

***Case No COMP/JV.37 -
B SKY B / KIRCH PAY
TV***

Only the English text is available and authentic.

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

Article 6(1)(b) NON-OPPOSITION
Date: 21/03/2000

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COMMISSION OF THE EUROPEAN COMMUNITIES

Brussels, 21.03.2000
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PUBLIC VERSION

MERGER PROCEDURE
ARTICLE 6(1)(b) DECISION

To the notifying parties

Dear Sirs,

Subject: Case No COMP/JV.37 – BSKyB / KirchPayTV

Notification of 22 December 1999 pursuant to Article 4 of Council Regulation (EEC) No 4064/89

1. On 22 December 1999, the Commission received a notification of a proposed concentration pursuant to Article 4 of Council Regulation (EEC) No 4064/89¹ (the “Merger Regulation”) by which British Sky Broadcasting Group plc (“BSkyB”) would acquire 24% of KirchPayTV GmbH & Co. KGaA (“KirchPayTV”) from Kirch Vermögensverwaltungs GmbH & Co. KG, holding company for the KirchGruppe (“Kirch”).
2. On 13 January 2000, the notification was declared incomplete. The parties subsequently provided the requested information. Consequently, the notification was declared complete on 7 February 2000.
3. The parties submitted commitments designed to eliminate the competition concerns identified by the Commission during the first part of the investigation, in accordance with Art. 6(2) of the Merger Regulation. In light of these commitments, the Commission has concluded that the notified operation falls within the scope of Council Regulation (EEC) No 4064/89 and does not raise serious doubts as to its compatibility with the common market.

I. THE PARTIES

4. BSKyB is quoted on the London and New York Stock Exchanges and is owned as to 39.72% by News International Television Limited (“News International”).

¹ OJ L 395, 30.12.1989, p. 1; corrigendum: OJ L 257, 21.9.1990, p. 13; as last amended by Regulation (EC) No 1310/97, OJ L 180, 9.7.1997, p.1; corrigendum: OJ L 40, 13.2.1998, p. 17.

5. BSkyB's principal business is, through its British Sky Broadcasting Ltd subsidiary, broadcasting analogue and digital television services via satellite and cable in the UK and Ireland and via digital terrestrial television in the UK. BSkyB also supplies its own pay-TV channels for retail to its satellite subscribers and wholesale for cable and terrestrial operators in UK and Ireland. A small amount of the programming on these channels is also produced by BSkyB.
6. BSkyB has an interest in the British Interactive Broadcasting joint venture, which provides digital interactive television services to consumers in the United Kingdom via its subsidiary, Open.
7. BSkyB also provides conditional access and customer management services via its subsidiaries Satellite Encryption Services Ltd. ("SESL") and Sky Subscribers Services Ltd. ("SSSL"). It also subleases some of its spare satellite transponder capacity on the Astra satellite system, which is used by broadcasters whose channels are broadcast unencrypted throughout Europe.
8. The News Corporation Ltd. ("News") has not been notified as a party to the concentration but it has acknowledged, based on the Judgement of the Court of First Instance in *Kesko Oy v Commission*², that it has sufficient influence over BSkyB to be taken into account for the purposes of Article 2 of the Merger Regulation. News International is an affiliate of News, the international multimedia group with interests in television broadcasting, film production and distribution, books, newspapers, magazines, data processing and media access control. News International's German interest are limited to a 66% interest in a German free to air channel, TM3, which it is currently negotiating to sell, and ownership of some German broadcasting rights, including those for the UEFA Champions League football matches.
9. KirchPayTV operates pay-TV services in Germany and Austria and has a 40% interest in a Swiss pay-TV service. KirchPayTV provides a bouquet of its own channels, through its "Premiere" operation. This consists of premium movies, live sports events and thematic pay-TV channels. It is offered in programme packages via cable or satellite transmission for a monthly subscription fee. Premiere has recently launched Premiere World, a digital, multi-channel pay TV operation that combines the activities of KirchPayTV's former pay-TV services, Premiere and DF1. The programming packages of Premiere World consist of both KirchPayTV channels and a few third party channels. Some of these channels – Discovery and Krimitel – are joint ventures in which Kirch has an interest via MultiChannel GmbH.
10. KirchPayTV is wholly owned by the holding company of Kirch. Kirch is an audio-visual media group of companies ultimately owned and controlled by Dr. Leo Kirch. It is active in particular in the fields of commercial television, rights trade (fiction), sports rights trade, film and TV production and post-production, business TV, pay TV, TV channel production, technical services for digital broadcasting and encryption technology.
11. Kirch controls BetaResearch GmbH ("BetaResearch"), the company that has developed the conditional access system which is used by KirchPayTV. BetaResearch has granted licences for its conditional access system to both BetaDigital GmbH ("BetaDigital") and to Deutsche Telekom AG ("Telekom") (for its cable operations). BetaResearch has also developed the d-box decoder.

² Case T-22/97 *Kesko Oy v Commission*, 15/12/99, paragraphs 137-140.

12. KirchPayTV operates the technical platform for digital satellite television via its subsidiary BetaDigital. BetaDigital is a technical service provider that offers play-out services such as data compression, multiplexing, encryption, and satellite-uplink to affiliates, including Premiere, and third parties. BetaDigital has leased transponder capacity on the Astra satellites from SES. BetaDigital provides its encryption services on the basis of a technology licence for conditional access technology from BetaResearch.

II. THE OPERATION

13. The net effect of the proposed operation will be a change in control of KirchPayTV, from sole control by Kirch to joint control with BSKyB after the proposed operation is given effect. The basic structure of the proposed transaction is the acquisition of 24% of KirchPayTV in return for EUR 510 million and a 4,3% interest in BSKyB for KirchPayTV.

III. CONCENTRATION

14. The proposed operation constitutes a concentration within the meaning of Article 3(1)(b) of the Merger Regulation and is a full function joint venture for the purposes of Article 3(2) of the Merger Regulation.

Joint control

15. Under the proposed concentration BSKyB will invest in KirchPayTV which is a *Kommanditgesellschaft auf Aktien*, a partnership with general partners and holders of limited partners' shares. Kirch, via a holding company, is currently the sole general partner of KirchPayTV. BSKyB's investment will create a second general partner, BSKyB General Partner. This arrangement gives BSKyB and Kirch joint control of KirchPayTV.
16. BSKyB has a right to at least two seats (or one third) on the KirchPayTV Supervisory Board, comprising at least six members. The other members will be selected by Kirch. This arrangement will be revised when the initial public offer of shares ("IPO") in KirchPayTV occurs, which is expected before the end of 2003.
17. Until the IPO, BSKyB's approval will be needed for KirchPayTV, or any subsidiary of KirchPayTV, to take or perform a range of decisions relating to: [.....]
18. By virtue of these rights of approval BSKyB will have the ability to exercise decisive influence over the strategic direction of KirchPayTV. Therefore, BSKyB and Kirch will have joint control over KirchPayTV notwithstanding the fact that BSKyB has control over less than 50% of the shares and only one third of the board.
19. BSKyB and Kirch will jointly control KirchPayTV within the meaning of Article 3 (1) (b) of the Merger Regulation.

Autonomous economic entity acting on a lasting basis

20. KirchPayTV is already a fully functioning economic entity and will continue to operate on a long term basis in pay-TV. KirchPayTV has had and will continue to have the necessary financial resources, personnel and other assets, including broadcasting rights, to provide pay-TV in the German market. It will therefore perform on a lasting basis all the functions of an autonomous economic entity within the meaning of Article 3(2) of the Merger Regulation.

IV. COMMUNITY DIMENSION

21. The combined world-wide turnover of the undertakings concerned is more than EUR 5 000 million (Kirch: EUR [...]billion, BSkyB: EUR 2,49 billion).
22. Each of them has an aggregate Community-wide turnover in excess of EUR 250 million (Kirch: EUR [...] billion, BSkyB: EUR 2,48 billion), but 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.

V. COMPETITIVE ASSESSMENT

A. The relevant markets

1. Pay-TV

Product market

23. Pay-TV constitutes a relevant product market separate from that for free-to-air or free-access television (free TV), i.e.advertising-financed private television and public television financed through fees and partly through advertising.³
24. While, in the case of advertising-financed television, there is a trade relationship only between the programme supplier and the advertising industry, in the case of pay-TV there is a trade relationship between the programme supplier and the viewer as subscriber. In view of these trade relationships, the conditions of competition are accordingly different for the two types of television. Whereas in the case of advertising-financed television the audience share and the advertising rates are the key parameters, in the case of pay-TV the key factors are the shaping of programmes to meet the interests of the target groups of viewers and the level of subscriptions.
25. The fact that subscribers are prepared to pay considerable sums for pay-TV indicates that the latter is a distinguishable product with specific extra utility. As digitalisation continues to spread, there could admittedly, with the passage of time, be a certain convergence between pay-TV and free TV. However, this possible future development is not enough now to justify the conclusion that pay-TV and free TV are part of the same market.
26. The Commission has stated in the past that there is no reason to distinguish between markets for analogue and digital pay television⁴. Digital pay-TV is only a further development of analogue pay-TV and therefore does not constitute a separate relevant product market. Moreover, account should be taken of the fact that in the next few years analogue broadcast pay-TV will be completely superseded by digital broadcast

³ See Commission Decision 94/922/EC, MSG Media Service (OJ L 364, 31.12.1994, p. 1), paragraphs 32 and 33; Commission Decision 1999/153/EC, Bertelsmann/Kirch/Premiere (OJ L 53, 27.2.1999, p. 1), paragraph 18; Commission Decision 1999/242/EC, TPS (OJ L 90, 2.4.1999, p. 6), paragraph 25; Commission Decision 1999/781/EC, British Interactive Broadcasting/Open (OJ L 312, 6.12.1999, p. 1), paragraph 24.

⁴ See Bertelsmann/Kirch/Premiere, paragraph 18; TPS, paragraph 26; British Interactive Broadcasting/Open, paragraph 25.

pay-TV. Under Premiere's business plan, analogue subscriptions will be gradually transformed into digital ones, so that by 2002 the only subscribers will be digital ones.

27. Television signals can be broadcast by terrestrial transmitter, satellite or cable. Pay-television is available to subscribers in Germany by two different means of transmission: satellite (analogue and digital) and cable (analogue and digital).

Geographic market

28. Despite the fact that in certain niche markets channels are broadcast throughout Europe, television broadcasting is still generally organised on a national basis. As the Commission has already stated in a number of decisions⁵, owing primarily to different regulatory regimes, language barriers, cultural factors and other different conditions of competition prevailing in the individual Member States, the markets for the organisation of television are national in nature.
29. Germany is accordingly the relevant geographic market for pay-TV. The Commission came to the same conclusion in the *Bertelsmann/Kirch/Premiere* case and the *MSG Media Service* case, although it indicated in the second Decision that, bearing in mind the lack of any language barrier, a market might in future be assumed to exist for German language pay-TV⁶. The Commission's investigation in the *Bertelsmann/Kirch/Premiere* case brought to light a number of reasons for considering that the relevant geographic market for pay-TV extends beyond Germany and, in view of the lack of any language barrier, comprises the entire German-speaking area. This question can, however, be left open for the purposes of this case, as the competition assessment of the concentration would be the same even on the assumption of a market encompassing the whole of that region.

2. Digital interactive television services

Product market

30. KirchPayTV will be active in the near future on the digital interactive television services market. In defining product markets, the most important factor is evaluation of demand substitutability.⁷ However, given that digital interactive television services, such as those which are likely to be offered by KirchPayTV, are not currently available in Germany, past data does not exist to evaluate the likely response of customers to a hypothetical small, non-transitory change in relative prices of KirchPayTV's services and possible substitutes. Nevertheless demand substitutability can also be assessed by comparing the characteristics of products or services in order

⁵ See *MSG Media Service*, paragraph 46; Commission Decision 96/346/EC, *RTL/Veronica/Endemol*, (OJ L 134, 5.6.1996, p. 32), paragraph 25, *Bertelsmann/Kirch/Premiere*, paragraph 23; *British Interactive Broadcasting/Open*, paragraph 42.

⁶ See *MSG Media Service*, paragraph 51.

⁷ See Commission Notice on the definition of the relevant market for the purposes of Community competition law (OJ C 372, 9.12.1997, p. 5).

to determine whether they are particularly suited to satisfy constant needs and are only to a limited extent interchangeable with other products or services.⁸

31. Typically the following retail services seem likely to be offered to viewers on digital interactive television: home banking, home shopping, holiday and travel services, down-loading of games, learning on-line, entertainment and leisure etc.⁹ However, the operators of digital interactive television will typically not be the suppliers of the goods and services purchased by consumers. Rather they will provide a “platform” through which vendors, otherwise known as “content providers”, will promote and sell their goods and services. Thus, for the operators of digital interactive television services, the primary source of demand, and income, will be from “content providers” who wish to offer goods and services to consumers through digital interactive television.
32. The demand from "content providers" for access to the “platform” provided by operators of digital interactive television is likely to be determined by how popular the “platform” and all the services it carries is with final consumers. The more consumers the digital interactive service has, the more powerful the attraction of the “platform” for content providers. Conversely the attractiveness of the “platform” to final consumers will be determined by the range and types of services they can find on it. In particular the Commission has already recognised that pay TV, whilst being in a separate market, is likely to be a “driver” for digital interactive television services.¹⁰ This is because pay TV offers premium and exclusive programmes which enables digital interactive services operators who carry this service to attract a high number of above average income viewers.

- Digital interactive services distinguishable from alternative sources of supply

33. The Commission has already held that the demand substitutability of final consumers for digital interactive services (access to the “the platform”) is likely to be distinguishable from alternative sources of supply such as e.g. high-street retailing.
34. As explained below this conclusion is based on the different characteristics of the types of goods and services that will be provided.

- Market separate from high street retailing

35. Retailing services represent only one part of the typical package of services forming digital interactive television services. E-mail, downloading of computer games, limited Internet access and information services will also form part of the package. There are economies of scope in the provision of such a package of services, because the infrastructure required for each of the individual services is the same.

⁸ In its judgement of 26 November 1998, in Case C-7/97, Oscar Bronner GmbH Co. KG v Mediaprint [1998] ECR I-7791, the Court of Justice repeated the formula (paragraph 33) that "the market for the product or service in question comprises all the products or services which in view of their characteristics are particularly suited to satisfy constant needs and are only to a limited extent interchangeable with other products or services (Case 31/80 L'Oréal v De Nieuwe AMCK [1980] ECR 3775, paragraph 25; Case C-62/86 AKZO v Commission [1991] ECR I-3359, paragraph 51)".

⁹ See British Interactive Broadcasting/Open, paragraph 11.

¹⁰ “The Development Of The Market For Digital Television In The European Union” COM (1999) 540 Final

36. The characteristics of the retailing services of the type likely to be offered by KirchPayTV and those of high-street retailing will be markedly different. For example, the range of products or services that is likely to be offered on-line by retailers will probably be very different from that available in high-street shops. This is most likely to be the case with perishable goods, such as food, or bulky goods where storage and delivery charges would be high. There will almost certainly be a price differential between goods or services purchased in the high street and those obtained via a package of digital interactive television services. In terms of price, it seems that consumers may even be willing to pay a premium for the convenience of home shopping.¹¹
37. It follows from the above that the market for digital interactive television services is separate from that for the traditional retailing of goods and services in high streets.
- Distinction between markets for digital interactive services available via televisions and those available via personal computers.
38. Both the demand-substitutability test and differences in the characteristics of interactive services available via television sets and via personal computers lead to the conclusion that they are at this stage separate product markets. A small permanent increase in the price of such services available via television is unlikely to be constrained by the existence of services available on personal computers. While television sets are ubiquitous, far fewer households have a personal computer; fewer still have a modem. Moreover, the relatively high cost of personal computers means that the switching cost for end-users would be high. Digital interactive services delivered to television can also be distinguished from services delivered to personal computers by the fact that interactivity can be integrated into traditional broadcast entertainment channels.
39. As the Commission found in the *British Interactive Broadcasting/Open* case, retailers are also likely to target different customers using different brands belonging to the same group of companies when providing digital interactive services available via television sets and personal computers.
- Market Separate from but linked and complementary to pay TV
40. Finally, the demand for, and characteristics and intended use of, pay-TV services are largely different from those of digital interactive television services, the former being largely entertainment services, the latter being largely transactional or informational services. Typically the business scope of digital interactive television service providers excludes forms of entertainment where viewing itself is the primary form of entertainment for the viewer, such as pay-television channels. However, as already noted, pay-TV is likely to be a “driver” for interactive services. Thus, in summary, the digital interactive television services market will be complementary to and separate from that for pay-TV.

Geographic market

¹¹ Binary Compass Enterprises Report, 1997, by David Reibstein and Sunil Gupta "The online retail commerce report" rated price competition fourth in what was important to customers.

41. Digital interactive television services will operate on a national basis. The kinds of service offered will be determined by the national taste and national demand: the transaction services are likely to be reliant on retailers with national or regional operations. The information services will be largely related to national demand for information and will be in German. The market for digital interactive services can therefore, in the foreseeable future, be seen as national and limited to Germany. However, for the purposes of this case the exact definition of the relevant geographic market can be left open.

3. The market for the acquisition of broadcasting rights, in particular for films and sporting events

Product market

42. It is universally accepted that films and sporting events are the two most popular pay-TV products. It has been acknowledged by the Commission in a previous Decision¹² that it is necessary to have the corresponding rights in order to put together programmes that are sufficiently attractive to persuade potential subscribers to pay for receiving television services. Films and sport are therefore pay-TV's "drivers". There is no need for the purposes of this case to determine whether separate markets exist for film broadcasting rights and rights to broadcast sporting events.
43. As far as films are concerned, the rights for pay-TV are available separately from those for other broadcasting "windows", such as free to air and pay-per-view. Pay-TV rights may be exploited prior to free to air broadcasting rights. No distinction is made according to whether the rights are to be exploited through analogue or digital transmission.
44. Rights to sporting events are also broken down into rights for broadcasting in clear, pay-TV and pay-per-view.

Geographic market

45. With regard to the geographic market for the acquisition of broadcasting rights, although rights can be sourced from anywhere in the world and some operators acquire rights for more than one territory at a time, it has to be borne in mind that broadcasting rights are still acquired mainly on a national basis or, at the most, by language area.¹³ Thus the Commission has noted that film broadcasting rights are usually granted for a given language version and broadcasting area.¹⁴ In this case the markets are those for the rights for the UK, Ireland and Germany. It is not necessary for the purposes of this case to determine whether the market for the acquisition of broadcasting rights should be defined as the German market or the German-speaking market.
46. In the case of some sporting events, however, the rights are acquired on an exclusive basis for the whole European territory and, regardless of the technical means of

¹² See TPS, paragraph 34.

¹³ Commission Decision 89/536, Filmeinkauf deutscher Fernsehanstalten, OJ L 284, 3.10.1989, p. 36.

¹⁴ See Filmeinkauf deutscher Fernsehanstalten, paragraph 25.

transmission, to be thereafter re-sold per country. These major sport events, such as the Olympic Games, have a pan-European interest from the viewers' perspective. Accordingly, there could be a separate geographic market for pan-European sports rights, although it is not necessary to precisely define the market for the purposes of this case.

B. Dominance

1. Pay-TV

47. KirchPayTV holds 95% of Premiere Medien GmbH & Co. KG (hereafter: "Premiere"). It offers the analogue pay-TV channel "Premiere" and (since October 1999) the digital pay-TV bouquet "Premiere World", consisting of 22 programme channels. This bouquet also includes channels from other providers like Multithématiques (Canal+) and Universal Studios. Premiere World is broadcast both by satellite and through the broadband cable network of Telekom and offers various packages of channels (for movies, sports, family/children channels etc.) as well as pay-per-view services.
48. KirchPayTV has, through Premiere, virtually a monopoly in the provision of pay-TV services in Germany. In December 1999, Premiere had around 2,1 million subscribers of which around 1,1 million had subscribed to the digital format.
49. A number of third parties have claimed that the notified operation will strengthen the dominant position of KirchPayTV in the German pay-TV market by providing it with a badly needed influx of financial resources and know-how. It is also argued that the operation will eliminate BSKyB as a potential competitor in Germany.

Influx of financial resources and know-how

50. The parties themselves acknowledge that KirchPayTV is in need of "an injection of significant resources" to develop its business. They have estimated the total investment required by KirchPayTV at [...], with accrued losses standing at [...]. According to its notification, KirchPayTV has, however, been unable to raise the funds it needs on the open market. In addition to money, BSKyB will add a wealth of marketing and distribution know-how which, it has been suggested to the Commission by certain operators in the market, KirchPayTV crucially lacks.

Given the significant costs of operating in this market, particularly the need to digitalise services over the next few years, the Commission has serious doubts as to whether KirchPayTV would have been able to maintain its position on the pay-TV market in Germany in the absence of this operation. For instance, failure to modernise its pay-TV services according to market expectations, or an inability to maintain its control over the content necessary for pay-TV, could significantly improve the conditions for entry by a third party in the medium term. As specified by Article 2(1)(b) of the Merger Regulation, the economic and financial power of the parties are factors which the Commission must take into account when assessing the effects on competition of a concentration. It also has to be noted that the Commission has, in a

number of decisions, held that the addition of greater financial resources as a result of a concentration can lead to the creation or strengthening of a dominant position.¹⁵

51. Based on the facts available to it, the Commission concludes that this operation raises serious doubts as to the compatibility of the concentration with the common market as it reinforces KirchPayTV's dominant position on the market for pay-TV in Germany.

Elimination of potential competition

52. Neither BSKyB nor News and/or any affiliated company of News are active on the German pay-TV market. They are not actual competitors to KirchPayTV.

53. However a number of third parties have argued that BSKyB, in combination with News, is the most likely entrant on the German pay-TV market. This is based primarily on the following reasons:

- BSKyB is the biggest operator of pay-TV services in the UK and Ireland and one of the biggest operators of pay-TV services in Europe and has experience in running a technical platform for pay-TV.

- Germany is an attractive, large market and pay-TV is underdeveloped.

- News has acquired the pay-TV rights to the UEFA Champions League for Germany.

- News has access to other rights via the Fox Entertainment Group, one of the world's largest producers of films and TV shows (Hollywood film studio Twentieth Century Fox).

- TM3, in which News German Television Holding GmbH owns a 66% interest, has asked for and was granted in December 1999 broadcasting licenses for six thematic channels from the Bavarian media authority.

54. Based on the facts available to it the Commission has, however, come to the conclusion that neither BSKyB nor any other company is likely to enter the German pay-TV market in the short to medium term.

55. There are four main reasons for this.

- Strength of the free TV market in Germany

56. The German pay-TV market is difficult to develop because there is a strong market for free TV in Germany. Pay-TV and free TV are separate markets, as has already been explained. There is, nevertheless some interaction between them. The more varied and attractive the programmes offered by the free broadcasters, the less incentive there is for viewers to subscribe to pay-TV as well. The existence of this interaction is borne out by the slow pace of development of pay-TV in Germany in comparison to France or the United Kingdom, which is doubtless due primarily to the more varied programmes on offer in Germany from free TV.¹⁶

57. Due to the offer from over 30 channels, consumers in Germany have not shown a strong desire to subscribe to pay-TV. Out of around 27,5 million households that can

¹⁵ See for example Commission Decision 97/816/EC, Boeing/McDonnell Douglas (OJ L 336, 8.12.1997, p. 16), paragraphs 53 and 72; Commission Decision M.196, Volvo/Procordia (OJ C 281, 19.10.1993), paragraph 12; Commission Decision M.139, VIAG/EB Bruehl (OJ C 333, 24.12.1991), paragraph 18.

¹⁶ See Bertelsmann/Kirch/Premiere, paragraph 87.

be reached either by cable or by satellite, only 2,1 million have taken a pay-TV subscription (to Premiere). One third party has indicated that an operator will need 3,5 million subscribers to “break-even”. Indeed independent studies have shown that KirchPayTV, despite being the sole supplier in this market, will continue to make significant losses until 2003.

- Kirch’s control over the decoder infrastructure and encryption technology used in Germany

58. The operation of pay-TV requires a special technical infrastructure which makes it possible to encrypt the television signals and to decrypt them for the authorised viewer. In order to receive pay-TV, a decoder (set-top box) is installed in the viewers' homes.
59. In addition to a decoder base, pay-TV requires a system of conditional access. This system includes the transmission of encrypted data, which contain information on the programmes or packages of programmes subscribed to and on the entitlement of the pay-TV subscribers to receive the programmes, together with the television signal, and possibly smart cards which are made available to the viewer and are able to decipher the encrypted authorisation data and transfer them to the decoder.¹⁷
60. Pay-TV services can be supplied to viewers in Germany in one of two ways: either via the cable network or by satellite. For the supply of cable television, network levels 3 and 4 are of particular importance. The distribution network from the cable head-end to the boundary of a given plot of land (network level 3) is operated in Germany almost exclusively by Telekom. Telekom is also by far the biggest provider of the network infrastructure between that boundary and the junction boxes of TV households (network level 4). As a consequence, Telekom has the preponderant share of the cable network market.¹⁸ It is MSG MediaServices GmbH (“MSG”), a subsidiary of Telekom, that operates the technical cable platform for pay-TV.¹⁹
61. For the provision of technical services for digital signal transmission over cable networks, Telekom exclusively uses BetaResearch access technology which is currently only decipherable by the d-box decoder. This technology and the d-box are controlled by Kirch and are of a proprietary nature. This means that any potential competitor wishing to supply services using the cable can only do so after acquiring a license for the encryption technology from BetaResearch. It would then try to use Kirch’s d-box to reach viewers. However, this would mean that that the potential entrant would depend on its direct competitor, Kirch.
62. To avoid BetaResearch technology, and thereby potential interference from its direct competitor Kirch, a potential entrant could attempt to enter using its own technical infrastructure. Given the exclusive use of Beta technology on the cable, the new entrant would therefore have to enter through satellite transmission. However from the point of view of the pay-TV operator the transmission of programmes by satellite is

¹⁷ See Bertelsmann/Kirch/Premiere, paragraphs 19 and 20; Commission Decision 1999/154/EC, Deutsche Telekom/BetaResearch (OJ L 53, 27.2.1999, p. 31), paragraphs 16 and 17.

¹⁸ See Deutsche Telekom/BetaResearch, paragraph 26.

¹⁹ Under the brand “MediaVision”, MSG has as its main offer “Premiere World”. In addition, MSG also offers as a basic package the digital free TV bouquets of the public broadcasters ARD and ZDF, digital radio programmes and an Electronic Programme Guide (EPG). Currently, it is furthermore possible to subscribe to 5 thematic channels and 8 foreign language channels.

not comparable to cable, at least in Germany. A TV supplier who broadcasts his programmes exclusively via satellite direct to the home would fail to reach two-thirds of all households not receiving television solely from land-based transmitters. In particular, households in large apartment blocks in Germany cannot, as a rule, be reached by satellite, as there is usually a clause in the lease restricting the use of satellite dishes. In addition there are also considerable differences between the costs borne by a pay-TV operator per viewing household which make cable transmission much more profitable than by satellite.²⁰

63. The potential new entrant would also have to persuade consumers to buy or rent its decoder, as well as a receiver dish if they did not already have one. The UK market has shown that consumers are unlikely to buy/rent such equipment unless it is subsidised heavily. This represents an enormous cost, as BSkyB is currently showing with the introduction of digital and interactive television in the UK. Thus entry through satellite alone in Germany is unlikely.
64. In summary, an undertaking wishing to enter the market will be obliged to use Kirch's technical infrastructure. In doing so it will be reliant on Kirch, its direct competitor. This makes entry, particular in a loss making market, seem unlikely.

- Lack of access to content

65. Any operator wishing to enter the pay TV market in Germany would have to offer programmes which are attractive to German viewers.
66. As far as programme rights are concerned, Kirch is the leading German supplier of feature films and entertainment programmes for television. In its decision in *MSG Media Service* the Commission noted that Kirch had at its disposal a stock of about 15 000 movies of all types and 50 000 hours of television programmes, and also had extensive production activities in the area of movies and television.²¹ In the years 1995 to 1997, Kirch has concluded exclusive output deals for pay-TV rights with numerous film studios, including almost all the Hollywood majors, and has thereby acquired a commanding position in the area of programming.²² These long-term output deals include license agreements of pay-TV broadcasting rights to current and future theatrical motion pictures with Columbia Tri-Star, Universal Studios, Paramount/Viacom, Walt Disney/Buena Vista, Warner Bros., MGM, Polygram, Twentieth Century Fox, and Dreamworks. The finishing dates of these contracts vary between [...]. In 1997, Twentieth Century Fox, a News affiliate, has licensed all its pay-TV output to Premiere with a term of [...]. As a result of the output deals concluded by Kirch for pay-TV rights in particular, Premiere enjoys a *de facto* monopoly in premium films for pay-TV. Thus it appears that there is little film content available for a potential entrant in the German market.
67. With regard to sports rights, Kirch owns or controls the pay-TV rights to many live sports events including the German football *Bundesliga*, Formula One Grand Prix races, boxing, tennis, ice hockey, golf, handball, athletics, American sports, and wrestling events. This reduces significantly the amount of sports rights that would be available to a potential new entrant.

²⁰ See Deutsche Telekom/BetaResearch, paragraphs 20 and 21.

²¹ See MSG Media Service, paragraph 76.

²² See also Bertelsmann/Kirch/Premiere, paragraph 36.

- Need for considerable financial resources

68. While it is correct that BSkyB is a successful pay-TV operator in the UK and Ireland and has access to the technology and some of the content required to develop a successful pay-TV business, it has to be noted that BSkyB is forced to invest heavily in the upgrading of its new digital pay-TV service in the UK, due to growing competition from cable operators and terrestrial pay-TV operators. At the same time, it has significant commitments to the roll-out of the British Interactive Broadcasting/Open platform for digital interactive television services in the UK.
69. Entry into the German pay-TV market would need the investment of large amounts of capital. As BSkyB faces enormous but necessary costs in the UK, it is unlikely that it will have access to the resources necessary to enter a difficult and loss-making new market in the short to medium term, even with the backing of News.
70. In conclusion, the Commission takes the view that, in the short to medium term, BSkyB, with or without News' backing, is not a potential entrant into the German pay-TV market. This assessment is in line with previous Commission Decisions.²³

- News' alleged preparations to enter the pay TV market

71. Despite these difficulties, at least one third party has maintained that News International, through its own actions, has shown that it is a potential entrant. It is argued that that News' purchase, in 1999, of the German broadcast rights to the UEFA Champions League for four years, as well as the application by TM3 for licenses for six digital channels, shows News intended to enter the market.
72. The Commission does not share this analysis of the facts. It notes that the deal between UEFA and News included the free TV as well as pay TV rights for Germany. The Commission's investigations have shown that, soon after the deal with UEFA, the pay-TV rights were in fact offered, for the full four year duration, to Premiere. Subsequently TM3 began to exploit the free TV rights itself. The acquisition of the pay TV rights cannot therefore be taken as an indication that News envisaged entering the German pay-TV market. Had it done so, the offer to Kirch would not have been made. As far as the broadcasting licenses for TM3 are concerned, an application was made to the *Bayerische Landesanstalt für Neue Medien (BLM)*. In December 1999, the BLM granted these licences after the *Direktorenkonferenz der Landesmedienanstalten*²⁴ and the *Kommission zur Ermittlung der Konzentration im Medienbereich*²⁵ had agreed. However the Commission understands that the application for the licences indicates that the channels were designed to be thematic free TV channels.²⁶

2. Digital interactive television services

²³ See MSG Media Service, paragraph 75; Bertelsmann/Kirch/Premiere, paragraph 50; Deutsche Telekom/BetaResearch, paragraph 29.

²⁴ See Press release 29/99 of the "Direktorenkonferenz der Landesmedienanstalten (DLM)" of 8.12.1999

²⁵ See Press release 12/99 of the "Kommission zur Ermittlung der Konzentration im Medienbereich (KEK)" of 15.12.1999.

²⁶ See Press release 90/1999 of the BLM of 16.12.1999.

73. Digital interactive television services are not, as yet, available in Germany. However, a number of operators, including KirchPayTV²⁷, Bertelsmann, ARD, UPC and Primacom group have announced plans to launch interactive services in the near future. There are no indications that BSKyB intended to independently enter this market in the short to medium term.
74. However, the installation of a technical infrastructure for the transmission of digital interactive television services requires major investment. Potential entrants must have the resources not only to develop the advanced technology necessary to provide such services but also to promote and, almost certainly, subsidise the rental or sale of digital decoders to consumers. The costs, as shown by the experience of BiB/Open, are significant.
75. Potential entrants have indicated to the Commission that they would only make the required investment if there were corresponding opportunities for market penetration. In its current form, however, the proposed concentration is likely to significantly reduce the possibility of entry by third parties. This is because it will enable KirchPayTV to enter the market before, or at the same time, as any other operator. As explained below, the entry of KirchPayTV into this market at an early stage is likely to significantly raise barriers to entry for other potential suppliers by establishing the d-box as the standard decoder in Germany. Given the proprietary technology on which the box is based, such an entry is likely to create a dominant position.

KirchPayTV lacks the resources to enter digital interactive television services market

76. According to the parties, KirchPayTV is in need of “an injection of significant resources” to develop its business. The parties have estimated the total investment required by KirchPayTV at [...], with accrued losses standing at [...]. According to its notification, KirchPayTV has been unable to raise the funds it needs on the open market. Given the significant costs of entry into this market, it seems unlikely that KirchPayTV would be able to finance its entry into this market, at least in the short to medium term. These financial constraints are very significantly reduced by the proposed operation.
77. Third party comments suggest that, as a consequence of the financial obstacles it faces, KirchPayTV lacks the necessary know-how to enter this market in the immediate future. The vast majority of “d-boxes” in current use are unable to provide digital interactive television services. Whilst KirchPayTV is in the process of launching a new box, the Commission’s investigation has indicated that the new box may not be equipped to provide a full range of digital interactive television services. For example, there is some indication that BetaResearch has not completed the development stage for software which will allow services such as data broadcasting, tele banking, home shopping and video-on-demand to be supplied through the new d-box. Similarly, independent market testing of the box indicates that the new box may not be capable, at the least for the time being, of supporting typical digital features such as videotext display, electronic programming guides with colour graphics and moving previews, or Dolby Digital technology. Like other potential entrants into the German market, KirchPayTV also lacks marketing know-how or experience of running digital interactive television services. The absence of this knowledge raises the already significant risks of entering this market. BSKyB, on the other hand, is the only broadcaster in Europe with direct experience of the digital interactive television

²⁷ See KirchPayTV Offering Memorandum of 31.8.1999.

services market. Through the BiB/Open joint venture it has successfully launched these services in the UK. Its box, known as the Digibox, is technologically advanced, being able to support the full range of digital interactive television services. It will therefore be in the position, and will have the incentive after the merger, to provide its German daughter company with the requisite know how and marketing experience required to successfully enter the market.

Creation of a dominant position

78. In itself entry into a new market by a firm dominant on a closely related one, does not automatically lead to the creation of a dominant position. However, in this case the entry of KirchPayTV into digital interactive television services risks foreclosing the market to other potential entrants by significantly raising the barriers to entry. It should be recalled that the demand from "content providers" for access to an operator's digital interactive television "platform" is likely to be determined by the popularity of the "platform" with final consumers whilst the attractiveness of the "platform" to final consumers will be determined by the range and types of services they can find on it. It has already been noted that pay-TV is likely to be an important "driver" for digital interactive television services. As a result of its monopoly position on the pay TV market, KirchPayTV will be the only undertaking in Germany able, in the foreseeable future, to offer pay-TV in combination with digital interactive television services. This is likely to mean that consumers will choose KirchPayTV as it will allow them access, through the d-box, to both interactive services and pay-TV without the cost or inconvenience of having two boxes. As a result the d-box will become the standard decoder in Germany for interactive services, as well as pay-TV. The position of the d-box is buttressed by the decision of Telekom to provide technical services for digital transmission of TV programmes on its broadband cable network exclusively using Beta technology. Telekom has announced that it is selling its cable assets and the first sale is currently being finalised. Nonetheless the situation is likely to remain the same in the short to medium term as the process of divesting the cable has only just commenced and the Commission understands that Beta technology will continue to be used as the main technical service technology.
79. In itself even this would not necessarily lead to the creation of a dominant position for KirchPayTV on the market for digital interactive television services if other operators were able to supply digital interactive television services through the d-box. However, it should be recalled that the d-box is a "closed" decoder which operates with a proprietary technology developed by BetaResearch. This means that a third party operator wishing to reach customers using the d-box must seek a licence from BetaResearch. In granting licenses, BetaResearch would have no interest in exposing its sister company, KirchPayTV, to competition on the market for digital interactive television services. BetaResearch would therefore have an incentive to use its licensing policy to hamper other service providers access to the market – with regard to this point the Commission notes that in their submissions, a number of third parties have claimed that their plans to develop services have already been frustrated by BetaResearch. In addition to requiring a license, third parties wishing to operate new digital interactive television services are currently obliged to submit their plans in advance to BetaResearch to ensure their compatibility with the system. This means that BetaResearch would have access to information on competitors of its sister company KirchPayTV which, potentially, could be very sensitive commercially.

80. Thus there are serious doubts that the proposed concentration will be compatible with the common market as it will lead to the creation of a dominant, if not monopoly, position on the market for digital interactive television services for KirchPayTV.

3. The market for the acquisition of broadcasting rights, in particular for films and sporting events

81. By virtue of its dominant position in the pay-TV market, and as indicated by its extensive rights library, Kirch dominates the market for the acquisition of broadcasting rights, in particular for films and sporting events, in Germany. It has long term exclusive agreements with all of the major Hollywood studios and the German rights holders for many major sports²⁸.
82. Kirch is also active as a purchaser of pan-European rights to sporting events which can be sublicensed in several European territories.²⁹ Kirch has control of such rights as the Football Championships for 2002 and 2006; and Wimbledon (European-wide without Great Britain).
83. BSkyB dominates the pay-TV market in the UK, having over 50% of the subscription revenue on the retail market and being the leading wholesale supplier of pay-TV channels. By virtue of this buying power it also dominates the market for acquisition of broadcasting rights, in particular for films and sport. It has agreements with most of the major studios which give it control of the pay-TV rights for almost all first run films and rights to leading sports events, including the UK's Premier League football.³⁰ Through its controlling shareholder,³¹ News International, it also controls the German pay-TV and free to air rights for Champions League football, and has bid for the some pan-European sports event rights. News International's interests in German free to air TV³² led to it acquiring some other free to air rights in Germany. However, its free to air interests are in the process of being divested.
84. Third parties have expressed the concern that as Kirch is the only buyer of pay-TV rights for Germany the concentration will provide the means and incentive to use this power in related markets, to benefit itself or BSkyB. It is argued that this would take the form of tying the acquisition of German pay-TV rights to those for other broadcasting windows (free to air, internet, pay-per view) or other territories (the UK, Ireland, Italy) and that their joint resources would allow the parties to outbid other

²⁸ These pay-TV rights include: German football league, Formula One, Tennis-ATP Super-9-Series, ATP-Championships and US Open; US Golf PGA-Tour ; Golf PGA-Tour Europe

²⁹ KirchMedia holds 50% of the capital of the sports agency ISPR, as well as the entire capital of Taurus Sport GmbH which is active in the field of sports rights and which holds interests in the sports rights agencies CWL (95%) and Prisma (80%).

³⁰ In 1996, the Office of Fair Trading in the United Kingdom found that BSkyB had more than 90 % of the pay-television rights to first-run major films and that, "BSkyB was dominant in the supply of sports channels in the United Kingdom Pay-TV market and was at that time the only provider of premium sports channels with the exception of one specialist channel." (The Director-General's Review of BSkyB's Position in the Wholesale Pay-TV Market, December 1996, point 2.19).

³¹ As defined in Article 117 of BSkyB's Articles of Association.

³² News International had a 49% interest in VOX and holds a 66% interest in TM3, two small free to air channels.

bidders. It is also alleged that they will engage in joint buying of pan-European sports events rights, a point which is addressed under Article 2(4).

85. Kirch already has the strength to engage in tied buying for different windows, if it wished to, by virtue of its dominance of pay-TV and extensive free-TV interests in Germany. The addition of BSKyB does not significantly strengthen that position.
86. The same applies to the argument about added resources to outbid other purchasers. Kirch has no need to offer higher bids for German pay-TV rights as it already has all these rights in long term agreements and is the only bidder when they come up for renewal. If Kirch and BSKyB buy together for the UK and Germany the amount they have available to bid for the joint rights would be substantially the same as they had separately. There is no indication that in buying the joint rights they would offer more than they would offer separately for the individual rights.
87. On the issue of tying rights for different territories, it has been argued, however, that the concentration could strengthen BSKyB's dominant position on the pay-TV market in the UK. The concentration could provide Kirch with the means to make the acquisition of the rights for Germany conditional on BSKyB obtaining the rights for the other territory. It is suggested that Kirch would use its dominant position in the German pay-TV market to oblige rights holders, such as the Hollywood studios, to only supply the rights for the UK and Ireland to BSKyB. Kirch would threaten not to buy the German pay-TV rights, unless such an agreement was made. Although this does not alter Kirch's buying power it does increase that of BSKyB, who would not have to outbid the competing pay-TV operations in the UK.
88. Such an arrangement, however, would face a number of practical hurdles, such as the fact that the output deals for film rights, as well as those for sports rights, are usually under exclusive contract for long periods and the chances of these contracts ending at a similar time for two or more territories is low, making such activities difficult to co-ordinate. Such behaviour would also run the risk of rights holders, such as the film studios, developing their own film channels which would reduce the control of Kirch over premium film content, thus lowering the barriers to entry to the pay-TV market in the medium term.
89. In addition there would have to be a motive for Kirch to take the risk when the benefit would go only to BSKyB in the UK and Ireland. Kirch's 4% shareholding in Sky, who is the only party to directly benefit from tied buying, would not seem to be a sufficient incentive for Kirch to engage in such behaviour, especially with the risk of losing control over pay-TV rights.

C. Co-ordination of competitive behaviour

1. Definition of a candidate market for co-ordination

90. The market for pan-European sports events broadcasting rights is an upstream market to that in which the joint venture operates. Both parents, through Kirch's sports agencies and News International, are active in this market, which is defined in paragraph 46.

2. Assessment under Article 2(4)

91. The concern is that the parties will jointly bid for pan-European sports rights, where they previously competed, and that they will preferentially sell the territorial rights to each other. For such collusion to be caught under Article 2(4), the parents' incentives

to co-ordinate under Article 81(1) and causality between the creation of the JV and a co-ordination of the competitive behaviour of the parents must be established. Some incentive to engage in such behaviour may exist separately from the concentration, namely the attempt to reduce costs in one of the most expensive areas for pay-TV operator, the acquisition of sports rights. There is therefore a lack of causality with regard to the potential collusion. Joint bidding could be done without the framework of the concentration and the concentration does not facilitate this process. Accordingly there are no Article 2(4) aspects in this case.

VI. COMMITMENTS

92. On the basis of the above assessment the Commission had serious doubts about the compatibility of the concentration with the common market. These doubts relate to the strengthening of a dominant position on the pay-TV market in Germany resulting from the influx of financial resources from BSkyB and the creation of a dominant position on the market for digital interactive television services.
93. In view of these and third party concerns, the parties offered commitments, which are set out at Annex 1 and which form an integral part of this decision, notwithstanding any additional statutory or other legal obligations to which the parties are currently subject or to which they may be subject in the future. The first set of commitments concerns the market for the acquisition of broadcasting rights. The Commission notes these commitments, though it is of the view that they are not necessary to address serious doubts about the compatibility of the concentration.
94. The second set of commitments relate to the technological platform for pay-TV and interactive services. The creation or strengthening of KirchPayTV's dominant position due to the influx of resources and know-how is sufficiently compensated for by these commitments. They lower the barriers to entry on the pay-TV market and prevent KirchPayTV from leveraging its dominance on this market into the market for digital interactive television services. These commitments therefore eliminate the serious doubts with regard to a creation or strengthening of a dominant position resulting from the proposed concentration.

VII. CONCLUSION

95. For the above reasons, the Commission decides not to oppose the notified operation and to declare it compatible with the common market and with the EEA Agreement, subject to the condition of full compliance with the commitments given to the Commission on 25 February 2000 (as amended on 20 March 2000) which are set out in the Annex. This decision is adopted in application of Article 6(1)(b) of Council Regulation (EEC) No 4064/89.

For the Commission,

ANNEX 1

CASE NO. COMP/JV.37 - BSKYB/KIRCHPAYTV PROPOSED UNDERTAKINGS BY PARTIES

The parties propose the following undertakings in the context of an agreement that the above case would not, if the undertakings are agreed, proceed to a second stage.

References in these undertakings to Kirch shall include all entities controlled or jointly controlled by Kirch VermögensVerwaltungs GmbH & Co. KG ("Kirch") or its successors.

These undertakings do not affect in any way statutory, or any other legal obligations which the parties are currently or in the future will be under.

Each of the undertakings below will remain in force as long as BSKyB and Kirch have joint control over KirchPayTV within the meaning of Art. 3 MCR and will expire when joint control no longer exists.

Each of the relevant Kirch company, News and/or BSKyB, as the case may be, will submit to arbitration before the "Arbitrator" in relation to any dispute with a third party regarding the implementation of these undertakings.

The burden of proof for any refusal to meet a request by a third party pursuant to these undertakings rests with Kirch, News and/or BSKyB, as the case may be. The proof must be provided to the Arbitrator within the time limits set by the Arbitrator.

The parties will propose an arbitration process to the Commission within two weeks of the Decision. The arbitration process shall comprise the process to be used and the appointment of the Arbitrator(s). The Commission shall decide within one month whether they approve the proposed arbitral process. If the Commission does not approve the arbitral process, the parties shall have a further fourteen days to propose alternatives and the Commission a further month to give its final approval. If the Commission does not approve any process proposed by the parties it may lay down the arbitral process itself.

The Arbitrator may decide all matters relating to these undertakings arising between the parties or any of them and a third party. The arbitral process shall be for the benefit of third parties for the purpose of procuring that the parties achieve full compliance, and make good any non-compliance, with the undertakings vis-a-vis third parties. In reaching a decision the Arbitrator shall take full account of any prior decision by any other arbitrator, court or regulatory body on matters covered by these undertakings relevant to the dispute before him. Decisions of the Arbitrator shall be

final and binding on all persons submitting to arbitration. Nothing in the arbitral process shall affect the powers of the Commission to take decisions in relation to the undertakings in accordance with its powers under the Merger Regulation and the Treaty.

- Technology

Access to Kirch's technical platform by interested third parties

1. Kirch agrees to procure that the relevant Kirch company will offer to all interested third parties, on a fair, reasonable and non-discriminatory basis, technical services (either individually or together) enabling the interested third parties' digitally-transmitted services, (including interactive services), where supported by Kirch's technical platform, to be received by viewers authorised by means of digital decoders administered by such Kirch company. Kirch will not preclude other existing or future third party licensees who administer access to digital decoders containing Kirch technology from offering technical services. Technical services shall mean any of encryption services, subscriber authorisation services, EPG access and any other service or part thereof which is of a technical nature where failure to provide such a part means that the interested third party's digitally transmitted services could not be displayed to viewers as intended by the third party using the full functionality supported by the platform.
2. Kirch agrees that the relevant Kirch company will keep separate financial accounts regarding its activities as a provider of technical services for each technical service separately, which shall be audited on an annual basis as part of its annual audit by an audit firm of international standing . Kirch will deliver copies of such accounts to the Arbitrator and the Commission if and when either of them so requests. Kirch will make available at its premises said accounts for inspection by interested third parties within two weeks of receipt of a written request. The Arbitrator shall be entitled to call for and the relevant Kirch parties will submit all necessary information, including the transfer pricing and other terms of supply for each technical service separately within Kirch Group to enable the Arbitrator to evaluate any claim that the terms offered by the Kirch party are discriminatory. The Arbitrator may at its discretion make available said transfer pricing for technical services to any third party in an arbitration instituted pursuant to these undertakings subject to such third party entering into an appropriate confidentiality undertaking, which if not agreed, shall be determined by the Arbitrator.
3. Kirch agrees, subject to performance by the offeree of its services of the condition below, to co-operate when requested by the offeree to ensure that the offeree is in a position to take full advantage of the performance by the relevant Kirch company of its duty under 1 above. This duty includes the duty to disclose information (within one month of receipt of a request in writing) concerning the conditional access system and the technical services referred to in 1 to the offeree in order to enable the offeree to take full advantage of the performance by the relevant Kirch company of its duty under 1 above including ensuring that the offeree is not placed at a disadvantage when compared to other offerees, or to other Kirch entities who themselves are conditional access customers of the relevant Kirch company.

The condition mentioned above is that the offeree has provided the relevant Kirch company with the necessary information to enable the relevant Kirch company to comply with its duty in 1 above and has given the relevant Kirch company an undertaking in writing that information supplied to the offeree pursuant to the above shall be kept confidential and shall (together with all copies thereof) be returned to the relevant Kirch company should the offeree no longer require that the relevant Kirch company perform its duty under 1. above in relation to him.

Kirch agrees to provide information about technical up-grades to the d-box functionality at the same time as it supplies the technical specification to manufacturers of the d-box, or, if earlier, at the time that the corresponding software download is ready for downloading to the base of d-box decoders. Kirch shall fulfil this obligation by placing a notice on its web-site announcing the intention to introduce such an up-grade and information will be provided to interested third parties requesting such information within ten days of receipt of appropriate confidentiality undertakings from such interested third parties.

Kirch agrees to make available within two weeks of receipt of a written request from interested third parties a list of technical services and the prices of each technical service from time to time offered by Kirch on its platform.

- Access of third party applications to Kirch's d-box system
- 4.(a) Kirch confirms that all the information relating to the API necessary to develop applications based on the API of the d-box 1 has been disclosed and, within two weeks of a request in writing, is available to interested third parties
- (b) Kirch agrees that any third party who wishes to supply an application (service) to the users of the d-box (whichever version) via the API will not (subject to agreeing fair, reasonable and non-discriminatory commercial terms for its use) be required to obtain a technical authorisation or approval by the relevant Kirch company provided that such third party and its technology provider (if different) shall have guaranteed, and assumed liability, to the relevant Kirch company that the application is compatible and does not interfere with, any functionality of the d-box, or offerings or applications of any other party. The technology provider must be duly qualified. The third party as well as the technology provider (if different) must be solvent and each shall have obtained adequate insurance.
- (c) If the third party submits its application to testing by the relevant Kirch company and if the testing shows that the application is compatible with and does not interfere with any functionality of the d-box, then the application shall be permitted to run on Kirch's d-box base without further liability. Testing shall be to no higher standards than those applied to the testing of other applications, including Kirch's own. The testing shall be undertaken on reasonable commercial terms and within a reasonable time scale, such time scale to be agreed between the relevant Kirch company and the third party within 1 month of receipt of a written request together with the necessary information to evaluate a realistic time-scale for testing and in the absence of agreement within such month, within such time-scale as is determined by the Arbitrator. Kirch undertakes to provide adequate resources to perform such testing

and to permit it to be done in the same timeframe as provided for other equivalent applications, including Kirch's own.

- (d) The personnel within Kirch who have access to or knowledge of any such application submitted for testing shall not be involved in any programme content or software development activities of Kirch, and will be under strict contractual confidentiality obligations not to disclose any information on the application or its existence to any other Kirch entity or use the information for anything other than testing purposes.
- (e) Should an independent entity be willing to undertake the testing of applications for third parties and thereafter assume full liability for applications tested by it and take out adequate insurance therefor, Kirch will, on reasonable commercial terms, support the establishment of such institution by providing all necessary information and support in order to facilitate an efficient and sufficient testing environment. Applications tested by such independent entity will be permitted to run on the d-box without further testing.

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- *Interoperability of applications*

5.(a) Kirch agrees to procure that the relevant Kirch company will implement the application programming interface (API) as standardised by the Digital Video Broadcasting Group (DVB) and known as DVB Multimedia Home Platform (MHP) into the integrated receiver decoder (IRD) known under the trade name "d-box" or any successor IRDs. Kirch agrees to procure that the relevant Kirch company will use all reasonable endeavours to ensure that the implementation of the MHP API will be operational within 9 months after the adoption and publication by ETSI of the technical specifications of the MHP API as standardised by the DVB or within 12 months from the submission by the DVB to ETSI of such technical specification for publication, whichever is earlier, unless Kirch demonstrates that any delay is due to reasons beyond Kirch's control.

(b) Kirch undertakes that any extensions or plug-ins developed or deployed by Kirch will maintain the openness of the MHP interface so that no additional licences for developing applications to run on MHP would be required from Kirch. Once the MHP API software is operational, Kirch undertakes without further delay to download the MHP API software into all boxes which have sufficient storage capacity to do so, which shall include all d-boxes known as d-box 2.

(c) Kirch will not occupy the memory of its d-box or any of its successors with applications that are not necessary for the functionality of the digital services offered by Kirch at that time.

- *Interoperability of competing technical platforms*

6. Kirch agrees to procure that the relevant Kirch company will offer to develop and to operate Simulcrypt arrangements (including the provision of the necessary coding information) with all digital conditional access providers in the German speaking territories who request the same, on reasonable commercial terms. Kirch will use all

reasonable endeavours to procure that Simulcrypt arrangements are operational as soon as possible, or within such time-scale as is agreed by the parties to the Simulcrypt arrangement, such time scale to be agreed within 1 month of receipt of a written request together with the necessary information to evaluate a realistic time-scale, and in the absence of agreement within such month, within such time-scale as is determined by the Arbitrator. To this end the relevant Kirch company will co-operate fully with the conditional access provider (and its technology provider, if different).

This condition is subject to:

- (a) the conditional access provider who wishes to operate a Simulcrypt arrangement (and its technology provider, if different) co-operating, as far as objectively necessary, with the relevant Kirch company, and if appropriate, such company's technology suppliers, in developing a Simulcrypt arrangement between Kirch's digital conditional access technology and the conditional access technology employed by the conditional access provider and agreeing fair and reasonable commercial terms for such development;
- (b) the conditional access provider agreeing with the relevant Kirch company fair and reasonable commercial terms for ongoing arrangements relating to the operation of the Simulcrypt arrangement, including, in particular, arrangements for the cross carriage of necessary data; and
- (c) the security of the conditional access provider's system not being compromised such that it creates an objective threat to the security of the system used by the relevant Kirch company.

- *Access to Kirch Pay TV services by other technology platforms*

7. In the event that an interested third party notifies Kirch in writing that it intends to establish or has established a technical platform on cable or via the same digital satellite system as is used by Kirch Pay TV which allows or will allow viewers in German speaking territories to access pay TV services via digital television decoders other than the d-box, Kirch agrees to procure that, Kirch Pay TV offers, at the request of such platform provider, to retail its pay TV services directly to subscribers via Simulcrypt arrangements to digital television decoders other than the d-box and directly to administer their subscriptions and address their smart cards on such platform, provided that:

- (a) such Simulcrypt arrangements are offered to Kirch Pay TV on fair, reasonable and non-discriminatory terms;
- (b) Such platform displays at least equivalent technical functionality as Kirch Pay TV's own technical platform, thereby enabling Kirch Pay TV's services to be offered to viewers with identical functionality to Kirch Pay TV's own digital satellite offering; and
- (c) Such platform is technically secure and the platform provider commits to guarantee such security on an unlimited liability basis related to income

losses by Kirch in its subscription services and liability to third parties and with adequate insurance in the event of a security breach.

Kirch will not discriminate in terms of retail price between the customers receiving via such platform and the customers receiving via its own platform subject to it not incurring additional costs for such distribution and subject to (a) above.

- **The use of Kirch's technology by competing platforms**

8. Kirch agrees to procure that the relevant Kirch company will offer licenses for the d-box network (operating system, conditional access system and API) on a reasonable and non-discriminatory basis to all interested third parties who wish to operate a digital technical platform in German speaking territories and who request such a licence. Such offer will be made within 1 (one) month after receiving a written request for a license together with the information necessary to enable the relevant Kirch company to construct such offer. To the extent that the relevant Kirch company controls the technology, Kirch undertakes that any third party licensee, will be offered, on reasonable commercial terms, a license to the software which is at least equal in scope to those offered to any Kirch controlled entity.

Kirch agrees to make available on written request by interested third parties term sheets including licensing fees and conditions for standard technology, where Kirch is in a position to grant licences for this technology to third parties.

- *Production of "multiple system" boxes*

- 9.(a) Kirch agrees to procure that the relevant Kirch company will grant manufacturing licenses for the production of the d-box to interested manufacturers of IRDs or comparable hardware in a non-discriminatory manner and under terms and conditions which are customary in and normally applied by the industry. It shall do so within 1 (one) month after receiving a written request for a license together with the information necessary to enable the relevant Kirch company to grant such a licence or, if the granting of the manufacturing license objectively requires more than 1 (one) month, within such timeframe as to be agreed within 1 (one) month after the receipt of the request between the relevant Kirch company and the interested party or, in the absence of an agreement, within such timeframe as to be determined by the Arbitrator. Kirch undertakes that it will not, in licensing manufacturers to manufacture d-box decoders which include Kirch's conditional access system, preclude the manufacturers from including in such decoders a third party's conditional access system, or capability for a third party's conditional access system to be attached to such decoder, and furthermore Kirch undertakes that it will not refuse to supply subscribers with its Pay TV services based solely on the fact that they wish to subscribe using a d-box which contains such capability.
- (b) Kirch will not impose any other licence restrictions on manufacturers which would prevent them from manufacturing such a box which contains additional conditional access system(s).

The above undertakings are subject to such third party's conditional access system not affecting in any way Kirch's conditional access system or adversely affecting its

operating system within the d-box or the applications running on the box, or in any way compromising the security of either system.

- Transition to digital of analogue subscribers
10. Kirch agrees to offer a d-box to every subscriber who is not in default of its subscription that requests a d-box in place of its analogue box within three months of such request and to change the subscriber's subscription accordingly (subject to the subscriber signing a new digital subscription agreement).
- *Limitation on Kirch for additional cable capacity*
11. Kirch Pay TV agrees that it will not apply for further digital cable capacity in Germany prior to 31st December 2000.

Rights acquisition.

1. Each of News and BSkyB agree that, in bidding for programming rights for exploitation on a pay TV basis in the UK and Eire, they will not impose upon the rights holder as a condition of their bids, that the rights holder must grant the pay TV programming rights for the German territory to Kirch; and Kirch agrees that, in bidding for programming rights for exploitation on a pay TV basis in the German territory, it will not impose on the rights holder as a condition of its bid a condition that the rights for the UK and Eire be sold to BSkyB or News.
2. In the event that News or BSkyB on the one hand, or Kirch on the other, acquires rights for the exploitation via pay TV of a major live international sports event on a multi-national basis, each of News and BSkyB agree that they will not give to Kirch the status of preferred bidder for such rights in respect of Germany, and Kirch agrees that it will not give to either of BSkyB or News the status of preferred bidder for such rights with respect to the UK and Republic of Ireland (in the case of BSkyB), or such territories within which News undertakes broadcasting activities (in the case of News), in all cases by granting a right of first negotiation, first refusal or first offer or a right of last matching offer or other rights with similar effect.
3. None of News or BSkyB on the one hand, or Kirch on the other, will agree to refrain from bidding for TV rights to major live international sports events for exploitation via pay TV in one or more Member States where such agreement is given in return for valuable consideration (which shall include, without limitation, a reciprocal agreement) from either News or BSkyB (in the case of Kirch) and from Kirch (in the case of News or BSkyB).
4. Kirch, News and BSkyB agree that Kirch and News or Kirch and BSkyB, as the case may be, will not bid jointly for multi-national TV rights to major live international sports events for exploitation via pay TV in one or more Member States unless, in respect of any particular sports event, another bidder or bidders for such rights include(s) (or is/are reasonably believed by the parties to include):

- a) a group of bidders with TV interests in several Member States bidding, directly or indirectly, for rights (either jointly, or where one or more bidders bid on behalf of others) for several Member States; or
- b) a single bidder with TV interests in several Member States who is bidding, directly or indirectly, for rights for several Member States.

For the purpose of this undertaking “several” Member States means two or more, save that UK and Eire count as one, and Germany and Austria count as one.

Submitted on February 25th 2000 as amended 20th March 2000

KirchPayTV GmbH & Co. KGaA (“Kirch Pay TV”)

Kirch VermögensVerwaltungs GmbH & Co. KG (“Kirch”)

British Sky Broadcasting Group plc. (“BSkyB”)

The News Corporation Limited (“News”)