

Summary of the MMC's 1983 report on *Films*

1. The following is a summary of the conclusions and recommendations of the MMC's report *Films: A Report on the Supply of Films for Exhibition in Cinemas* (Cmnd 8858, May 1983) made under the Act; and of action taken in response. References below in parentheses are to paragraph numbers in that report.

The monopoly situation

2. In the four years 1978 to 1981, the average market shares of Columbia-EMI-Warner Distributors Ltd (CEW) and Cinema International Corporation Ltd (UK) (CIC (UK)) amounted to 30.7 and 21.8 per cent respectively. Since November 1981 United International Pictures (UK) (UIP (UK)) had distributed not only on behalf of those distributors previously served by CIC (UK) but also on behalf of United Artists, whose market share in recent years had been of the order of 10 per cent, so that UIP (UK)'s market share might be expected to be substantially larger than that of CIC (UK) and greater than 25 per cent. Over the same period of four years the average market shares of EMI Cinemas Ltd (EMI) and Rank Leisure Ltd (Rank) amounted to 32.2 and 26.2 per cent respectively. Because all these market shares, as expressed, exceeded 25 per cent, a monopoly situation existed by virtue of section 6(1)(a) in favour of the distributors CEW and (if allowance was made for the market share of United Artists) UIP (UK) and in favour of the exhibitors EMI and Rank. (8.3)

3. Many distributors, including CEW and UIP (UK), adopted a practice (referred to as the practice or system of alignments) of normally offering their films in the first instance either to EMI or to Rank in preference to all other exhibitors, but never to both.¹ EMI and Rank adopted the practice of accepting films on that basis. This practice restricted competition between distributors who did not obtain competing offers for licences to exhibit from EMI and Rank or from any other exhibitors. It also restricted competition between EMI and Rank who did not make such offers. A complex monopoly situation existed by virtue of section 6(1)(c) in favour of those distributors, including CEW and UIP (UK), who adopted the practice, and in favour of EMI and Rank who accepted films on the basis on which they were offered by those distributors. (8.4)

4. The bars which applied between cinemas were the results of long-standing settlements between exhibitors as to the order in which cinemas would show a film. Distributors accepted the bars, and implemented them by inclusion in their film hire agreements. Competition between distributors was restricted because they did not generally offer to license films to exhibitors except in the sequences determined by the bars. Competition between exhibitors was restricted because they did not generally attempt to obtain licences except in accordance with the bars. A complex monopoly situation existed by virtue of section 6(1)(c) in favour of those exhibitors, including EMI and Rank, and those distributors, including CEW and UIP (UK), who adopted the practice of barring. (8.5)

The alignments between distributors and EMI and Rank

5. The system of alignments was no doubt a convenient way of doing business between the major distributors and the two major exhibition circuits, but it restricted competition, because EMI and Rank did not compete to obtain films at first run, nor were the major distributors taking any steps to encourage them to do so. Within a single system of decision-making operated by EMI and its aligned distributors on the one hand, and by Rank and its aligned distributors on the other, there was effective control of some 60 per cent of the film exhibition market and a still greater share of the film distribution market in Great Britain. (8.17)

6. Alignments provided some certainty of outcome, as compared with the risks of a more competitive

¹The only exception which occurred regularly was that seven cinemas which had an allocation of product received some films on a first-run basis instead of the relevant EMI or Rank cinemas.

system. However, the dominant market share of EMI and Rank as exhibitors prevented others from becoming effective competitors in circumstances of very limited price competition. The alignments both helped to create the situation and to maintain it. They enabled EMI and Rank to exploit the scale monopoly situations which existed in their favour. The alignments operated and might be expected to operate against the public interest. (8.21)

7. An effective remedy would necessitate substantial reductions in the market shares of both EMI and Rank as exhibitors, in ways which would not lead to the re-creation of the existing degree of concentration in exhibition. Such a remedy would be likely to require the divestment of substantial numbers of EMI's and Rank's cinemas. Taking into account the decline in cinema audiences, the continuing need to close cinemas, and the fact that some surviving cinemas were making losses, such a remedy was not practicable and could not be recommended. (8.22)

The system of barring

8. There might be somewhat less cost involved in operating the present system of barring instead of taking all exclusivity decisions on a case-by-case basis. But distributors had in any event to deal with many cinemas, and with most if not all exhibitors, in respect of films released on a substantial scale. It was not thought that their costs would increase to any substantial extent were they to operate differently (8.29). The present system of barring gave predetermined answers to questions of exclusivity, except on infrequent occasions. But the industry needed to choose between a number of release strategies and apply them to suit different films, in greatly varying numbers of cinemas. This required rapid responses to the public's reception of a film, and if necessary changes to the strategy of release. It had, for example, already become necessary to have a substantial-but itself pre-determined-variation on the present set of 'general' bars to provide for television area releases. (8.30)

9. An exhibitor, when entering into a hire agreement to show a film at a particular cinema, would need to know whether other cinemas which were in effective competition with its own cinema were intending to show the film at the same time or immediately before, because in its judgment that would be likely to reduce the audience it could hope to obtain. The exhibitor would then need to decide whether to enter into an agreement on that basis, or on a different basis as regards those other cinemas if the distributor was prepared to agree to one, or whether instead to show a different film if it thought that would give a better result. When the exhibitor entered into the agreement, it would need to see that it reflected the terms for exclusivity agreed with the distributor. In the above sense, the need to define exclusivity was accepted. There was no great practical difficulty in terms for exclusivity being reached on a case-by-case, film-by-film basis, in the way outlined. Such a process might produce broadly similar results to the present system at least for some time. However, the present system of deciding exclusivity produced results which were determined, largely, by EMI and Rank. It did not achieve sufficient competition during the full period in which films were released. Although much of the industry was in favour of keeping some barring, many operators wanted to see changes made, towards less restriction and greater freedom of action and decision. Taking all those things into account, together with the restriction of competition caused by the alignments, on which the places of EMI and Rank in the system of barring partly depended, the present system of barring operated and might be expected to operate against the public interest, and other arrangements should be made to determine exclusivity. (8.31)

10. Appropriate steps should be taken to ensure that both distributors and exhibitors brought to an end the system whereby bars were decided and implemented, that they did not replace it with a like system, and that they conducted their respective businesses thereafter in such a way that provisions for exclusivity could be negotiated for each film hire agreement on a case-by-case basis (8.32). If such steps were implemented, it would follow that some of the *Standard Conditions* of the SFD, which dealt with barring and related matters, would either no longer apply (in which case the SFD would doubtless wish to withdraw them) or would need to be amended to reflect the new circumstances in which exclusivity provisions would appear in film hire agreements. (8.33)

Delays in the release of popular films to exhibitors other than EMI and Rank

11. Exhibitors who competed with EMI and Rank were disadvantaged when EMI and Rank obtained exclusive runs of unknown duration during which the film was unavailable to other exhibitors (8.34). Given the

dominant market positions of EMI and Rank, reinforced by the effects of their alignments with CEW, UIP and most other distributors, a situation existed which worked generally to the disadvantage of exhibitors other than EMI and Rank, with the result that those other exhibitors obtained films later than they would have obtained them in the absence of the dominant positions of EMI and Rank, and of the alignments. The public had an interest in being able to see popular films early in their release, in places and at prices which suited their choice. Some people preferred to go to the city centre cinemas; others preferred to see the films locally, often at lower admission prices and perhaps lower costs of travel. The public did not have such a choice if the city centre cinema alone showed the film for a prolonged period. (8.43)

12. Delays in the release of popular films, particularly where this had happened in the large cities, were a distortion of competition between exhibitors. They affected the choice available to the public. In almost all cases they constituted an advantage gained by EMI and Rank by reason of their market power as scale monopolists in exhibition, which power was reinforced by the system of the alignments between them and most distributors. Such delays operated and might be expected to operate against the public interest. (8.44)

13. Arrangements should be made to provide that, at any stage in the release of a popular film, that film would not be exhibited for more than four weeks-nor thereafter re-exhibited-in any cinema unless or until the film had been made available to all other cinemas in effective competition which had sought to exhibit the film. For the distributor to meet this requirement, cinemas in effective competition with the first cinema to show the film, or with any subsequent cinema to show the film, must be able to obtain the right to exhibit the film when they sought to do so (within the terms of the preceding sentence), and to conclude a film hire agreement on terms consistent with those applying generally to film hire in the industry. When a film was first released to EMI and for as long as the distributors remain aligned either to EMI or Rank, Rank cinemas would not be regarded as being in effective competition with any EMI cinema showing the film. Likewise, in the case of first release to Rank, an EMI cinema would not be regarded as being in effective competition with any Rank cinema. (8.45)

14. The definition of a popular film should exclude films which did not obtain a first-run release in the EMI and Rank circuits and those which were not expected to achieve any substantial film hire rentals. A popular film could be currently defined as one for which 60 or more prints were or had become available in Great Britain. This definition should be reviewed after it had been in operation for a suitable period of time (8.47). The arrangements should not apply to the well-known cinemas in the West End of London in which film premières were staged (8.46). The primary criterion for deciding whether two cinemas were in effective competition with each other was whether, in the relevant circumstances, one would take significant audience from the other. Distributors and exhibitors would be able to decide on this matter, and would have information to support their judgments. Any dispute as to whether one cinema was competing with another should be capable of being referred to the Trade Disputes Committee (TDC). (8.49)

15. Film hire agreements should be negotiated on terms consistent with those applying generally in the industry. Cases might arise, nevertheless, in which a distributor or an exhibitor might feel that it was being subjected to undue pressure, in a subsequent-run situation, to depart from such terms. If that happened sufficiently often as to be considered a course of conduct, as distinct from an occasional and mutually acceptable departure from generally accepted terms, the matter should be capable of being referred to the TDC. If the Committee felt able to decide whether the situation was or was not in accordance with the recommended arrangements, its decision should then be taken into account in future negotiations by the exhibitor and distributor concerned. (8.50)

Other possible effects of the scale monopoly situations

16. Concentration in the distribution sector had developed to the point that CEW and UIP were scale monopolists, and were likely to remain so (8.53). The degree of concentration in the distribution sector had recently increased as a result of the creation of UK Film Distributors Ltd, a joint venture between Twentieth Century Fox and Walt Disney. Concern was expressed at the possibility of still further concentration, because the way in which films were released, and the way in which the existing groups operated, could change; and because nearly all distributors were involved in the complex monopoly arising from the system of alignments, which had been found to operate against the public interest, but against which it had not been possible to recommend any remedy. Any further moves which would increase the degree of concentration in film distribution in Great Britain, and especially if it involved any of the three existing groups, should be looked at carefully under the arrangements for dealing with mergers under the Act. (8.56)

17. It appeared unlikely that EMI or Rank would seek to acquire cinemas, with the result that they increased their market shares in exhibition. But in the eventuality that they did, it would be detrimental to the public interest. (8.57)

The Trade Disputes Committee and the Appeals Tribunal

18. Representatives of the industry should continue to have a voice in decisions made by its TDC. Independent persons could with advantage play a major role. Two of the four members should become persons who did not have active involvement in the industry, while the other two should be persons who had such involvement. An independent person should be appointed as Chairman of the TDC thus bringing its membership to five. A single-stage procedure should replace the present two-tier arrangement of the TDC and the Appeals Tribunal, by dispensing with the Appeals Tribunal. (8.60)

19. The removal of the present system of barring, as recommended, would mean that no further disputes about that system or its operation would arise for the TDC to consider. However, if the recommendations to limit exclusive runs were implemented, there would be a need to decide whether one cinema was in effective competition with another or not. If the operation of the new arrangements were to give rise to complaints or disputes, these could be made to the TDC, which should be empowered to deal with those matters (8.61). The TDC should also be empowered to deal with disputes or complaints about the terms on which film hire agreements were negotiated, in connection with the arrangements recommended to limit the delays in popular films being released to exhibitors other than EMI and Rank (8.62). The recommendations were not intended to restrict the TDC from considering any other problems in the distribution or exhibition of films which the industry might see fit to refer to the committee (8.63). The TDC should continue to consider applications for allocation of product. (8.64)

The SFD's *Standard Conditions*

20. The SFD argued that there was no basis for a finding that a recommendation by the SFD to its members that they should use standard terms and conditions in transactions with exhibitors could be said to form the basis of a complex monopoly situation comprising the members of the SFD. The SFD said that it had so ordered its affairs that its *Standard Conditions* related exclusively to an agreement under which its members did no more than grant a licence to exhibit a film. This was not an agreement which related to the supply of goods or services and accordingly, the SFD argued, could not be dealt with under the reference to the MMC. (8.69 and 8.70)

21. In law a distinction might at times be drawn between the right to exhibit and the right to acquire the means to exhibit. But in practice no cinema exhibitor would enter into a transaction under which it would pay for the right to exhibit a film to the public in its cinema without, at the same time and in the course of the same transaction, securing the right to the film itself (8.71). It was clear that for the cinema exhibitor, dealing with a distributor who was the only source of supply to which it could turn, the purchase of exhibition rights alone without the supply of the film itself would be pointless. The same could be said of the distributor, since its right to payment in respect of exhibition to the public was dependent upon the attendance of the public at a cinema which had been supplied with the film in question. For both parties to the transaction, the right to exhibit was inextricably bound up with the agreement to supply, and the transaction would be meaningless in the absence of one or the other. Attempts to distort this position, and thus to avoid the consequences of competition law in the UK, by purporting to distinguish between what would otherwise be regarded as the inseparable elements of a straightforward (albeit particular) commercial transaction between distributor and exhibitor were inappropriate and unconvincing. (8.72)

22. Three of the standard conditions dealt with barring, advertising in relation to the operation of bars, and with runs. If the recommendations were adopted, it would be necessary for those standard conditions, and any others that might be affected by those recommendations, to be amended or withdrawn (8.73). As regards the other standard conditions and recommendations, some appeared to restrict the freedom of individual distributors and exhibitors to negotiate agreements, particularly as regards terms of credit. Some conditions dealing, for example, with the programming of films and with equipment in cinemas also appeared to be outdated or unnecessary. (8.74)

Summary of conclusions and recommendations and action taken in response

23. Scale monopoly situations existed in favour of CEW and UIP (UK), and EMI and Rank. The system of alignments gave rise to a complex monopoly situation which operated and might be expected to operate against the public interest. Divestment was considered but not recommended.

24. The present system of barring gave rise to a complex monopoly situation which operated and might be expected to operate against the public interest. The system should cease to operate, and be replaced by arrangements under which exclusivity would be negotiated for each film hire agreement on a case-by-case basis. *Following consultation with the industry, the 1989 Order prohibiting barring came into effect in April 1989 (see Appendix 3.3).*

25. Delays in the release of popular films to exhibitors other than EMI and Rank were a consequence of the market power which those companies possessed as scale monopolists, which power was reinforced by the system of alignments as a complex monopoly. Arrangements should be made to place limits on the length of time for which cinemas might exhibit popular films in certain circumstances. *Consultation with the industry revealed strong opposition to the imposition of a four-week limit. The recommendation was not proceeded with.*

26. The procedures and membership of the TDC and the Appeals Tribunal should be changed. The TDC should be empowered to deal with disputes relating to the extent of competition between individual cinemas. It should also be empowered to deal with disputes or complaints in connection with film hire agreements in certain circumstances. The arrangements for awarding allocations of product to independent exhibitors should continue. *Developments in the industry between 1983 and 1989 led the DTI and the OFT to agree that the remit envisaged for the TDC had disappeared. The recommendations relating to the TDC were considered to be no longer relevant, particularly as the question of the allocation of product was addressed by the 1989 Order. The recommendations were not proceeded with.*