

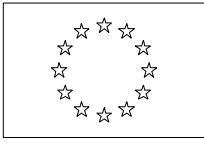
***Case No IV/M.1219 -
SEAGRAM /
POLYGRAM***

Only the English text is available and authentic.

**REGULATION (EEC) No 4064/89
MERGER PROCEDURE**

Article 6(1)(b) NON-OPPOSITION
Date: 21/09/1998

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COMMISSION OF THE EUROPEAN COMMUNITIES

Brussels, 21.09.1998

PUBLIC VERSION

MERGER PROCEDURE
ARTICLE 6(1)(b) DECISION

To the notifying party

Dear Sirs,

**Subject : Case No IV/M. 1219 - Seagram/Polygram
Notification of 18.08.1998 pursuant to Article 4 of Council Regulation
(EEC) No 4064/89.**

1. On 18.08.1998, the Commission received a notification of a proposed concentration pursuant to Article 4 of Council Regulation (EEC) No 4064/89¹ by which The Seagram Company Ltd. ("Seagram") will acquire control of the whole of PolyGram N.V. ("Polygram").
2. After examination of the notification, the Commission has concluded that the notified operation falls within the scope of Council Regulation (EEC) No 4064/89.

I. THE PARTIES AND THE OPERATION

3. Seagram is a Canadian company whose main activities are in the beverages and entertainment sectors. The entertainment business is operated through its subsidiary Universal Studios Inc. ("Universal"), which is active in filmed entertainment, music entertainment and recreation, i.e. theme parks and retail gift stores.
4. Polygram, a subsidiary of Philips N.V., is a Dutch entertainment company active in the music and film businesses. In music, Polygram has its principal activities in the

¹ OJ L 395, p.1; corrected version OJ L 257 of 21.9.1990, p.13; as amended by Regulation (EC) No 1310/97, OJ L 180, 9.7.1997, p.1, corrigendum in OJ L 40, 13.2.1998, p.17

production, distribution and publishing of recorded music. Polygram produces and distributes motion pictures and has a catalogue of films and television programmes.

5. The proposed operation consists of the acquisition of sole control by Seagram of Polygram by means of purchase of shares. Polygram will subsequently be merged with Universal.

II. CONCENTRATION

6. The notified operation constitutes a concentration within the meaning of article 3(1) (b) of the Merger Regulation.

III. COMMUNITY DIMENSION

7. The combined aggregate world-wide turnover of the undertakings concerned exceeds ECU 5 000 million (Seagram ECU 10 183 million, Polygram ECU 5 019 million, in 1997). The aggregate Community-wide turnover of each party exceeds ECU 250 million (Seagram ECU 1 529 million, Polygram ECU 2 194 million). They do not achieve more than two-thirds of their aggregate Community-wide turnover within one and the same Member State. The notified operation, therefore, has a Community dimension according to Article 1(2) of the Merger Regulation. It does not qualify for co-operation with the EFTA Surveillance Authority pursuant to the EEA Agreement.

IV. COMPATIBILITY WITH THE COMMON MARKET

8. The operation concerns the recorded music and filmed entertainment industries. The analysis below is given for both sectors separately.

A. Recorded music

1. Relevant product markets

9. The recorded music sector may be divided into the following relevant product markets:
 - music recording and distribution
 - music retailing
 - music publishing.
10. Seagram has no music retailing operations in Europe. Polygram sells directly to consumers, mainly by direct mail. Retailing is not affected by the operation and therefore is not considered further. However, both companies have music recording and distribution as well as music publishing operations in Europe. Therefore, the relevant product markets, which must be considered in the competitive assessment of the proposed transaction, are music recording and distribution and music publishing.

a. Music recording and distribution

11. The principal activities of record companies are manufacturing records and selling them on the market. In particular, record companies discover and develop recording artists, record the music, organise the manufacture of record releases in the main formats (compact disc, cassette and vinyl), distribute the records to retailers and wholesalers, market and promote each record release.
12. In its EMI/Virgin decision², the Commission considered that recorded music might be broadly divided into popular music (“pop”) and classical music. Polygram is the leader in the classical music field, while Seagram has no activities in this sector. Both Polygram and Seagram operate in the pop music sector. Therefore, the effect of the acquisition will be assessed only on the recorded pop music sector.
13. In the EMI/Virgin decision the Commission noted that the parties in that case differentiated between international pop (i.e. songs in English) and national pop (i.e. songs in any other language). In the present case the parties and some of their competitors claim that, although it is true that some pop is marketed and sold only nationally, the conventional distinction between national and international pop has largely lost relevance. What counts is the popularity of the individual hits; international and national pop is sold by the same retailers and competes in the same outlets.
14. In any event, according to the parties and their competitors, the language of the song is not the key factor to define the repertoire as national or international (e.g. another criterion is that the repertoire is treated as national when sold in the country when it was first released and international when sold in other countries). Principally the melody and rhythm of a song, the language being far less important, attract consumers.
15. The Commission takes note of the fact that the distinction between national and international pop has to a certain extent lost its importance and is not necessarily based on the language of the song. It is, however, unquestionable that some pop music is marketed only nationally and can thus represent a separate category and possibly a separate market. The Commission is also of the opinion that within the popular music sector a large number of different categories (e.g. jazz, soul, heavy metal and techno) are readily identifiable. The artists belonging to different categories do not compete with each other. It is possible that those different music categories constitute separate markets. However, for the purposes of the present case it is not necessary to decide whether or not different categories of music within the pop market constitute separate markets since the effects of the proposed transaction on these different categories of music are similar to those on pop music taken as a whole. Even on the basis of the narrowest product definition the proposed acquisition, as seen below, will not lead to the creation or strengthening of a dominant position.

b. Music publishing

² Commission decision of 27 April, 1992 in Case No IV/M.202 – Thorn EMI/Virgin Music.

16. Music publishing consists of the acquisition of rights to and exploitation of musical compositions. Publishers' revenues derive from the following sources:
- mechanical rights: the publisher gives a license to a record company for the reproduction of copyrighted music by mechanical means such as CDs and tapes
 - Performance rights: the publisher licenses the performance of copyrighted music to commercial users of music such as radio, television stations and night-clubs
 - synchronisation rights: the publisher licenses the recording of a composition as a part of the soundtrack of a film or advertisement
 - sheet music sales.
17. The exploitation according to the different sources may lead to the definition of separate product markets. However, for the purpose of this case, the exact definition of the product market can be left open since, even on the basis of such narrower markets, the notified operation will not lead to the creation or strengthening of a dominant position.

2. Relevant geographic markets

a. Music recording and distribution

18. The parties consider that the geographic market for pop music is national in scope for the following reasons. Record companies have distinct repertoire policies for each Member State to reflect different demand. The structure of the record retailing market differs across the Community. Currently, only few retailers have Community wide operations. Record distribution is also organised nationally, with the main exception of the Benelux. Release dates for records, as well as promotion and marketing are determined nationally. Prices of records differ from Member State to Member State.
19. The parties estimate parallel imports at no more than 5% of the volume of sales. This relatively low figure results from a general reluctance of retailers to import records from abroad on significant scale. Retailers have a commercial advantage when buying from local distributors or wholesalers because of delivery times and the opportunity to participate in joint promotions and some rights to return stock that the retailer has been unable to sell.
20. For the purposes of this decision it is not necessary to determine whether the geographic market is national or Community-wide since, as seen below, even on the basis of a definition of national markets the proposed transaction will not lead to the creation or strengthening of a dominant position.

b. Music publishing

21. In the parties' view music publishing is a world-wide market since the publishing rights are exploited world-wide either through the music publishing companies' own network or through local sub-publishers or licensing.
22. The Commission considers that in the EU the scope of the market is limited by the fact that the royalties are collected and their level decided on a national basis.

Publishing rights are collected and administered by collective licensing bodies (e.g. performing rights societies), acting as agents on behalf of the rightholders in the different Member States. The level of the publishing rights varies across the Community as it is the result of agreements between the collective licensing societies or, as it is the case for the mechanical rights, between the societies and the recording companies. In any event, it is not necessary to give a precise definition of the geographic market since even on the narrowest market definition the proposed acquisition will not lead to the creation or strengthening of a dominant position.

3. Assessment

a. Music recording and distribution

23. The acquisition by Seagram of Polygram will result in the elimination of Polygram as a competitor of Seagram in pop music recording and distribution.
24. The world-wide recording and distribution industry is characterised by the presence of six major international companies: Polygram, Sony, Warner, BMG, EMI/Virgin and Seagram. In 1996 those companies accounted for approximately 78% of global world-wide retail sales. The remaining market share is in the hands of a number of independent labels.
25. In Europe Seagram is not a major record company. It achieves two-thirds of its revenues in North America and has limited market presence outside that territory. Unlike the other five it is not vertically integrated since it does not have its own manufacturing facilities and distribution network in Europe. In Europe it licenses these operations to BMG. On the other hand, PolyGram has significant operations in Europe where is one of the five largest record companies.
26. In the EMI/Virgin decision of 1992 the Commission recognised that Seagram, at that time named MCA, was not a major recording company in Europe, but was a new entrant. The situation has not changed, as Seagram's market share, as seen below, has not grown significantly since 1992 to the detriment of the major five music companies. Therefore, the proposed acquisition will not affect the level of concentration in the European music industry since the five firm oligopoly, which characterised, and still characterises the European market will not be affected by the concentration.
27. On an EU basis the concentration will bring about a combined market share, in terms of volume of sales, of [15-20]%³, representing an increase of Polygram's existing market share of [<5]%. The parties will attain the highest combined market shares for recorded pop music in France ([35-40]% in sales volume and [35-40]% in sales value) and Germany ([25-30]% in sales volume and [25-30]% in sales value). In particular, the acquisition will result in an increase in Polygram's market shares of [<5]% (volume) and [<5]% (value) in France, and [<5]% (volume) and [<5]% (value) in Germany.

³ Market shares or other figures considered as business secrets have been replaced by ranges in square brackets []. Text considered as business secret has been replaced by square brackets [].

28. The proposed acquisition will not affect any particular pop music genre in the Community since Seagram does not have any particular strength in any narrower sector of pop music recording. On the contrary Seagram repertoire is more focused on genres, such as country music, which are not very popular outside the US. Seagram has a relatively young European repertoire (it has been present in Europe since 1994, with the exception of Germany and the UK where their presence was established earlier) and its European repertoire strength is modest. Of its worldwide repertoire of around [600-800] artists only approximately [<110] (i.e. less than 20%) are artists signed in the EU. It estimates that it has not signed more than [<50] artists in each Member State.
29. The oligopolistic structure of the music industry may point to a situation of collective dominance. However, the Commission has concluded that the proposed acquisition would not create or strengthen a dominant position among the five major companies as a result of which effective competition would be significantly impeded in the common market or a substantial part of it.
30. The European industry has experienced a steady increase in sales over the last years (volume of album sales increased from 736.2m in 1992 to 865.3m in 1996 in Europe). New entry is frequent. A dynamic competitive force is represented by the independent labels, which may bring their product to the market through independent distribution, contracts with the vertically integrated distributors and emerging channels of distribution such as Internet. Therefore, besides competing among themselves the major companies face competition from the well established and emerging independent labels. Competition takes place in the upstream market of discovering and signing new talents and securing and attracting existing artists and the downstream market of distribution.
31. As regard prices, price competition takes place both at the wholesale and retail levels. Every company has its own published price to the dealer ("PPD") which differs slightly from that of the other companies. A much larger difference in prices follows from the fact that the PPD is the starting point from which discounts are calculated. The actual price paid by the retailer or wholesaler will depend on those discounts to PPD which are secretly negotiated with the record company (e.g. a recorded music retailer has indicated that the level of the discounts in 1998 can be as high as to approximately 20%). The range of the discount depends on a number of factors such as the bargaining power of the wholesaler or retailer, achievement of sales targets and promotional campaigns.
32. As seen above the acquisition will result in only a small change in the structure of the Community recording and distribution market. Seagram is not one of the major players in Europe and its growth in the European market has been modest (e.g. in France Seagram's market share increased from [<5]% in 1994/95 to [<5]% in 1996/97, in Germany it increased from [<5]% to [<5]% over the same period). In addition, Seagram has not pursued an aggressive commercial policy to increase its market share at the expense of the five members of the oligopoly. Seagram's published prices are broadly in line with those of the major companies and have remained stable over the last years (e.g. in France Seagram's published dealer price for CD has decreased from FF[50-100] in 1994/95 to FF[50-100] in 1996/97, in Germany it has decreased from DM [10-30] to DM [10-30] over the same period).

33. For the above reasons, the proposed transaction will not create or strengthen an individual or collective dominant position in the music recording and distribution market.

b. Music publishing

34. On a world-wide basis EMI was the largest music publisher with estimated gross revenues of USD [500-700]m and a market share of [<15]% in 1997. Warner-Chappel was the second biggest with revenues of USD [400-500]m and market share of [<15]% in 1997. After BMG and Sony, Polygram and Seagram were fifth and sixth, with revenues of USD [150-200]m and USD [150-200]m respectively and a combined market share of [<10]% ([1-5]% Polygram + [1-5]% Seagram). In 1997, small companies generated [50-60]% of music publishing revenues. The strong presence of smaller publishers is due to ease of market entry, low operating expenses and relative unimportance of economies of scale.
35. The parties have not been able to break down their market shares in the different Member States. A precise calculation is made particularly difficult by the fact that where the publisher has also recording music operations the two activities are not reported separately in the company's financial statements. The parties maintain, for example, that none of the six publishers owned by the major international record companies disclose their financial results. However, the parties believe that Seagram, the majority of whose copyrights are US copyrights, would not account for more than [<10]% nor would Polygram account for more than [10-15]% of gross revenues from publishing in any Member States. In the course of its investigation the Commission received no evidence from third parties which calls into question the parties' estimate.
36. On the basis of the foregoing the Commission considers that the transaction will not give rise to the creation or strengthening of a dominant position in the music publishing market.

B. Filmed entertainment

1. Relevant product markets

37. Filmed entertainment can be divided into the following principal activities: the production of feature motion pictures ("films"), the distribution and licensing of films, and the exhibition of films.
38. Polygram does not have any theatrical film exhibition operations (cinemas). However, both companies have production and distribution activities. Therefore, the relevant product markets, which must be considered in the competitive assessment of the proposed transaction, relate to the production of films and the distribution and licensing of films.

a. Production of films

39. Making a film involves the co-ordination of various operations such as finding promising film scripts, finding talented actors and directors, financing, developing a marketing and distribution plan, etc.. Production activities, e.g. scripting, casting, require to be funded. To produce a big-budget film intended for showing on

international markets is usually a multi-million ECU project. The big-budget films intended for international distribution belonging to the category of so-called mainstream films are generally in the hands of the Hollywood studios (“Hollywood majors”): Universal, Twentieth Century Fox, Paramount, Metro Goldwyn Mayer, Warner Bros., Walt Disney, Columbia/TriStar. These companies have their own production organisations and can generally finance their film projects from internal resources. Co-production arrangements are increasingly made with independent companies, often in case additional funding is required.

40. The notifying party submits that films can be considered as heterogeneous products. Every film combines different artistic and creative talents of numerous individuals from the initial ideas, script development, design, acting, background music, to name but a few. Although the final success of a film is not predictable before theatrical exhibition the film producer’s ability of attracting talent, i.e. best actors, directors, plays a fundamental role. In addition to that, films have a short life cycle, and the popularity of individual actors or type of films could change in the short-term following changing consumer tastes and preferences.
41. The Commission’s investigation has shown that ‘mainstream’ films, typically produced by the Hollywood majors, may represent a separate category from ‘arthouse films’, which are smaller productions, not necessarily intended for a wide (international) audience. Of course, certain films produced with a relatively low budget, pass from one category to the next as a result of their success on the market, but that does not invalidate the above distinction. Whether this distinction actually ought to lead to the definition of separate product markets is an issue, which can be left open, since even on the basis of a market definition for different types of film, the operation will not lead to the creation or strengthening of a dominant position.

b. Film distribution

42. According to the notifying party, films are distributed through several so-called exhibition windows, namely theatrical exhibition, video rental and sell-through, pay-per-view (“PPV”), pay-TV, and free-to-air-TV. The notifying party has stated that the different types of windows are part of the same market for film releases. However, the question of whether or not the distribution for these windows actually constitute separate product markets may be left open, since the operation will not lead to the reinforcement or creation of a dominant position even on the basis of the definition of such separate markets.

aa) General

43. A distinction may be considered between distributors linked to the producers of mainstream films, typically the Hollywood majors referred to above, and independent distributors which offer other films, i.e. those of smaller (European) producers and/or films from another origin. Almost all of the Hollywood majors distribute their films through their own distribution organisations or have joint distribution agreements, e.g. UIP of which Universal is one of the partners together with Paramount and MGM. According to customers, who replied to the Commission’s inquiries carried out for the purpose of this case, European productions or other non-mainstream productions are rarely distributed through distributors owned or controlled by the Hollywood majors. In the past, a number of successful productions

made by the European film industry were distributed through smaller European distributors operating mainly on a national level.

bb) Distribution for the particular exhibition windows

i) Theatrical exhibition

44. The notifying party considers that distribution for theatrical exhibition is carried out in two principal ways. One possibility is that the production company licences the distribution rights for one country to a local distributor, who then sub-licences the exhibition right to cinema operators. Another possibility is that an international distributor acquires the rights for several countries and sub-licences these to a local distributor in individual countries. The local distributor then again sub-licences the exhibition right to local exhibitors. The local distributor negotiates the film rental agreements with exhibitors, executes marketing functions, collects the rental fees and makes the necessary arrangements with respect to film copies delivered to cinemas.
45. At the level of theatrical exhibition, non-mainstream films are generally distributed to smaller cinemas and theatres, also referred to as 'arthouse'. That distribution network may be considered distinct from the distribution to larger theatre complexes and main theatres of smaller cities. In any event, the Commission has been informed in its investigation that for arthouse type of films, the rental conditions agreed between the distributor and exhibitor may be quite different.
46. For the above reasons, the Commission considers that distinct markets may exist for the distribution of so-called mainstream films and other types of films ('arthouse' films). A further distinction within the category of 'arthouse' films may even be possible for films, which are intended for an audience in a given country only and are exclusively intended for distribution at a national level, and films of a different (foreign) origin, which are not mainstream productions. However, for the purpose of this case, the exact definition of the product market can be left open since, even on the basis of such narrower markets, the notified operation will not lead to the creation or strengthening of a dominant position.

ii) Video rental and sell-through

47. According to the notifying party, in video distribution the rental videos are sold to video rental stores. After the initial marketing period for a given release, films may also be sold to the sell-through market. The content of a video is primarily derived from films that were successful in theatrical exhibition. Moreover, the production companies re-release films from their libraries for video distribution. Polygram, in addition, produces special event videos, e.g. sport highlights, musical events and other special interest film content. However, the definition of separate product market for video rental and sell-through may be left open since, even on the basis of such narrower markets, the notified operation will not lead to the creation or strengthening of a dominant position.

iii) PPV

48. The notifying party submits that PPV forms part of the larger market of film exhibition, which includes the other forms of distribution. However, for the purpose

of this case, the question of the definition of the product market may be left open since the operation will not lead to the creation of strengthening of a dominant position.

iv) Pay-TV

49. Television rights of a film are typically licensed to pay-TV, which normally follows the release for video rental and sell-through. According to the notifying party, licence fees vary depending on, *inter alia*, the box office performance. However, in the present case, the question of the definition of the product market may be left open since the operation will not lead to the creation of strengthening of a dominant position.

v) Free-to-air-TV

50. The notifying party has referred to this window as ‘free-TV’, however, a common name in the trade is free-to-air-TV. Following the theatrical exhibition, films can also be licensed to television companies, sometimes even without having been licensed for other exploitation windows. However, the exact definition of the product market may be left open since the operation will not lead to the creation or strengthening of a dominant position even if free-to-air-TV were to be considered as a separate product market.

cc) Exploitation of the film library

51. The notifying party submits that a possible assessment of the market position of film production companies across the distribution windows could be made comparing the number of titles in their film libraries. Exploitation of these titles has typically been on free-to-air-TV. However, for the purpose of this case it can be left open whether the exploitation of the film library constitutes a separate product market since the operation will not lead to the creation or strengthening of a dominant position as a result of which effective competition would be significantly impeded in the EEA or any substantial part of it.

2. *Relevant geographic markets*

a. Production of films

52. The geographical scope of the market for production of films could be considered as at least EEA-wide, possibly even world-wide. As each film is made on an individual basis, film production involves competing for resources, i.e. contracting the best and the most suitable actors, directors and producers from a pool of talented individuals of any nationality. Furthermore, films contain scenes produced either inside or outside of a studio. Attractive geographical locations play an important element in films. Even though a particular film may be intended for exhibition in a particular country, and the production would imply working solely with actors and directors from that country, this would not necessarily mean that the production could only take place using ‘national’ resources. For the purpose of this case, however, it is not necessary to further delineate the relevant geographical market for the production of films because, in all the alternative definitions considered, effective competition would not be significantly impeded in the EEA or any substantial part of it.

b. Film distribution

aa) Distribution for the particular exhibition windows

i) Theatrical exhibition

53. The notifying party has submitted that the geographical scope of market for film distribution is national. Even though, films may be intended for exhibition in many countries, they are still distributed within national boundaries through national distribution offices of distributors, mainly because distribution licences are granted for a national territory, under the protection of copyright laws. For the release of a new film the marketing campaign has to take into account national tastes of the audience. The original film copy either is dubbed or receives subtitles, so that the audience can enjoy a film in their native language. Films which have been successful in one country, could however fail in other countries and, therefore, might not be exhibited in such countries. The fact that certain different distributors are present in different countries, that the integrated distributors of the Hollywood majors apply different conditions in different EEA countries, and also that the market shares of the distributors vary from one country to another, are indicators that national markets exist for the distribution of films. However, the exact definition of the product market can be left open since, in all the alternative definitions considered, effective competition would not be significantly impeded in the EEA or any substantial part of it.

ii) Video rental and sell-through

54. The geographical market of video rental and sell-through can be considered as of national scope. Releases for video distribution are prepared in a similar way than for theatrical exhibition with respect to the language, the marketing campaign and the taste of the audience. However, for the purpose of this case, the definition of the geographical scope can be left open because even in the narrowest possible definition the notified operation will not create or strengthen a dominant position as a result of which effective competition would be significantly impeded in the EEA or any substantial part of it.

iii) PPV / Pay-TV / Free-to-air-TV

55. The geographical scope of PPV, pay-TV, and free-to-air-TV can be considered as national for each of them. However, for the purpose of this case, the definition of the geographical scope can be left open because even in the narrowest possible definition the notified operation will not create or strengthen a dominant position as a result of which effective competition would be significantly impeded in the EEA or any substantial part of it.

bb) Exploitation of the film library

56. Since exploitation of film rights from a film library mostly happens for television, the geographical scope can be considered national in nature. In any event, it is not necessary to further delineate the geographical market since, in all the alternative definitions considered, effective competition would not be significantly impeded in the EEA or any substantial part of that area.

3. Assessment

a. Production of films

57. Both Seagram (through Universal) and Polygram are active in the production of feature films. Polygram's filmed entertainment division has three production labels. Certain of its productions can be categorised as 'mainstream' productions, other films fall outside of this category. Polygram, apart from films, also produces television programs, music videos and commercials.
58. When considering the production of mainstream films (i.e. international 'Hollywood' productions), the new entity will face competition from a number of producers that generally operate on an independent basis. The so-called Hollywood majors have a comparable competitive strength and individually produce a similar amount of films as Universal on a yearly basis. When considering other types of film as well (i.e. including 'national' producers in the EEA) the number of competitors is much larger. When looking at the films released in the Community in 1997 as a measure of successful film production, Universal and Polygram together have a market share of [15-20]% (measured in terms of box office receipts). Even though the inclusion of Polygram into Universal would strengthen the position of the latter (adding a share of [5-10]% to Universal's [10-15]% on an EEA basis), this would not lead to the creation of a dominant position for film production.

b. Film distribution

aa) Distribution for the particular exhibition windows

i) Theatrical exhibition

59. As a result of the acquisition of Polygram, although there will be an increase of [more than 10]% market share for three Member States ([15-20]% being the highest in Ireland), the combined market share of Polygram and Universal will in no Member State be higher than [30]%, on the basis of 1997 figures. These markets are characterised by the presence of a significant number of strong competitors. The operation will consequently, in spite of the strengthening of Universal's position, not lead to the creation or reinforcement of a dominant position for Universal in any of these national markets.
60. However, the result of the operation may be that Polygram's films, which are currently being distributed on an independent basis, will in the future be distributed by United International Pictures BV (UIP). UIP is the distribution joint venture of Universal, Paramount and MGM, which is active in nearly all EEA countries. The UIP agreement is currently under investigation by the Commission (Case No IV/C.2/30.566) as a result of a request for a new exemption on the basis of article 85(3) of the EC Treaty. Any effects on competition of the UIP agreement including the effects on the functioning of the UIP agreement of the transfer of Polygram into the UIP distribution structure, if this eventually happens, can be assessed in the framework of that proceeding.
61. Finally, the Commission notes that the Polygram filmed entertainment business is in the process of being sold to another third party. Seagram has publicly announced its sale of the Polygram Filmed Entertainment (PFE) division. In the framework of the acquisition agreement between Philips and Seagram, the three parties (Seagram, Philips and Polygram) have jointly retained an investment banker (Goldman Sachs

International) for the purpose of seeking a sale to a third party and an Offering Memorandum has been issued to interested buyers. Seagram has submitted in its notification that the rationale of the current operation is to acquire only the music entertainment business of Polygram. Any control that Seagram would acquire over Polygram's film business would consequently be of a transitional nature. In separate information received during the investigation, Seagram has repeated its intention to sell Polygram's filmed entertainment division provided a suitable bid is received.

62. On the basis of the above analysis, the Commission considers that the operation will not lead to the creation or strengthening of a dominant position at the distribution level.

ii) Video rental and sell-through

63. The parties' activities overlap in video rental and sell-through. In 1997, Universal achieved a market share of [3-5]% on a Member State basis, Polygram of [8-19]%. The combined market share adds up to [10-20]% per Member State. The videos of other Hollywood majors achieved market shares of [5-10]% each on a Member State basis. Videos of smaller independent production companies account for [30-50]% per Member State. These companies produce certain types of films particularly for video distribution, such as a collection of major sport events, special interest videos of various kinds. For these reasons, the distribution of videos for rental and sell-through will lead to the creation or strengthening of a dominant position.

iii) PPV

64. Given that PPV is a market in development, accurate market share figures are not available. However, judging from the position as regards film libraries, which are the basis for selling film rights for PPV, it can be concluded that no dominant position will be achieved as a result of the merger.

iv) Pay-TV / Free-to-air-TV

65. In the exploitation of film rights Polygram's market shares in some Member States is [1-5]% in each exploitation window, namely Germany, France, UK, Spain, the Netherlands and Portugal. Universal's market share is in the range of [8-29]% in these countries. The addition of market shares leads to a combined market share of between [10-30]%. A number of competitors achieve market shares similar to the new entity. Moreover, a significant part of the film rights are productions that have been exclusively foreseen for TV exploitation. Smaller independent film production companies typically make these. It therefore appears that the notified operation does not create or strengthen a dominant position as a result of which effective competition would be significantly impeded in the EEA or any substantial part of that area.

bb) Exploitation of the film library

66. According to market data made available to the Commission, Polygram has [1300-1600] titles in their film library, Universal has [800-1100] titles. The combined number adds up to [2100-2700] titles. To compare with the film library of the Hollywood majors, Metro Goldwyn Mayer has [3200-3500] titles, Warner Bros. has [1800-2100] titles, Twentieth Century Fox has [800-1200], Paramount has

[800-1000], and Walt Disney has [300-400]. No numbers were available for Columbia/TriStar. Sony, for example, has [1400-1600] titles. According to the parties, Canal Plus as a national distributor has more than [4000-6000] titles in their film library, one-third of which are English language. According to the parties, however, the number of titles in a film library is not equivalent with its value. For example, the Walt Disney library is generally considered one of the most valuable although it has few titles. The value of individual titles within a film library depends largely on their previous box office success and how long ago it was first released. Moreover, re-release of film titles of a film library also depends on the audience whose taste is changing constantly. In any event, it can be concluded that as far as the exploitation of the film library is concerned the notified operation would not create or strengthen a dominant position in the EEA or any substantial part of that area.

V. CONCLUSION

67. For the above reasons, the Commission has decided not to oppose the notified operation and to declare it compatible with the common market and with the EEA Agreement. This decision is adopted in application of Article 6(1)(b) of Council Regulation (EEC) No 4064/89.

For the Commission,