (3) of the EEC Treaty, the provisions of Article 85 (1) are hereby declared inapplicable for the period 27 July 1988 to 26 July 1993 to the basic agreement dated 5 October 1981 between Paramount Pictures Corporation, MCA Inc., Metro-Goldwyn-Mayer Film Co., United Artists Corporation, and Cinema International Corporation NV on the formation of the joint subsidiary, United International Pictures BV, and to the accompanying agreements between the parent companies or subsidiaries of them and the joint venture company.

Article 2

The declaration of exemption contained in Article 1 shall be subject to the following obligations:

(a) the undertakings to which this Decision is addressed shall inform the Commission forthwith of any amendment or addition to the agreements referred to in Article 1, and of any change in the scope, nature or extent of the cooperation between them; and

(b) they shall notify to the Commission all awards by arbitration tribunals settling disputes regarding film allocation and access to screenspace between UIP and exhibitors in the Community.

Article 3

This Decision is addressed to the following undertakings:

— United International Pictures BV
Rijswijkstraat 175,
Amsterdam W3,
Netherlands;

— Paramount Pictures Corporation,
One Gulf & Western Plaza,
New York,
New York 10023 USA;

— MCA Inc.,
100 Universal City Plaza,
Universal City,
California 91608 USA;

— MGM/UA Communications Co.
10000 West Washington Boulevard,
Culver City,
California 90232 USA.

Done at Brussels, 12 July 1989.

For the Commission
Sir Leon BRITTAN
Vice-President

ANNEX

Undertaking

'UIP undertakes in good faith that:

(a) UIP will support cinema industry efforts to establish arbitration or comparable procedures for the resolution of disputes relating to product allocation or access to exhibitor screenspace.

(b) When a dispute arises with an exhibitor regarding product allocation in those Member States where exhibitors currently cannot compel UIP to submit disputes to arbitration under existing industry arbitration procedures, UIP will advise that exhibitor that it can register with UIP to arbitrate this and all future disputes regarding the allocation of films for which UIP holds the distribution rights which may arise before, during or after any contractual relationship concerning a particular film is entered into between UIP and the exhibitor.

Whenever existing mandatory systems do not foresee arbitration of disputes regarding product allocation arising before, during or after any contractual relationship concerning a particular film is entered into between UIP and the exhibitor concerned, UIP will also advise that exhibitor that it can register with UIP to arbitrate such disputes.

(c) Any such arbitration shall respect the following principles:

1. The party who intends to bring a dispute before an arbitrator or arbitral tribunal shall give written notice (registered letter) to the other party, stating the nature of the dispute to be resolved, the basis of the claimant's position and the relief requested.

2. The proceeding shall be conducted by one arbitrator nominated jointly by the parties within fifteen (15) days after receipt of the written notice, or by three arbitrators. In the latter case, the parties to the dispute shall appoint one arbitrator each within fifteen (15) days after the period to jointly nominate one arbitrator has elapsed. The arbitrators appointed by the parties shall appoint another arbitrator to be president of the arbitral tribunal within fifteen (15) days after the both of them have been nominated. If the arbitrators do not agree, the third arbitrator shall be appointed by the President of the Court of Appeals having jurisdiction in commercial matters in the capital city of the exhibitor's country.

3. The law applicable to the substance of the case shall be the law of the country of the exhibitor.

4. The internal arbitration procedure shall follow the Rules of the Arbitral Court of the International Chamber of Commerce (ICC Rules). General procedural issues shall be regulated by the law of the country of the exhibitor.

5. The place of arbitration shall be the country of the exhibitor.

6. The arbitration shall be conducted in the language of the exhibitor.

7. Unless otherwise agreed by the parties the arbitral award is to be made within five months after the date on which all the arbitrators accepted office. Arbitrators should be aware of the urgency derived from the specific features of the cinema distribution industry.

8. To the extent permitted by national law, an application to the competent judicial authority for preservation or interim measures shall not be incompatible with the arbitration agreement and shall not imply a renunciation of the agreement.

9. The arbitrator or arbitral tribunal shall fix the on account payment which shall be made by either or both parties towards the costs of arbitration.

10. If an exhibitor elects to arbitrate a product allocation dispute with UIP, that exhibitor thereby agrees to arbitrate any dispute UIP may then or thereafter have relating to access to that exhibitor's screenspace.

11. The arbitration award shall, in addition to dealing with the merits of the case, fix the costs of the arbitration and decide which of the parties shall bear the costs or in what proportions the costs shall be borne by the parties.

(d) This undertaking shall become effective upon the grant of an exemption to UIP and shall remain effective throughout the period of the exemption.'