II

(Acts whose publication is not obligatory)

COMMISSION

COMMISSION DECISION

of 15 September 1989

relating to a proceeding under Article 85 of the EEC Treaty

(IV/31.734 — Film purchases by German television stations)

(Only the German, English and Dutch texts are authentic)

(89/536/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 6 and 8 thereof,

Having regard to the Commission Decision of 15 December 1986 to initiate a proceeding in this case,

Having given the undertakings concerned the opportunity to make known their views on the objections raised by the Commission, pursuant to Article 19 (1) of Regulation No 17 in conjunction with 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), and having received the undertakings' written views and their oral views at the hearing held on 13 October 1987,

Having regard to the notification of the relevant agreements on 2 December 1988 and the application for exemption under Article 85 (3) of the EEC Treaty,

Having published a summary of the agreements in accordance with Article 19 (3) of Regulation No 17 (3),

Having consulted the Advisory Committee on Restrictive Practices and Dominant Positions,

Whereas :

I. THE FACTS

(1) This proceeding relates to agreements on television rights to American feature films, television films and television series by the Erstes Deutsches Fernsehen.

A. The undertakings concerned

(2) The Hessischer Rundfunk, the Norddeutscher Rundfunk, Radio Bremen, the Saarländischer Rundfunk, the Sender Freies Berlin, the Süddeutscher Rundfunk, the Südwestfunk and the Westdeutscher Rundfunk (hereinafter referred to as 'the ARD broadcasting organizations') together with the Bayerischer Rundfunk, which is not covered by this proceeding, belong to the Arbeitsgemeinschaft der öffentlich-rechtlichen Landesrundfunkanstalten der Bundesrepublik Deutschland (Association of public broadcasting organizations of the Federal Republic of Germany — ARD). The activities of the broadcasting organizations belonging to the ARD include the broadcasting on terrestrial frequencies throughout the Federal Republic of a joint television channel known as 'Erstes Deutsches Fernsehen'. They also broadcast, in some cases alone and in others in cooperation with one another, regional programmes known as 'Dritte Programme' — also via terrestrial frequencies — and, via satellite, an additional channel known as 'Eins Plus'.

Degeto Film GmbH, whose registered office is in Frankfurt/Main and which is responsible for purchasing programmes, particularly the acquisition of television rights to films, is a joint subsidiary belonging to all the ARD broadcasting organizations.

(1) OJ No 13, 21. 2. 1962, p. 204/62.
(2) OJ No 127, 20. 8. 1963, p. 2268/63.
(3) OJ No C 54, 3. 3. 1989, p. 2.

(3) The American film production and distribution company Metro-Goldwyn-Mayer/United Artists Entertainment Co. (MGM/UA), whose registered office is in Culver City, United States of America, came into being in 1981 as a result of a merger between Metro-Goldwyn-Mayer Inc. (MGM) and United Artists Corporation (UA). It was one of the leading American film and television production companies and owned one of the largest American film libraries, consisting of some 3 000 feature films, including a number of films that had been given awards, and also television productions and cartoons. One of its subsidiaries was United Artists Corporation, whose subsidiary was Algemene Financieringsmaatschappij Nefico BV (Nefico), whose registered office is in Amsterdam.

(4) In March 1986, MGM/UA was taken over by Turner Broadcasting System Inc. (TBS). The subsidiary company United Artists Corporation (including its subsidiary Nefico) was sold off and became an independent company. The former parent company MGM/UA was finally liquidated in August 1986. Its assets, including all its film and television rights, were taken over partly by Turner Entertainment Co. (TEC), a subsidiary of TBS. The remaining rights, including the right to the company name Metro-Goldwyn-Mayer, were transferred to the former subsidiary United Artists Corporation, which then changed its name to Metro-Goldwyn-Mayer/United Artists Communications (MGM/UA Co). Nefico remains its subsidiary.

B. The agreements

(5) On 8 and 9 February 1984, the ARD broadcasting organizations, represented by Degeto Film GmbH, concluded with Nefico three agreements on the acquisition of television rights, with MGM/UA providing an unconditional guarantee for the obligations entered into by Nefico. The agreements were as follows:

(a) the Library Licence Agreement concluded on 9 February 1984;

(b) the James Bond Licence Agreement concluded on 9 February 1984; and

(c) a further agreement, concluded on 8 February 1984, providing for the payment of a separate fee for the exclusivity granted.

These agreements, which entered into force with retroactive effect on 1 October 1983, were supplemented and partly amended by an exchange of letters (nine letters dated 9 February 1984, one letter dated 23 February 1984, three letters dated 31 August 1984 and one letter dated 15 April 1986) and two agreements concluded on 21 August 1986. Subsequent to this, the situation regarding the agreements is as follows:

1. *The subject matter of the agreements*

(6) (a) Under the Library Licence Agreement the ARD broadcasting organizations acquired television rights in 1 350 feature films to be selected from MGM/UA's film library. During the period 1984 to 1993 they are to choose at least 70 of these library films a year and during the period 1994 to 1998 at least 130 films a year. A list of the films selected must be submitted by 31 December 1986.

The rights in 514 (originally 663 when the agreement was concluded), of the selected library films are currently covered by other licences and will be available to them only as from 1994. However, MGM/UA's top seven films including *Gone with the Wind* and *Ben Hur*, which are also licensed to other licensees, were from the outset not covered by the Library Licence Agreement.

(7) (b) The Library Licence Agreement also includes rights in all new films released by MGM/UA between 1 January 1984 and 31 December 1998 for showing in cinemas or produced for first showing on television. MGM/UA must make available a total of at least 150 suitable films, with at least 10 suitable films per year.

(8) (c) The Library Licence Agreement also covers all cartoons controlled by MGM/UA up to 1 January 1984 (a total of 744 half-hour units), and

(d) 416 hours of television films and television series (television product). These are selected by the ARD broadcasting organizations from the existing and future library of MGM/UA, with at least 26 hours being selected per year.

(9) (e) Under the James Bond Agreement, the ARD broadcasting organizations also acquired television rights in 14 named James Bond films from MGM/UA's existing library.

(f) Under a supplementary letter dated 9 February 1984, they were further granted television rights in all new James Bond films produced or acquired by MGM/UA between 1 January 1984 and 31 December 1998.

(10) Following the liquidation of MGM/UA and the assumption of its rights and obligations by TEC and MGM/UA Co., the rights and obligations under the agreements were extended to TEC and MGM/UA Co., in addition to Nefico, with the films covered by the agreements devolving partly to TEC and partly to MGM/UA Co. Essentially, TEC owns

those films which, before the merger with UA in 1988, used to belong to the MGM library, i.e. 927 of the feature films selected by the ARD broadcasting organizations from MGM/UA's total film library, 617 of the 744 half-hour cartoon units and the bulk of the television product. The remaining films, which used to belong to the former UA library, including the James Bond films, are controlled by MGM/UA Co. In addition, under the agreements concluded between TEC and MGM/UA Co., MGM/UA Co. is solely responsible for the production of the new films covered by the agreements, including the new James Bond films.

2. *Exclusivity*

(11) The ARD broadcasting organizations have acquired the exclusive right to the television broadcasting in German within the contract area of all the films concerned (library films, new films, cartoons and television product selected by them) with the result that, during the contract period, except in the case of the subsequently granted 'windows' (see points 30 *et sqq.* below), no other licences may be granted, not even for the purposes of exploitation on pay-TV. However, the original agreements do provide for two pay windows of up to a year in which 25 % of the films may be licensed to third parties for exploitation on pay-TV. In so far as individual library films selected were licensed to other parties when the agreements were concluded, such licences may not be extended.

In addition, the ARD broadcasting organizations were granted exclusivity in respect of the library as a whole for the duration of the selection period, i.e. up to 31 December 1986, so that during this period no television rights could be granted to third parties within the contract area in respect of the entire film library.

3. *The licence territory*

(12) The area covered by the agreements comprises not only the territory of the Federal Republic of Germany, including West Berlin, but also the German Democratic Republic, Austria, Liechtenstein, Luxembourg, Province Alto Adige (South Tyrol) and the German-speaking part of Switzerland.

4. *Term of the licences*

(13) The licence term for any particular feature film or television film is usually 15 years. In the case of 136 features films that were licensed to other licencees when the agreements were concluded, the term is 16 years. It is shorter in the case of some of the films for which only a limited number of broadcasts is permitted if the last authorized broadcast takes place before the expiration of 15 years.

The licence term begins on 1 January of the year in which the ARD broadcasting organizations schedule the first broadcast, i.e. between 1 January 1984 and 31 December 1998.

5. *Number of showings*

(14) Feature films — both those selected from the library and the new films — and cartoons may in principle be shown any number of times.

MGM/UA may, however, designate 75 of the library films and 45 of the new films for not more than 15 showings. Television product and all the James Bond films may similarly each be shown only 15 times.

6. *The technical form of the exploitation*

(15) The exploitation may in principle take place either through terrestrial transmission or through transmission by cable and satellite, including direct broadcast satellites. However, transmission by direct broadcast satellite is partly restricted.

7. *The language versions*

(16) The films may normally be broadcast only in the German-language version. However, a limited number of films may be broadcast in two languages (German and English), with English subtitles or in their original English version (with or without German subtitles).

8. *Right of first negotiation*

(17) The ARD broadcasting organizations have, from 1 October 1983 until 1 January 1997, a right of first negotiation if MGM/UA wishes to conclude with a third party an agreement similar to the Library Licence Agreement. MGM/UA must then first negotiate exclusively with the ARD broadcasting organizations for 30 days. If upon expiry of this period it enters into negotiations with third parties, it must inform the ARD broadcasting organizations of the content of such negotiations. The ARD broadcasting organizations have five days within which to decide whether they wish to conclude an agreement on the terms offered by a third party. MGM/UA may not conclude with any other party any agreement whose content is less favourable to MGM/UA than the last written offer from the ARD broadcasting organizations. The final judgement on this is made by MGM/UA.

A similar right of first negotiation also applies until 1 January 1997 if MGM/UA wishes to conclude an output agreement on the films newly produced or acquired after 31 December 1998.

9. *Sublicensing of the acquired rights*

(18) The ARD broadcasting organizations are authorized to sublicense (transfer) outside the Federal Republic of Germany to other broadcasting organizations the rights acquired under the Library Licence Agreement, but not the rights in the James Bond films.

Inside the Federal Republic of Germany, by contrast, they may grant sublicences only to undertakings associated with them.

Outside the Federal Republic of Germany, the ARD broadcasting organizations have sublicensed 625 films to the Österreichischer Rundfunk and 150 films to the Schweizer Rundfunk.

10. *The licence fee*

(19) The fee for the acquired rights, including the rights in new films, totals US $ 80 million.

C. General conditions governing the acquisition and broadcasting of television programmes

1. *The development of television in the Federal Republic of Germany*

(20) Following the ending in 1984 of the monopoly on broadcasting held by the public broadcasting organizations, there are now various private broadcasters in addition to the two public broadcasting organizations, the ARD and the ZDF (Zweites Deutsches Fernsehen). Two of these private broadcasting organizations, SAT 1 and RTL Plus, broadcast — via satellite and cable and recently also via terrestrial frequencies — a full range of programmes which can be received throughout the Federal Republic. A third full-range channel to be broadcast throughout the Federal Republic, Tele 5, is currently being developed. There are also other channels which are still at an experimental stage and a number of local or regional broadcasting stations. In addition, a number of foreign English-language and French-language channels are fed into the cable networks and transmitted via them. Their significance and degree of distribution are still small. Experiments are also being made with pay-TV.

(21) Most private television stations are financed exclusively from advertising revenue. At present they are therefore predominantly less well-off than the public organizations, which have secure income from fees as well as advertising income. High ratings are necessary in order to achieve advertising revenue, and these can be achieved only by providing programmes having mass appeal.

2. *Importance, stock and distribution of feature films and television product*

(22) (a) Feature films are a particularly important component of programming. Compared with television product (i.e. television films and television series), they are in many cases on a higher artistic level and are produced with greater financial expense, are therefore often more popular and mostly achieve high ratings. Every year, including the Dritte Programme, the ARD broadcasting organizations broadcast some 500 feature films, and the ZDF some 250 films, not counting repeats, rebroadcasts on the Dritte Programme and the programmes broadast by Eins Plus, which mostly consist of repeats. Amongst the private broadcasters, SAT 1 broadcasts some 300 feature films annually and RTL Plus some 250, with all the broadcasters attempting, as a result of competition for viewers and high ratings, to extend the range of feature films they broadcast. All in all, therefore, in view of an anticipated extension in programming by the current broadcasters and also the arrival of new broadcasters, the demand for television rights in feature films may be expected to increase.

(23) Worldwide, there is at present a stock of some 30 000 feature films suitable for exploitation on German television. Some 40 to 50 % of these were produced in the United States.

The major feature film libraries in the United States belong to the so-called major companies: MGM/UA (now MGM/UA Co. and TEC) (some 3 000), MCA/Universal (some 2 600), Columbia and 20th Century Fox (some 2 100 each) and Warner Bros and Paramount (some 1 100 each). In Europe, some 2 500 feature films are available in the United Kingdom and some 2 000 films each in the Federal Republic of Germany, France and Italy, owned by a large number of small and medium-sized undertakings.

(24) Over 100 000 hours of television product suitable for exploitation on German television are available worldwide, with a further 3 000 hours or so being produced each year. In the case of cartoons, some 5 000 to 6 000 half-hour units are available worldwide, with a further 450 to 500 half-hour units being produced each year.

(25) (b) Television rights in feature films and television product throughout the world are generally granted on an exclusive basis for a specific language version, a specific broadcasting area and a specific period. The licence territory comprises in principle the broadcasting area allocated to the relevant national television

broadcasting organizations, i.e. the territory of a given State, but is sometimes also extended to include adjacent areas of neighbouring States in which the language of the licensed language version is also spoken.

(26) The average licence period is a few years. Licence periods of more than 10 years are extremely rare and are in any case granted to intermediaries and only in exceptional instances to television stations. The agreements usually relate to varying quantities of films ranging in some cases up to a few hundred. However, as far as the Commission can ascertain, in no case previously has an agreement relating to more than 1 000 films been concluded with a television broadcasting organization and never has the entire library of a film production and distribution undertaking been made available for selection. Furthermore, agreements with television broadcasting organizations usually relate to films which are already available and only in extremely rare cases do they also cover new productions. In the past the ARD broadcasting organizations have usually concluded agreements for 200 to 300 films for an average licence period of five years.

(27) (c) On the German market, particular importance attaches to a group, which has established itself as an intermediary and acquires German-language television rights throughout the world in order to sublicense them to television broadcasting organizations. At present, this group holds German-language rights in some 15 000 feature films and 50 000 hours of television product. These include the essential parts of the libraries of the American major companies 20th Century Fox, Warner Bros, Paramount and Columbia and some 200 films of MGM/UA, which revert to MGM/UA Co. or TEC only in 1994 and will then be available to the ARD broadcasting organizations.

(28) Because of its important position, the group has been able to negotiate with film production and distribution companies larger numbers of licences and longer licence periods than is otherwise usual throughout the world and has in some cases also been able to acquire rights in entire film libraries or to conclude agreements allowing it to select the most attractive films from the libraries. The group comprises film and television production and distribution companies. It also has shares in some private television broadcasting organizations.

D. Course of the proceedings and subsequent agreements and declarations

(29) On 22 December 1986, the Commission sent the parties to the agreements a statement of objections in which, given the number of films involved and the period covered by the agreements, it challenged the exclusivity of the rights acquired and the lack of access for third parties to the films. Following a hearing held on 13 October 1987, the ARD broadcasting organizations then made efforts, in negotiations with TEC and MGM/UA Co., to allow third parties access to the films.

On 16 December 1988, the following agreement was concluded with TEC on TEC's films:

(30) The ARD broadcasting organizations allow TEC, by means of so-called 'windows', to license its films (feature films, cartoons and television product) to third parties. These windows designate certain periods relating to single films, during which the exclusivity granted to the ARD broadcasting organizations is lifted. The ARD broadcasting organizations do not themselves use the films during the windows and, at the same time, they allow the licensing of the films to third parties.

The windows amount to between two and six years, and in exceptional cases to eight years, their beginning and end being designated with regard to each film. They are staggered and begin in some cases before (Pre-Term-Window) and in some cases during (In-Term-Window) use by the ARD broadcasting organizations; in the latter case, use by the ARD broadcasting organizations in interrupted.

(31) During the windows TEC's licenses may broadcast one run (i.e. one tranmission in prime time and one repeat within two days outside prime time). The ARD broadcasting organizations make copies suitable for televising available to TEC's licenses in good time before the beginning of the windows and if the films are already available in German the copies are in German. If a German version is not yet available, the ARD broadcasting organizations contribute 50 % to the necessary dubbing costs, if the dubbing is carried out in agreement with them.

(32) The ARD broadcasting organizations also release the television product which they have not themselves selected from the 416 hours alloted to them, with the result that TEC can grant licences without restriction on such television product to third parties. In this regard, the agreements had originally granted the ARD broadcasting organizations exclusivity even for the product not selected by them and had ruled out licensing to any other parties. However, in the case of seven named television series, the ARD broadcasting organizations are granted a right of first negotiation.

(33) The ARD broadcasting organizations further allow third parties to broadcast the films in a foreign-language version throughout the entire contract area or to broadcast them into the licence territory from outside, which was not originally allowed under the agreements.

(34) With regard to MGM/UA Co. with which a contractual agreement could not be concluded, on 3 February 1989, the ARD broadcasting organizations gave the following unilateral irrevocable grant:

MGM/UA Co. is authorized, in respect of all the films controlled by it (library films, new films, James Bond films, television product and cartoons), to grant licences to other television broadcasting organizations for one run per year within the framework of so-called 'windows'. The windows cover periods of two years and begin five years after first use by the ARD broadcasting organizations or, in the case of 213 library films, 13 years thereafter. Any MGM/UA Co. licensees receive from the ARD broadcasting organizations in good time before the beginning of the windows copies suitable for broadcasting and in so far as the German version is available the copies are in German.

(35) In addition, the ARD broadcasting organizations release the television product which up to the time of the undertaking given by them they did not select from the available stock, with the result that it can be licensed to other parties. Lastly, they allow the foreign-language broadcasting of the films into the licence territory, in so far as such broadcasting takes place within the framework of a foreign-language channel.

(36) Following the agreement with TEC and the irrevocable grant given to MGM/UA Co., by means of which account was taken of the Commission's demands, the ARD broadcasting organizations notified the agreements on 2 December 1988 with a view to exemption under Article 85 (3) of the EEC Treaty.

(37) Further to the publication of a summary of the agreements notified, the Commission did not receive any observations from third parties. However, MGM/UA Co. informed the Commission, following such publication, that it opposed exemption on the grounds that the windows created were insufficient and the restrictions of competition were not removed.

II. LEGAL ASSESSMENT

A. Article 85 (1)

1. *Agreements between undertakings*

(38) The agreements in question constitute agreements between undertakings, since the ARD broadcasting organizations and Nefico and its former parent company MGM/UA are undertakings within the meaning of Article 85 (1). This applies notwithstanding the fact that the ARD broadcasting organizations are public institutions charged under national law with the task of providing programmes in the public interest. The functional concept of undertaking in Article 85 (1) covers any activity directed at trade in goods or services irrespective of the legal form of the undertaking and regardless of whether or not it is intended to earn profits. Accordingly, the Court of Justice ruled in Case 155/73 [1] that public television broadcasting organizations are undertakings within the meaning of Article 85 (1) in so far as they exercise activities of an economic nature.

(39) The acquisition of television rights constitutes such an economic activity. What is involved is the acquisition of a good for a consideration, with the broadcasting organizations being in direct competition with other undertakings, in particular private television stations.

Nor is any other approach called for by the taking into account of the right to free broadcasting. The question may be left open how far such a fundamental right exists at Community level and whether, as under national (German) constitutional law, it includes a duty on the part of public broadcasting organizations to provide programmes and in certain circumstances protects their acquisition of programmes. At any rate, there is no indication that the application of the competition rules in this case would thwart the duty on the part of broadcasting organizations to provide programmes, since they remain free to continue to conclude agreements on the acquisition of television rights in so far as the scope and duration of the agreements are in accordance with competition law.

(40) Nor, for the same reason, does Article 90 (2) of the EEC Treaty stand in the way of the applicability of the competition rules because it is not apparent that in the present case application of the competition rules prevent the fulfilment of the public task of the ARD broadcasting organizations, so that Article 90 (2) is not relevant.

2. *Restriction of competition*

(41) The agreements in question have as their object and effect the restriction of competition. The question may be left open here whether the rights granted to the ARD broadcasting organizations amount to licences in the legal and technical sense, or whether what is involved is an assignment of rights for a limited period and to a limited extent. If it is assumed that there is an assignment of rights, the restriction of competition lies in the fact that, despite this transfer of property, the ARD broadcasting organizations may not grant any sublicences in the Federal Republic of Germany (in the case of the James Bond films, also outside the Federal Republic of Germany) which restricts them in their freedom of action and at the time impedes other television stations from having access to the films. If, by contrast, it is assumed, as the parties themselves seen to assume, that the agreements involve licences, then, taking into account the principles set out in the Coditel II judgement of the Court [2] the restriction of competition derives, by contrast, from the duration and the scope of the exclusivity.

[1] [1974] ECR 409.
[2] [1982] ECR 3381.

(42) In its Coditel II judgment the Court of Justice held that the granting of an exclusive right to exhibit a film (the reference here is to presentation in a cinema) was not as such a restriction of competition. However, it simultaneously made it clear that the exercise of such a right may, depending on the accompanying legal or economic circumstances, result in a restriction of competition, regard naturally being had not only to the actual exercise of the right, but also to the contractually agreed scope for its exercise. The Court of Justice focuses, in particular, on the question of whether or not the exercise of the right creates barriers which are artificial and unjustifiable in terms of the needs of the cinematographic industry, whether the charging of fees which exceed a fair return on investment is made possible and whether an exclusivity is created the duration of which is disproportionate to such needs. Such circumstances exist in this case taking the agreements as a whole.

(a) Number and duration of the exclusive rights and duration of the selection period

(43) Of significance firstly is the unusually large number of the licensed rights.

Although the granting of exclusive rights to show films does not as such constitute a restriction of competition, account must be taken of the fact that the stock of suitable feature films cannot be increased at will and that therefore large quantities of films must not be withdrawn from the market as a result of long-term exclusive ties. The number of films involved in this case goes well beyond the normal quantity necessitated by the needs of programme acquisition and programme planning and also well beyond the previous acquisition practice of the ARD broadcasting organizations themselves. It is true that the films acquired by the ARD broadcasting organizations represent only 4,5 % of the total stock available worldwide. However, since such films represent a selected and therefore particularly interesting part of the library of one of the world's leading production and distribution companies and since they include many films with particular mass appeal such as the James Bond films or films that have been given awards, the rights acquired have an importance which goes beyond the purely numerical quantity involved. A further difficulty is the fact that not only the films available in the MGM/UA library are included, but also all of MGM/UA's new productions, and new productions are often particularly attractive.

(44) The duration of the agreements is also of relevance. The licence period is naturally influenced by the large amount of licensed films, since such a number of films calls for a fairly long period to allow optimum exploitation. The resulting duration of the licence period was up to now not customary in the industry and goes beyond the previous acquisition practice of the ARD broadcasting organizations themselves. It is also not called for by the requirements of programme acquisition and planning. Account should be taken here, in particular, of the staggering of the licence period, which in the case of the last 130 library films begins only on 1 January 1998 and thus expires only in 2013. This staggering means that the exclusive tie of the parties to the agreements is extended beyond the actual licence period of 15 years, with the result that other television stations are prevented from having access to some of the films, even before the actual licence period of the ARD broadcasting organizations begins. This long duration of the agreements and the extension of the exclusivity beyond the actual licence period are disproportionate within the meaning of the Coditel II judgment of the Court of Justice and result in an artificial barrier to other undertakings.

(45) The relevant restrictions are not removed by the newly created windows in view of the fact that they lift the granted exclusivity only within certain periods, without third parties having full access to the films.

(46) The selection period arising from the large quantity of films is also restrictive of competition. The fact that, for the duration of the selection period, i.e. between 1 October 1983 and 31 December 1986, MGM/UA was not allowed to grant any licences to third parties made its entire film library unavailable to other undertakings throughout this period. Since this also affected films which the ARD broadcasting organizations did not subsequently select, an artificial barrier was created for other television stations.

(b) The right of first negotiation

(47) The right of first negotiation granted to the ARD broadcasting organizations restricts MGM/UA in selecting the parties with which it concludes agreements and adversely affects the negotiating position of other undertakings. This represents a further restriction of competition which reinforces the anti-competitive effect of the number and duration of the rights acquired by the ARD broadcasting organizations.

3. *Effect on trade between Member States*

(48) Trade between Member States is affected by these agreements, since the contract area goes beyond the Federal Republic of Germany and also covers other Member States — Luxembourg and parts of Italy.

B. Article 85 (3)

Following the more recent agreement between the ARD broadcasting organizations and TEC and the irrevocable grant given by the ARD broadcasting organizations to MGM/UA Co., the conditions set out in Article 85 (3) are now met.

1. *Improvement in the distribution of goods*

(49) In view of the abovementioned more recent agreement and the grant given, the agreements contribute to improving the distribution of goods, because they enlarge the offer of films on the relevant market.

The large number of films concerned, and in particular the selection of such a large number from the available library, meant that the entire MGM/UA library was systematically examined to see which of the available films were suitable for exploitation on German television. The ARD broadcasting organizations, which are familiar with the needs of German television and the viewing habits of their customers, were in a better position to do this than MGM/UA, which was not well acquainted with the German market and hitherto had distributed only smaller numbers of films through an intermediary. As a result of the selection agreement it was realized, in particular, that a series of, in general, fairly old films, were exploitable on German television and they were made accessible to German television viewers for the first time. These films had not previously been shown in the German-speaking area of Europe either on television or in the cinema and therefore no German version existed.

(50) A further improvement in the distribution of goods derives from the windows, in particular from the arrangement concerning the dubbing costs. As a result of the windows the films can also be shown by other broadcasting organizations alternating with the ARD broadcasting organizations. The staggering of the windows ensures that, during the period of the agreements, a fairly large number of films can be licensed to third parties each year. Of particular interest to other television stations is the fact that, in accordance with the agreement with TEC, they may show a large portion of the films before the ARD broadcasting organizations themselves and indeed, in the case of quite a number of films, may do so during a period of up to eight years.

(51) MGM/UA has submitted to the Commission in this respect that, as far as their duration and their sequence are concerned, the windows are insufficient and unattractive to private television stations. However, this argument is not convincing in the Commission's view. The Commission has received statements from private television stations in the Federal Republic which make clear their interest in acquiring licences under two-year windows. Furthermore, TEC, which under its agreement with the ARD broadcasting organizations, has windows of up to eight years, has already entered into specific negotiations with television stations, and has already licenced a number of the films within the windows.

(52) The new private stations in particular benefit from the fact that the ARD broadcasting organizations provide them not only with copies suitable for direct broadcast, but also dubbed versions of the films for which they received licences within the framework of the windows, and from the fact that, where such versions are not yet available, the ARD broadcasting organizations pay 50 % of the cost of dubbing. This must be seen as an improvement in the distribution of goods, since without such an arrangement some of the private channels could not broadcast such films. Particularly in the start-up phase, new private television stations have considerable financial difficulties which in many cases do not allow then to cover the costs of high-quality dubbing. The agreements in question therefore not only allow the films to be brought on to the German market and to be dubbed, but also, through the arrangements established with regard to dubbing, create the conditions which enable the films to be shown not only by the ARD broadcasting organizations, but, in alternation with them, by the other channels as well.

(53) The large number of films has also resulted in a distinctly lower price per film to be achieved than in the case of individual agreements relating to smaller quantities of films. This in turn has meant that the ARD broadcasting organizations, which as public institutions have to work on the basis of fixed budgets, have been able to acquire more films than would otherwise have been possible.

2. *Fair share in the resulting benefit for consumers*

(54) Consumers, i.e. the television viewers, receive a fair share of the resulting benefit, since more films are shown in the Germany language than would have been the case in the absence of the agreements.

3. *Indispensability of the restrictions and lack of any scope for eliminating competition*

(55) Following the agreement concluded with TEC and the irrevocable grant given to MGM/UA Co., no restrictions are now imposed which are not indispensable to the attainment of the objectives described above. The newly created windows have limited the exclusivity granted to the ARD broadcasting organizations. The remaining exclusivity is necessary in order to allow a fair return from the relevant investments (licence fee, dubbing costs and administrative costs arising from selection). This applies also to the ban on licences for pay-TV, since simultaneous exploitation of the films on pay-TV would considerably affect the value of the films for the ARD broadcasting organizations. Other restrictions preventing exemption which were not indispensable and which were previously contained in the agreements have now been removed. This applies, in particular, to the

exclusivity relating to television product, which originally extended to programmes not selected by the ARD broadcasting organizations, and the ban on foreign-language broadcasts, which prevented cross-frontier broadcasting of the relevant films by pan-European channels.

(56) The agreements notified do not afford the ARD broadcasting organizations the possibility of eliminating competition in respect of a substantial part of the products in question, since, in the first place, the windows allow other television channels to have access to the films and, in the second place, apart from the films in question here, there are sufficient other films suitable for exploitation on German-language television available on the market.

D. Articles 6 and 8 of Regulation No 17

(57) Pursuant to Article 6 (1) of Regulation No 17, this Decision applies from the date of the last supplement to the agreements, i.e. 3 February 1989.

Having regard to the length of the contract period, the length of the windows available to other television channels and the fact that the market for television and television programmes in the German-speaking area is developing, exemption under Article 8 (1) of Regulation No 17 is granted for 10 years.

(58) So that the Commission can check during the exemption period whether the conditions for exemption continue to be fulfilled, Degeto Film GmbH is required to submit to the Commission all amendments and additions to the agreements and possible further agreements, concluded by exercising the right of first negotiation,

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 from 3 February 1989 until 2 February 1999 to the agreements concluded on 8 and 9 February 1984 between Degeto Film GmbH and Algemene Financieringsmaatschappij Nefico BV.

Article 2

The following obligation is attached to this Decision:

Degeto Film GmbH shall immediately inform the Commission of any amendment and addition to the agreements and of any new agreement concluded by exercising the right of first negotiation.

Article 3

This Decision is addressed to the following undertakings:

1. Degeto Film GmbH,
   Bertramstraße 8,
   D-6000 Frankfurt/Main;
2. Hessischer Rundfunk,
   Bertramstraße 8,
   D-6000 Frankfurt/Main;
3. Norddeutscher Rundfunk,
   Rothenbaumchaussee 132-134,
   D-2000 Hamburg 13;
4. Radio Bremen,
   Heinrich-Hertz-Straße 13,
   D-2800 Bremen;
5. Saarländischer Rundfunk,
   Funkhaus Halberg,
   D-6600 Saarbrücken;
6. Sender Freies Berlin,
   Masurenallee 8-14,
   D-1000 Berlin 19;
7. Süddeutscher Rundfunk,
   Neckarstraße 230,
   D-7000 Stuttgart 1;
8. Südwestfunk,
   Hans-Bredow-Straße,
   D-7570 Baden-Baden;
9. Westdeutscher Rundfunk,
   Appellhofplatz 1,
   D-5000 Köln;
10. Algemene Financieringsmaatschappij Nefico BV,
    Rijswijkstraat 175,
    NL-Amsterdam;
11. MGM/UA Communications Company,
    10000 W. Washington Boulevard,
    Culver City, California 90232,
    United States;
12. Turner Entertainment Co.,
    10100 Venise Boulevard,
    Culver City, California 90232,
    United States.

Done at Brussels, 15 September 1989.

For the Commission
Sir Leon BRITTAN
Vice-President