EN

Case No COMP/JV.48 - VODAFONE / VIVENDI / CANAL PLUS

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REGULATION (EEC) No 4064/89
MERGER PROCEDURE

Article 6(2) NON-OPPOSITION
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COMMISSION OF THE EUROPEAN COMMUNITIES

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Brussels, 20.7.2000

In the published version of this decision, some information has been omitted pursuant to Article 17(2) of Council Regulation (EEC) No 4064/89 concerning non-disclosure of business secrets and other confidential information. The omissions are shown thus […]. Where possible the information omitted has been replaced by ranges of figures or a general description.

PUBLIC VERSION

MERGER PROCEDURE
ARTICLE 6 (2)DECISION

To the notifying parties

Dear Sir/Madam:

Subject : Case COMP/JV.48 - Vodafone/ Vivendi/ Canal+

Notification of 6 June 2000 pursuant to Article 4 of Council Regulation (EEC) No 4064/89

I. INTRODUCTION

1. On 6 June 2000, the Commission received a notification of a proposed concentration pursuant to Article 4 of the Council Regulation (EEC) No 4064/89[1] (the "Merger Regulation"), by which the undertakings Vodafone Air Touch plc (Vodafone), Vivendi SA (Vivendi) and Canal+ SA (Canal+) acquire within the meaning of Article 3 (1)(b) of that Regulation joint control of Vizzavi by way of purchase of shares in a newly created company constituting a joint venture (the "JV Company").

2. After examination of the notification, the Commission has concluded that the notified operation falls within the scope of Council Regulation (EEC) No 4064/89 and as a result of the commitments given by the parties does not raise serious doubts as to its compatibility with the common market and with the EEA Agreement.

II. PARTIES

3. Vodafone AirTouch is the holding company of a group of companies involved in the operation of mobile telecommunications networks and the provision of related telecommunications services, such as data network operation, radio paging, satellite mobile communications and value added network services. It

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 of 9.7.1997, p. 1, corrigendum in OJ L 40 of 13.2.1998, p. 17.

has subsidiary mobile operators active in several Member States (namely the UK, Germany, Italy, the Netherlands, Greece, Portugal and Sweden) and interests in mobile operators in other Member States (France, Belgium and Spain), as well as in fixed operators in a number of Member States (Austria, Germany, and Italy). Some of these companies also carry out Internet-related activities, such as the provision of WAP portals. Through Vodafone's acquisition of Mannesmann AG[2] and its subsidiaries, it now has interests in fixed and/or mobile telecommunications provision in several Member States, namely Germany, Italy, France and Austria, and has interests in providing Internet access (notably in Austria, Germany, Greece, Italy, Portugal, Spain, Sweden, and the UK). Vodafone is a publicly quoted company and so is not controlled, directly or indirectly, by any third party.

4. Vodafone has recently established a wholly owned subsidiary, Vodafone AirTouch European Portal Limited ("VEP"). VEP is intended to develop and deliver regionally focused European-wide wireless Internet content. Vodafone's shareholding in the JV Company will be held indirectly, through VEP.

5. Vivendi is the ultimate parent company of a group active in France and internationally. Its main activities are the communications industry and in utilities. It provides telecommunications networks and related services, including data network operation and value added network services, principally through its 44% controlling interest in Cegetel. Cegetel in turn has an 80% stake in SFR, the second mobile operator in France. The remaining 20% of SFR are held by Vodafone, and Vodafone and Cegetel jointly control SFR[3]. Vivendi is active in both fixed and mobile telephony markets. It is also active in the publishing and multi-media industries, and had interests in audio-visual activities, primarily through its 49%% controlling interest in Canal+. Vivendi is a publicly quoted company and so is not controlled, directly or indirectly, by any third party. It has joint control over AOL France (an Internet Service Provider (ISP)), BOL France (a vendor of French language books via the Internet), @Viso (a venture capital Internet investor) and Scoot Europe (an information intermediary company, primarily active on the Internet). In addition, Vivendi controls (i)France, a French Internet community website that is developing into a horizontal portal.

6. Canal+ is a French company, active in France, Belgium, Italy, The Netherlands, Spain and the Nordic countries through its subsidiaries. It is primarily engaged in audio-visual activities, including the broadcasting, production, distribution and marketing of films and television programmes and channels. It also develops and supplies conditional access software and interactive services and applications. It is developing activities related to multimedia and the Internet. Canal+ is a publicly quoted company, of which Vivendi is the largest [and controlling] shareholder with a 49% interest.

7. Vivendi and Canal+ together are currently setting up Vivendi Net S.A. ("Vivendi Net"). Vivendi Net is a 50/50 joint venture combining the Internet-based activities of Vivendi and Canal+. Vivendi and Canal+ will hold their interest in the JV Company through Vivendi Net.

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2 See Case No. COMP/M.1795 – Vodafone/Mannesmann of 12/04/00.

3 See Case No. IV/M.1055 – Cegetel/Vodafone Airtouch of 19/12/97.

III. THE OPERATION

8. The JV Company will develop, market, maintain and provide a branded horizontal multi-access Internet portal, known as Vizzavi (or the "Portal"), throughout Europe, providing customers with a seamless environment for a range of web-based interactive services (hence: "horizontal" portal), across a variety of platforms (i.e. mobile phones, PCs and set-top boxes, hence: "multi-access" portal)[4]. It is intended that Vizzavi should be the default horizontal portal for all Vodafone, Vivendi and Canal+ telecommunications and pay TV subsidiaries capable of offering Internet connectivity to their customers. Users accessing the Internet via the portal will receive services including e-mail, e-commerce, search engine facilities and hypertext link references. The JV Company may also develop and supply content, and it may act as an ISP in countries where the Parties have no subsidiaries or affiliates capable of fulfilling this role (or where they have elected not to fulfil this role).

9. The JV Company is to establish local subsidiaries, initially 100% owned by the JV Company[5], in order to offer localised services to customers. The subsidiaries will initially be established in France, Germany, Italy and the UK, although the Parties intend to set up local subsidiaries in other countries too.

10. The Parties will transfer to the JV Company all of their horizontal portal-related activities currently carried on in the Territory[6] by subsidiaries or affiliates of either Vodafone or Vivendi/Canal+. This will include the transfer of […]These transfers are intended to be carried […]

11. […]

12. […]

13. [..]

14. The parties will use their rights over mobile telecommunication operators, pay TV operators and other access providers, which they wholly own or in which they have a majority stake or majority board control, to enter into arm's length agreements with the JV Company to provide customers of these operators with access to the Portal (in the form of a front page or a default front page).

IV. CONCENTRATION

A. Joint Control

15. The share capital of the JV Company will be held in equal proportions by Vodafone (through VEP), and Vivendi and Canal+ (through Vivendi Net). VEP and Vivendi Net will each appoint four non-executive directors to the board of the JV Company. Additionally, Vivendi Net will appoint an executive director, who will also be the Chief Financial Officer, and VEP will appoint an executive director who will also be the Chief Executive Officer.

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4 See the definitions of horizontal and vertical portals in paras 47ff. of this decision below.

5 In the UK, France, Germany and Italy, 20% of these subsidiaries will be owned by the relevant local Vodafone/Vivendi mobile operators, provided certain conditions are met. In other countries, similar minority stakes may be offered to local operators or third parties.

6 "Territory" as defined by the JV Agreement is the EU, Norway, Switzerland, Iceland, the Baltic States, Poland, the Czech Republic, Slovakia, Hungary, the countries of the former Yugoslavia, Bulgaria, Romania, Malta and Cyprus.

16. Under the proposed concentration, the Chairman and Vice Chairman will initially be appointed by Vivendi Net and VEP, respectively. Thereafter, the appointment of these officers will alternate between the Parties. Neither the Chairman nor the Vice Chairman will have a casting vote.

17. Board decisions will require the unanimous approval of all non-executive directors present for so long as the Parties maintain equal shareholdings in the JV Company. All significant matters must be put to the Board.

18. The Parties intend to convert the JV into a publicly quoted company but they also intend to retain joint control of the JV Company upon any initial or subsequent public offering.

19. The effect of the above provisions is that the JV Company will require the approval of all Parties before it can act on any significant matters. This amounts to the negative veto rights required to give each parent company joint control over the JV Company. Therefore, there will be joint control over the JV Company by Vodafone, Vivendi and Canal+ exercised indirectly, through VEP and Vivendi Net.

B. Full Function Joint Venture

20. The JV Company will develop, market, maintain and provide a multi-access horizontal portal in the Territory. The Parties will transfer to the JV Company their current horizontal portal-related assets and activities. In addition, the Parties have an initial financial commitment to the JV Company of €[…], and the power to call upon additional financing from the shareholders (subject to the approval of the parents) and from other sources. The JV Company will also have its own independent management, organisation, staff and resources.

21. The income of the JV Company is anticipated mainly to come from revenue from Internet advertising, subscriptions for paid-for content and commission on e-commerce transactions. It is anticipated that within three to five years, [...][*]of the JV Company's revenue will be generated by e-commerce and paid-for content, with users accessing the Portal via third party networks. Independent revenue will also be generated from advertisers.

22. It is intended that the Vizzavi portal will be used as the default portal for the access services of Vodafone and Vivendi/Canal+. It is also possible for the Portal to become the default Portal for third party operators based on agreements with such operators in those countries where either none of the Parties has a subsidiary, or where agreements with Internet access providers that are subsidiaries of the JV Parties have not been concluded within a reasonable time. Initially most users accessing the portal will be subscribers to the access services of the Parties, their subsidiaries and affiliates. However, the Parties intend that the JV will develop further through third party access, including PC access, to the Portal via the JV Company.

23. Subsidiaries and affiliates of the Parties will provide content and/or support services to the JV Company on a first offer, arm's length basis. However, the JV Company will be free to use independent third party content/service providers,

[*] a significant percentage

and the content/support service providers will be free to provide content/ support services to other portals.

24. The JV is intended to be of indefinite duration. However, it is intended that the shareholder structure of the JV Company will be changed by the launch of an IPO as soon as possible, although no precise date has been specified. According to the Parties, after the IPO they will continue to maintain joint control over the JV Company.

25. The JV Company will therefore perform on a lasting basis all of the functions of an autonomous economic entity within the meaning of Article 3(2) of the Merger Regulation.

V. COMMUNITY DIMENSION

26. The combined aggregate world-wide turnover of Vodafone […], and of Vivendi (including the turnover of Canal+ as from 1 October 1999) […] exceeds €5,000m. The aggregate Community-wide turnover of each of these undertakings is in excess of €250m (Vodafone […], Vivendi/ Canal+ […]) Vivendi/ Canal+[…]. However, Vodafone does not achieve more than two-thirds of its aggregate Community-wide turnover in one and the same Member State. The concentration therefore has a Community dimension within the meaning of Article 1 of the Merger Regulation.

VI. RELEVANT MARKETS

27. The Commission, pursuant to previous decisions, for example Telia/Telenor/Schibsted[7] and Cegetel/Canal+/AOL/Bertelsmann[8], has identified the following distinct product markets: Internet access, Internet advertising and paid-for content provision. This division has been based on the assumption that as these different activities earn revenue in different ways from different sources, they reflect differing demands. Given the dynamic nature of Internet markets, and the emergence of new products and services, concerning the JV the Commission has analysed the market to determine whether Internet portals, such as the joint venture portal Vizzavi or existing portals such as Yahoo! or Lycos constitute a separate market in their own right.

28. This market definition section is divided into markets on which the joint venture will be active, and into markets on which two or more of the parent companies are or will be active outside of the venture. Markets from both sections may be considered as candidate markets for an Article 2(4) assessment. Given the number of markets and for ease of reading, for each market, the product and geographic market are considered in the same section.

A. Markets on which the Joint Venture will be active

Internet access

29. The Commission in its decision in Telia/Telenor[9] distinguished between dial-up and dedicated access. The division of these two Internet access services into two separate product markets, is based on the fact that demand for supply of dial-up access is mainly from residential and business customers whilst demand for

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7 Case No. IV/JV.1 of 27/05/1998.

8 Case No. IV/JV.5 of 04/08/1998.

9 Case No. IV/M.1439 – Telia/Telenor of 13/10/99.

dedicated access centres mainly around large corporate customers. Furthermore, it emerged in the BT/Esat[10] decision that within dial-up access it may be possible to distinguish even further, between residential and business dial-up access. The provision of business dial–up access involved more sophisticated dial-up mechanisms. For the current assessment an analysis of this further distinction is not necessary and may be left open.

30. Content and service provision has historically been separable from Internet access (via dial-up or dedicated line) given the open nature of Internet standards and the configurability of Internet access PC software. This has led the Commission to distinguish in past decisions between Internet access, and Internet content services markets (the latter are in turn divided into advertising funded and paid-for content markets – see below). Although companies exist, such as AOL, that provide both residential access and content services, the fact that both services are provided by a single undertaking does not undermine this market definition, unless it can be shown that consumer demand exists for those services distinguishable from the demand for the separate services.

31. Looking in more detail at Internet access, up to now, Internet connectivity was made via dial-up access (low bandwidth service) or a dedicated (high bandwidth service) using a fixed line and personal computer as the access mechanism. However, other means of delivery are now available to access the Internet, which do not require the purchase of a PC.

32. With the development of WAP technology, mobile telephone users now have the ability to access the Internet and to send e-mails using second generation (GSM/DCS) mobile networks and WAP mobile handsets. This ability will be further developed with the implementation of further technological advances, such as General Packet Radio Systems (GPRS) which offer similar features to that offered using current WAP phones for second generation mobile (GSM/DCS) but offer higher speed access. The rollout of new third generation networks will further enhance the range of products available over WAP mobile phones (and may enable new developments beyond those based on WAP phones and WAP portals). However, because of the size of the screen, and the current data transmission capacity of mobile networks, Internet services delivered via mobile networks will be tailored to the delivery capabilities of those networks. Accessing the Internet via a mobile phone is therefore unlikely to be a substitute for existing methods of accessing the Internet through a PC screen.

33. In addition to the development of Internet access by mobile phones, access will also be offered through digital TV set-top boxes. The notifying parties intend to offer the Vizzavi portal over Canal+ digital TV services. Other digital TV operators in the EEA, such as Open in the UK, also offer access to interactive services through TV set top boxes. Both the demand-substitutability test and differences in the characteristics of interactive services that can be delivered via television sets and via personal computers, lead to the conclusion that they constitute separate access markets. A small permanent increase in the price of

10 Case No. Comp/M.1838 – BT/ESAT of 27/03/00.

such services available via televisions is unlikely to be constrained by the existence of services available on personal computers.[11]

34. In accord with previous Commission decisions, Internet access provided over access mechanisms with different transmission, display and usage characteristics, notably WAP mobile handsets, set-top boxes, and PCs, therefore constitute separate access markets.

35. Although, for the reasons set out above, in the present decision TV and mobile phone platforms for Internet access are considered to constitute separate markets, with the increase in number of access technologies to the Internet, the possibilities of providing bundled services increase.

36. Accordingly, certain customers may have a demand in the future for Internet access available across multiple access platforms such as PCs, mobile telephones and through digital set top boxes. This access will be facilitated by multi-access portals such as Vizzavi, which is already intending to offer a common e-mail address across all delivery mechanisms. In the future operators may wish to bundle or tie sales of mobile telephony services with pay TV services using the same branded portal as a common factor. This convergence at the service level would not, however, lead to the conclusion that access provided across the different platforms (PCs, mobile phones, and set-top boxes) became substitutable: a service provider wishing to provide a multiple access service would still need to gain access to each of the Internet access delivery mechanisms.

37. The existing access markets are essentially national in nature due to the necessity for local loop access and the availability of freephone/local call rate numbers to the nearest point of presence (POP). In Telia/Telenor, the Commission found that the access market is national in scope by this requirement. As licenses to operate cable TV networks are likewise awarded on a national basis, the markets for Internet access based on cable TV infrastructure are likewise national. However, with the use of mobile telephones to access the Internet, such as through Vodafone mobile phones to the Vizzavi portal, it may be possible to identify a tendency for a widening of the Internet access market to a Europe wide basis, to take advantage of the pan-European services identified in Vodafone/Mannesmann.

38. In particular it may also be possible to distinguish between residential and business mobile Internet access services, with business users demanding higher bandwidth and/or pan-European data services. This would suggest the possible emergence of a pan-European market for mobile Internet access.

<u>Internet content and services markets</u>

39. A large and increasing number of information, entertainment and transactional products and services can be provided over the Internet. Revenue for these products and services can be derived from a combination of advertising,

[11] BiB, Commission Dec. of 15/09/1999.

subscription (user) charges, access charges[12], and third party content provider charges (by way of a flat fee and/or a per transaction charge). The balance between these revenue models varies from company to company, and is evolving over time.

40. Given the number of different services that can be provided over the Internet, it is likely that a number of different product and service markets exist, satisfying distinct consumer demands. The Commission has not had to specify these markets in detail. The Commission has, however, drawn a general distinction between advertising funded services and paid-for content services.

41. There will be different content markets relevant to each delivery mechanism so long as consumers regard the provision of services across the different access mechanisms as non-substitutable.

Internet advertising

42. According to the notifying parties, portal operators derive revenue inter alia from sales of advertising space on their web sites to companies. Advertising space on website can be sold directly to advertising companies or to media buying companies, who resell to media buying companies. They add that Internet advertising is relatively new and competes with all other types of advertising on a greater advertising market. Therefore, the notifying parties consider that portals operate on a wider advertising market.

43. However, in previous decisions (as set out above), the Commission has defined Internet advertising as a market in its own right. In those decisions, the geographic scope for the market for Internet advertising has been defined as national, due to the adaptations of publicity campaigns[13] on national/linguistic lines when used on different national markets. The Telia/Telenor/Schibsted decision confirms that the market can be considered to be national.

44. Even though Vizzavi will be operating at a pan-European level, the advertisements that it carries are likely to be focused on each individual national market. Currently, Vodafone is active in the Internet advertising market in Germany, Greece, Italy, Portugal, Spain and the UK. Vivendi is active in this market in France, Germany and the UK, and Canal+ is active on the French market and has minor involvement in the Spanish market. Therefore, there will be some overlap in the markets for Internet advertising in the UK, Germany and Spain. Finally, although due to language and other cultural factors Internet advertising markets will tend to remain national, the pan-European spread of the large number of users to which the JV provides access may provide the JV with an economy of scope allowing it to obtain better terms for advertising campaigns with a pan-European scope.

Provision of paid-for content

45. The Commission in the case Bertelsmann/Burda/HOS Lifeline[14] found that the provision of paid-for content (games, special news services) on the Internet is a separate market from Internet advertising. There are likely to be a number of

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12 For example, based on a revenue sharing arrangement with the telecommunications access provider.

13 Case No. IV/JV.11 – @Home Benelux BV of 15/09/1998.

14 Case No. IV/M.973, of 15/09/1998.

distinct paid-for content markets, reflecting the distinct user demand for particular types of content services. A wide range of content providers and developers such as music/movie producers, universities, individuals exist. However, there is a finite amount of premium content. In this content market, there is a strong link between the provision of content and buying power.

46. The geographic scope will vary depending on the particular content market. Given cultural, linguistic and regulatory reasons, it would tend to be national[15], although it may be wider (e.g. a Nordic market may exist).

<u>Portals</u>

47. The Commission has not previously defined portals as constituting a separate market. The Commission has however distinguished different content markets in the context of digital interactive television services, in the British Interactive Broadcasting/Open (BiB) decision[16]. There, the Commission held that end-user demand substitutability for a package of interactive services was distinguishable from demand substitutability of the individual services that form part of the package. This is consistent with the approach to market definition in traditional industries: the fact that there is a demand and a market for particular products or services does not prevent there being a separate market for intermediary services such as yellow pages or business guides (see Telia/Telenor[17]).

48. Such a distinction of a separate portal market would need to be based on consumer demand for particular intermediation services, rather than based simply on the various revenue streams by which portal operators will earn their revenue (e-commerce commissions, advertising revenue, subscriptions).

49. A portal serves as a gateway through which consumers and businesses can have access to a range of online services and the wider Internet. A portal aggregates a large number of recurring Internet users and /or subscribers around specific types of services. Competition between portals is based on attractiveness and functionality (i.e. context, content, commerce, communications, connectivity, and community). A portal is analogous to a shopping mall where customers and advertisers make their selection on the basis of brand image.[18] Portals may be distinguished conceptually as having either a broad (horizontal) focus or a narrow (vertical) focus.

Vertical Portals

50. Vertical portals focus narrowly on providing access to a particular content category and types of functionality devoted to a specific consumer needs such as sports, video games or travel. Examples of vertical portals, include American SportsLine.com or 365 Corporation which offer access to content and e-commerce on sports, such as information on games and multimedia products. Uproar and Gameplay, offer access to video games and e-commerce related to games. Vertical portals offering different content do not compete with one another as they satisfy distinct consumer demand and the customer base is distinct for each sector.

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15 Ibid.

16 See footnote 11 above.

17 See footnote 9, above.

18 A portal would not, however compete with traditional high street retailing: see the BiB decision at paras 18 et seq.

Horizontal Portals

51. The main activity of the JV company will be to develop, market, maintain and provide a branded horizontal portal (Vizzavi). Examples of horizontal portals include Yahoo! Excite and Altavista, who provide comprehensive directories, personal home pages, email and shopping as well as entering into business relationships with business partners that offer content and cross-promotional opportunities. Each type of portal will seek to satisfy a particular consumer demand for intermediary services, its revenue being based on consumer charges and charges to third party content providers who gain access to consumers through that portal. On this basis, and given that Internet access markets are defined by platform, then there are potentially separate markets for horizontal portals for each access platform (TV, mobile, PC).

52. Horizontal portals such as Vizzavi will exist on variety of access mechanisms. Vizzavi will be delivered over mobile telephones and digital TV set top boxes as well as over PCs. Such portals will serve a distinct customer demand, for people who wish to be able to be contacted continuously and/or those who wish to have Internet access without a PC only through mobile phones and digital set top boxes. This may be desirable for those people who are unwilling to commit themselves to the unsubsidised purchase price of a PC. Given this distinct pattern of demand, it appears that the market for horizontal multi-access portals may also be identified as a distinct market.

53. In addition, following the Commission's finding of a pan-European business market in Vodafone/Mannesmann, as the ubiquitous mobile network of the Parties will allow pan-European WAP-roaming with significant potential cost-savings (e.g. location-based services including dial-in at local or uniform rates to ISPs on the Parties' networks throughout the Territory[19]) and services tailored to corporate users, there may also be an emerging pan-European market for horizontal portals providing WAP based Internet access.

<u>Digital interactive television services</u>

54. Although the Commission has not defined narrower Internet content markets for PC based services, it has defined a particular content market for TV based content markets.

55. Pursuant to its BiB decision[20], the Commission defined packages of digital interactive television services as a market separate from Internet services available via PC's, given the different characteristics and use of PC's compared to televisions. Such a package of digital interactive television services may include the following, home banking, home shopping, holiday and travel services, walled garden Internet sites provided by third parties, sports and email. The Commission stated that although pay TV is a distinct market it is in fact a driver for digital interactive services as it attracts a high number of relatively affluent viewers to digital interactive services operators who carry this service[21].

56. The market for digital interactive services (access to the platform) is distinguishable from alternative sources of supply such as high street retailing,

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19 See the definition of the JV Territory in footnote6, above.

20 Ibid.

21 The Development of the Market for Digital TV in the European Union COM (1999) 540 Final.

based on demand substitutability of the final consumers due to the different characteristics of the types of goods and services provided and price differential.[22]

57. Canal+ offers or intends to offer certain interactive television services. The parties distinguish between interactive services that are tied directly to television entertainment programming and interactive services providing information entertainment and transaction services not tied to particular television programming. The latter services, i.e. those most closely comparable to the interactive services identified in the BIB case, are to be provided by the joint venture.

58. The market for interactive television services is likely to be national, as services offered have to be adapted to suit national tastes and national demand and these services are likely to be reliant on retailers with national or regional operations. Previous Commission decisions have left open the possibility of television markets extending across language zones[23], and this issue can also be left open in the context of the interactive services in question here.

B. The parents of the JV Company are also active on the following closely related upstream markets

Mobile telecommunication services

59. The definition of the relevant product market for mobile telecommunications services can be left open without it being necessary to define whether mobile telephony using the DCS 1800 standard is a distinct market from mobile telephony using the GSM 900 standard[24]. Furthermore, the relevant product market for mobile telecommunications services may encompass both analogue and digital platforms and a further segmentation of the market according to business consumers and private individuals may be inappropriate, according to the Vodafone/Airtouch[25] decision, although the exact product market was left open in that case. The possibility of a further segmentation of the market into a market for network operator/service[26] provider has also been left open.

60. The Commission, in its Vodafone AirTouch/ Mannesmann[27] decision held, that there is a distinct market for the supply of advanced mobile telecommunications services to internationally mobile customers. The reasoning is that a demand exists from corporations for ubiquitous and seamless pan-European mobile telephony services that cannot be met by any single provider, or even by separate agreements with a number of such providers. Services such as Internet mobile services and wireless location services for mobile users (allowing larger volumes of data transfer), cannot be provided over existing GSM/DCS networks but only over enhanced GSM/DCS networks using emerging technologies such as GPRS (General Packet Radio Service) or EDGE (Enhanced Data GSM

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22 BiB, see footnote 11.

23 E.g. German-speaking, in Case No. IV/M.469 – MSG Media Service of 09/11/94, and in Case No. IV/M.993 – Bertelsmann/Kirch/Premiere of 27/05/98; or English-speaking, in BiB, footnote 11, above.

24 Case No. COMP/JV.38 – KPN/BellSouth/E-Plus of 18/02/00.

25 Case No. IV/M.1430 – Vodafone/Airtouch of 21/05/99.

26 Case No. COMP/M.1760 – Mannesmann/Orange of 20/12/99.

27 At para 14. See footnote 2, above.

Environment and CAMEL (Customised Application of Mobile Enhanced Logic). Vodafone was expected to be an early adopter of these technologies precisely to offer advanced services to business users on a pan-European scale.

61. Based on these reasons, the Commission's decision in Vodafone/Mannesmann found a pan-European business market existed for advanced seamless pan-European mobile telecommunications services for internationally mobile customers in particular corporate services, hence comprising both mobile voice services and the mobile data services just described, including Internet-based services. Finally the Commission has concluded that there is a distinct market for mobile handsets (terminals)[28] and a distinct market for mobile telephony network equipment.

62. The Commission has found in earlier decisions[29] that the geographic market for mobile telephony services is national. Respondents in the Vodafone/Mannesmann case indicated that the market for advanced mobile telecommunication services to internationally mobile customers would be at least pan-European due to the international customer base and the international scope of the large business corporations. The market for handsets and equipment may be global, however, as in the aforementioned case, and for the purposes of the current investigation the relevant geographic market can be left open.

Pay Television

63. The Commission has in previous decisions defined pay television as a separate market distinct from free access television, financed by advertising or by state contributions[30]. This distinction is based on the different price and characteristics of pay television services as compared to free-to-air television services: subscribers are, for example, willing to pay considerable sums for pay TV[31] and also need to have a decryption module which decodes the encrypted pay TV signals. The parties have argued that due to digitalisation there will be a convergence between pay TV and free TV markets. Whilst digitisation may well lead to an increase in the number of free to air channels, this does not in itself support the parties' conclusion. If, notwithstanding the greater availability of free to air channels, there nonetheless remains a sufficiently large body of consumers whose demand for particular television channels is sufficiently strong for those consumers to fund a pay television service through a subscription fee, then it is reasonable to conclude that the markets remain separate.

64. The Commission similarly found no justification for distinguishing between analogue and digital pay TV[32], and instead held that they form part of the same market, as digital TV is an extension of and is soon to supersede analogue TV. Pay TV, whether using analogue or digital technology, has the same

[28] Ibid.

[29] At para 23. See footnote 2 above.

[30] See the references in footnote 23, above (MSG Media Service; Bertelsmann/Kirch/Premiere; BiB).

[31] Case No. COMP/JV.37 – B SKY B/Kirch Pay TV of 21/03/00.

[32] See Bertelsmann/Kirch/Premiere footnote 23, above.

requirements. It requires a conditional access system, as well as the same method of marketing, subscriber management and choice of programming[33].

65. Both Canal+ and its subsidiaries and associated companies are active on the pay TV market, producing and buying TV programmes and films. Canal+ has approximately […] subscriptions in France, which constitutes a […]% market share. Furthermore Canal+ has a significant market share in Spain, Italy Belgium, The Netherlands and the Nordic countries (Denmark, Sweden, Norway and Finland).

66. In some previous decisions, the Commission has considered the geographic scope for the market of pay TV to be national, in particular for cultural reasons, language barriers and differing regulatory regimes[34]. Other decisions have left open the possibility of television markets across language zones[35]. Given both the language characteristics and the largely uniform programming of pay TV in the Nordic countries for example (Denmark, Norway and Sweden, as regards language and programming, and Finland as regards programming) it may be possible to define a Nordic pay TV market[36].

VII. COMPETITIVE ASSESSMENT

A. Dominance

Internet access

67. Given the different transmission, display and usage characteristics of Internet access based on the different platforms, and given in particular the different demand characteristics for Internet access based on the different platforms the market for Internet access must be separated from Internet access for the different platforms (PC, STB, and mobile handsets) and, aside from the emerging pan-European business market, by national market. Based on this narrow market definition, the Parties may enjoy a position of market power in a number of Member States, given the strength of Vodafone and Canal+ in mobile and pay TV markets respectively. In addition, the transaction may lead to the creation or strengthening of a dominant position in an emerging Pan-European market for WAP-based mobile Internet access.

68. Regarding Internet access via mobile handsets, the JV Parties and their local subsidiaries will, with respect to the majority of consumers, operate on national markets. Fixed and mobile incumbents in these national markets for mobile Internet access will have a relatively strong position given their ability to integrate fixed and mobile services. However, although primarily based on the market power of the Vodafone group in mobile telephony, the position of the JV Parties in mobile Internet access is strengthened by the Vizzavi branded and integrated approach to Internet access across various platforms, which allows for cross-selling and bundling of offers. Such potential for cross selling and leveraging market power by means of bundled offers is especially significant because the rapid succession of several generations of terminal devices will be a precondition for successful market development. Fixed and mobile incumbents

33 Case No. IV/36.237 – TPS of 03/03/99.

34 Case No. IV/M.553 – RTL/Veronica/Endemol of 05/06/96.

35 See the references in footnote 23, above.

36 See Telia/Telenor footnote 9, above.

will not be able to replicate this possibility, as they would require agreements with competing pay TV operators, whereas in those national markets where Canal+ is active, notably France, Spain, Italy, Belgium, The Netherlands, and the Nordic countries (Denmark, Sweden, Norway and Finland) no credible alternative pay TV operators are available. Hence, the creation of the JV may give rise to concerns as regards the ability of the Parties to leverage market power in national markets for mobile telephony, directly or indirectly, into national markets for mobile Internet access.

69. Regarding Internet access via set-top boxes, Canal+ will clearly enjoy a very strong position in a number of national markets, notably France, Spain, Italy, Belgium and The Netherlands, and overall in the Nordic countries. In all these markets for pay TV, its market share clearly demonstrates the strong position of Canal+. For pay TV subscriptions in France, Canal+ had a market share of [60-85%] based on subscriber numbers [for multi-channel pay TV Canal+ has a [40-60%] market share]. For pay TV subscriptions in Spain, Canal+ has a market share of [60-85%] based on subscriber numbers [for multi-channel pay TV Canal+ has a [40-60%] market share]. For pay TV subscriptions in Italy, Canal+ has a market share of [60-85%] based on subscriber numbers [for multi-channel pay TV Canal+ has a [60-85%] market share]. In Belgium and The Netherlands, Canal+ is the only pay TV operator. In the Nordic countries, Denmark, Sweden, Norway and Finland, Canal + has an overall market share in terms of pay TV subscriptions of [40-50%]. For pay TV subscriptions in Denmark, Canal+ has a [20-40%] market share [for multi-channel pay TV in Denmark, Canal+ has a [10-20%] market share]. For pay TV subscriptions in Sweden, Canal+ has a [20-40%] market share [for multi-channel pay TV in Sweden, Canal+ has a [20-40%] market share]. For pay TV subscriptions in Norway, Canal+ has a [60-80%] market share. […]. For pay TV subscriptions in Finland, Canal+ has a [60-85%]market share […].

70. Even although the notification states that less than 30% of the Canal+ subscribers are currently offered digital services, this does not affect the analysis of its market position or its ability to leverage this position, as this percentage is likely to be the same or similar for its competitors. Moreover, with its established consumer base among those consumers that are used to paying for content using pay TV services, Canal+ is in a strong position to migrate this consumer base to the JV's Internet-based services, including by means of bundled offers. The high market shares of Canal+ raise serious concerns in view of the ability of Canal+ to leverage its position in pay TV markets into the markets of the JV.

<u>Internet advertising</u>

71. Both the large number of sites and the range of various types of sites selling advertising space on the Internet limits the relevance of any given site as an Internet advertising medium. However, the sites that are most popular with consumers will evidently attract a larger proportion of advertising revenue. This could hold in particular for a multi-access portal that would combine Internet advertising exposure to potentially well over 50 million European consumers, including both many first-time Internet users and a large number of more sophisticated first-adopters of new technology, with the possibility of e-commerce transactions and location based services. Hence, although due to language and other cultural factors advertising markets remain predominantly

national in nature, the mere number of overall users to which the JV provides access, and their pan-European spread, would allow it to obtain better overall terms for any advertising campaigns for which this scope would be a significant advantage. This means that the sum of the parties' current Internet advertising market shares is likely to understate the possible effects of the JV in this market.

72. All parties in the JV are active in the Internet advertising market, and jointly they have a presence on the Internet advertising market in twelve different EEA Member States. However, on the assumption that the markets for Internet advertising remain national in scope, based on their current market shares in these narrowly defined markets the combined entities will not exceed a market share of 20% in any given Member State. Although this may understate the effects of the JV, given the large number of competitors in this market, including well-established competing portal operators such as Yahoo!, Microsoft and Lycos, there is no clear indication that the transaction as notified would lead to the creation or strengthening of a dominant position on the relevant national markets.

73. However, if national Internet advertising markets for mobile and STB-based portals are considered to assess the JV's effects on the narrowest possible relevant markets, there may be cause for concern as regards these emerging markets.

Paid-for content

74. On the market for paid-for content over the Internet, whilst Canal+ has a strong position in France, the operation does not add any significant horizontal market share on the national markets concerned. As there is a large number of competitors, including potential competitors, for the provision of paid-for content, and as the market shares of the Parties in national markets for the provision of paid-for content are in all cases less than 5%, their current market positions do not in themselves provide a cause for concern.

75. However, in terms of vertical effects, the Vizzavi portal will combine a potentially powerful new Internet access mechanism with paid-for content, and a customer base of pay TV subscribers with relatively well documented preferences, accustomed to paying for content. As pursuant to the JV the Parties may create or strengthen a dominant position for Internet access via mobile handsets and/or set-top boxes in national markets for such access, this raises concerns regarding their buying power concerning paid-for content delivered via those platforms. Hence, there are concerns over the provision of paid-for content based on the potential for leverage that the JV and/or the Parties may be able to exercise as a result of their buying power over paid-for content.

76. Moreover, as Vivendi and Canal+ hold a combined stake of [...] in AOL France, the structural link between two groups that could be among the main future buyers and producers of paid-for content gives rise to additional concerns, both concerning buying power, and concerning paid-for content production.

Portals

77. It is clear that the Parties individually do not at present enjoy significant market share on the horizontal portals market. According to the notification the current portal market leaders in terms of their reach as a percentage of Internet

subscribers[37] are: for France, Wanadoo, with [40%-50%], and Yahoo! with [40%-50%], followed by a group of portals including AOL with around [30%-40%]; for Germany, T-Online, with [60%-80%], and Yahoo! with [40%-50%], followed by a number of portals including AOL with around [30%-40%]; for the UK, Yahoo with [40%-50%], followed by MSN with [40%-50%] and a group of portals including AOL ranging between 23% and 32%. Apart from the horizontal portals already mentioned, portals that have a significant reach in all these three Member States include Lycos and Microsoft. In relation to the horizontal portals market the main concern raised by the JV is that Vodafone and Vivendi/Canal+ may tie in their established customer base in national markets for mobile phone and pay TV services as customers of Vizzavi. They could do so by leveraging their respective market positions as regards national markets for mobile telephony (using SIM-lock and WAP-lock) and for pay TV (using set-top boxes) into the horizontal portals market that combines access and content services. SIM-lock and WAP-lock are available in the majority of EEA markets. In those markets where SIM lock is not available or illegal, consumer resistance to WAP-lock may be higher, but this is unlikely to seriously compromise the activities of Vodafone, Vivendi and Canal+.

78. If distinct national multi-access portal markets develop within the Territory, for residential customers, and in particular those who wish to take advantage of the Vizzavi capability to offer features such as a single e-mail address across all delivery mechanisms, and other forms of cross selling, it would be difficult for a competing portal operator to offer a comparable service. This difficulty would be particularly acute in France, where Canal+ has a strong position on the pay TV market, and SFR is the second mobile telephony operator. It would not be possible for any single company to compete with Vizzavi without making new alliances itself, and as there are currently only three mobile telephony licences and one other major pay TV operator in France, such an alliance would not be easy to form. A similar issue is raised in Spain, with Canal+ Spain and Airtel. The multi-access horizontal portal, which covers a number of different delivery mechanisms will be the default first screen for the WAP and subsequent generation mobile phones as well as the interactive services page for set-top boxes. The Parties could refuse third-party access, and bar their users from selecting the portal used on their mobile handset and/or set-top box.

79. Hence, regardless of the precise relevant product market definition, the JV Parties could extend their positions of dominance in national pay TV markets, and their market power in national mobile markets into the national markets for horizontal portals used via mobile handsets and/or set-top boxes. Consequently, in particular for those Member States where the Parties have a strong market position in mobile telephony and pay TV, the operation raises serious concerns regarding the related national markets for horizontal portals based on mobile handsets and set-top boxes.

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37 In this case the reach of portal operators was determined based on the number of hits across all Internet users in the national market involved who visited the site concerned at least once during a one month period. Evidently many users will hit more than one site at least once in any given month, hence ”reach” does not equate market share.

80. Moreover, the ability of the JV to offer pan-European WAP-roaming based on its ubiquitous presence in mobile telecommunications, and ability to offer cost-savings with location-based facilities (local dial-in into ISPs on the JV Parties ubiquitous networks and/or flat rate services) could not be replicated by other fixed and mobile operators, or by a patchwork of such operators, on comparable terms. Given the market position in mobile telephony services that Vodafone was found to enjoy in Vodafone/Mannesmann, the JV and its local subsidiaries may as a result enjoy a similar position in a more advanced Pan-European business market for WAP-based services. It may do so not only by offering tailored services to corporate users but also through WAP-roaming access, using the possibilities for cost-savings based on location-based services throughout the Territory, and/or such WAP-roaming access at a flat rate or uniform tariff. Hence, the JV may lead to the creation or strengthening of a dominant position on the WAP-roaming based pan-European portal market using ubiquitous pan-European mobile telecommunications services, and it consequently raises doubts as regards its compatibility with the common market.

Conclusion on dominance

81. Given the above market definitions, in particular concerning Internet access, there are serious doubts that the Parties will be in a position to leverage their existing positions of dominance and/or market power in pay TV and mobile markets into national markets for Internet access and horizontal portals markets, in France, Spain, Italy, Belgium, The Netherlands, the Nordic countries, the UK and Germany, which constitute a substantial part of the EEA, and into a possible pan-European market for WAP-based services.

82. Hence there are serious doubts that the JV will lead to the creation of new dominant positions in the national markets for horizontal portals operated on set-top boxes and mobile handsets, and for the separate national markets for Internet access, advertising and paid-for content across set-top boxes and mobile handsets, as well as on an emerging pan-European market for WAP-based horizontal portals on mobile handsets, as on an emerging pan-European market for WAP-based Internet access using mobile handsets. Moreover, because the creation of these new dominant positions will undermine the position of the other parties active on those markets who are also actual or potential competitors in the pay TV and mobile markets, it will rebound onto the neighbouring pay TV and mobile markets in which the JV parties were already dominant, thereby in addition strengthening the JV Parties' dominance in the latter markets.

B. Co-ordination of competitive behaviour

Assessment under Article 2(4)

83. The parties submitted that co-ordination of the competitive behaviour between the parent companies is not the object of the creation of the joint venture. In the absence of clear indications to prove that such an object is pursued, an intended co-ordination of the parent companies' behaviour can not be established. However, it might be the effect of the operation to give way to co-ordination of competitive behaviour. This question has to be examined for the mobile telephony market in Spain.

84. Vodafone is present on the mobile telephony market in Spain through Airtel, over which it currently has joint control. Airtel currently operates a GSM service in Spain and has been awarded a licence for a third generation in Spain earlier this year. Vivendi has a joint venture with ACS, a Spanish company, and Sonera, the incumbent operator in Finland called Xfera. This joint venture was formed to bid for a third generation licence and on 10 March 2000 was granted such a licence. The licence obliges Xfera to begin operations by 1 August 2001.

85. In the light of the above information, Vodafone, through Airtel and Vivendi, through Xfera, will both be active on the mobile telecommunications market in Spain. Only four licences have been allocated, the other two being held by Telefónica and Amena, the existing mobile operators.

86. According to the JV agreement, both companies are obliged to make best efforts to oblige their mobile phone operations to carry the Vizzavi portal. Accordingly, the Vizzavi portal is likely to be the default portal for two out of the four UMTS operators on the Spanish market. Given the presence of Vodafone and Vivendi as parent companies of the Vizzavi joint venture, there is a likelihood of co-ordination between Airtel and Xfera on the mobile telecommunications market, which is a market upstream to that of the JV. With the development of third generation phones, the portal will be more important for the mobile phone user, as it will have more functionalities and be more sophisticated than existing WAP phones. With the investments required for the development of third generation services, the incentives to co-ordinate on the mobile telecommunications market in Spain will be high.

87. This co-ordination could occur in the following way, based on the combination of the structural link, the obligations under the JV and the standard agreements that accompany it, and the different starting points of the two consortia in Spain. Xfera as a new entrant in Spain with no existing telecommunications infrastructure will be likely to look for an existing operator with which to co-operate. Following received models of UMTS roll-out, Xfera would build its own infrastructure in the large cities first, but in order to provide a nation-wide service would be reliant on one of the existing operators' networks. Given that both Xfera and Airtel will be obliged to carry the Vizzavi portal, Airtel will be the logical operator with which Xfera would work to do this. However, the presence of both companies in Vizzavi would enable them to go further than co-operation, by for example jointly purchasing equipment that could be used for Vizzavi users on either network. In particular the nature of Internet access under UMTS, which is likely to develop beyond conventional telephone dial-in access to more direct forms of access determined by technical gateway characteristics, would provide incentives for this to occur. Such incentives to co-ordinate would not exist for Xfera with the other two existing operators, where it would be more likely to decide to contract for access based on considerations of cost and available spare network capacity alone, if at all.

88. It is not necessary to determine this issue, as the undertaking in respect of mobile telephony handsets described below is justified on the basis of the dominance arguments, above, and would also remedy any co-ordination effects.

VIII. ANALYSIS OF THE UNDERTAKINGS

89. The notifying parties have provided undertakings in response to the competition issues raised above. These undertakings are annexed to this decision.

A. Obligation to allow other portal operators to access mobile handsets

90. The undertaking Vodafone and Vivendi have given concerning mobile handsets will open access to their mobile handsets to third party portal providers by giving the mobile users/subscribers of the Vodafone-Vivendi group the choice of overriding the default (Vizzavi) portal setting on their mobile handset in the three following ways. First, users will be able to manually override any default setting on a call-by-call basis, e.g. by typing in the URL address of the alternative portal site they wish to use. Second, users will be able to manually override the default portal setting permanently by resetting it to an alternative portal (until such time as they decide to override or change this). Third, users will be able to authorise a third party to reset their default portal setting (e.g. by means of a free-phone call to a portal operator, which resets the default by means of sending an SMS message to the mobile handset). In doing so, the undertakings in the present case complement the earlier undertakings in Vodafone/Mannesmann.

91. The undertaking ensuring third-party access based on consumer choice meets the serious doubts raised above. The possibility that Vodafone and Vivendi, through SFR, could lever their market position in the mobile telephony market in France into the portal market is now removed, especially as it is combined with the parallel undertaking for Canal+ to open up access to its set top box, as outlined below. Likewise, the possibility is removed that the market position of one of the Vodafone group's mobile operators in another national market, or of these mobile operators jointly in the emerging Pan-European business market, could leverage their position into national markets for WAP-based Internet access or WAP-based horizontal portals, or into a pan-European market for WAP-based Internet access or for WAP-based horizontal portals. In all these cases, the parallel undertaking for Canal+ removes the possibility that the Parties could bundle their offers on a fully exclusive basis, as in any event the Parties' subscribers could opt for using the services of competitors across the relevant platforms. Market testing confirms that a 3-year period, running in parallel with the related undertakings in Vodafone/Mannesmann, is sufficient for this undertaking, also in view of the rapid technical and commercial developments in the markets concerned.

B. Obligation to allow other portal operators to access set-top boxes

92. The undertaking that Canal+ have given to allow other portal operators access to their set top box mirrors that of Vodafone and Vivendi above. However, for set top boxes this access will only occur in two scenarios. First, users will be able to access other portals through a menu option (analogous to manually overriding any default setting in the mobile phone undertaking). Alternatively, users will have the opportunity for Canal+ to change the default portal on the user's behalf. This undertaking will give Canal + the possibility to ask the Commission to lift it after 3 years.

93. This undertaking effectively allows users to access other portals from the Canal+ set top box. This will prevent Canal+ from tying its consumers to its portal offering and allow consumers to choose other portals to access the Internet.

However, Canal+ argues that a [...] clause is necessary because of the changing nature of the technology and the projected life cycle of the product.

IX. ANCILLARY RESTRAINTS

94. The notifying parties have identified two restraints that they have requested to be treated as ancillary to the operation.

95. The parties request that Article 1.3.6 of the JV Agreement be treated as ancillary. This provision prevents the parent companies from owning, designing, developing, operating, managing and/or maintaining any horizontal portal. In addition the parent companies will not acquire an interest exceeding […] in any entity involved in conducting any of the reserved activities defined in the joint venture agreement.

96. This clause represents the protection of the investment of the parent companies in the joint venture from another parent entering the market of the joint venture. Accordingly, inasmuch as it represents a restriction of competition, it can be considered as necessary and directly related to the operation.

97. The parties also identify Article 1.4.3 (a) and (b) of the joint venture agreement as a clause that they wish to be considered as ancillary. In addition, the parent companies will cause those content and support service suppliers to offer to the joint venture first any content or support services that they may develop.

98. The obligation on the content and support service suppliers controlled by the parties to offer new products to the joint venture first inasmuch as it gives rise to a restriction of competition, can be considered to be directly related and necessary to the operation.

X. CONCLUSION

99. For the above reasons, the Commission has decided not to oppose the notified operation and to declare it compatible with the common market and the EEA Agreement. This decision is adopted in application of Article 6(2) of Council Regulation (EEC) No 4064/89 subject to the condition of full compliance with the undertakings set out in the Annex to this decision.

For the Commission,

UNDERTAKING

(Case COMP/JV. 48 – Vodafone/ Vivendi/ Canal+)

Vodafone AirTouch Plc ("**Vodafone AirTouch**"), Vivendi S.A. and Canal+ S.A. have agreed to set up a jointly controlled company (the "**JV Company**") to develop and operate a multi-access horizontal portal, to be known as Vizzavi. To this effect they have entered into a joint venture agreement on 16 May 2000 (the "**JV Agreement**"). The JV Agreement was notified to the European Commission pursuant to Council Regulation (EEC) No 4064/89 (the "**Merger Regulation**") on 6 June 2000.

Pursuant to Article 6(2) of the Merger Regulation, and on the condition of the European Commission approving the creation of the JV Company pursuant to Article 6.1(b) of the Merger Regulation, Vodafone AirTouch, on behalf of itself and its Subsidiaries (as defined below), undertakes that it will not take any action (through agreements with any mobile handset manufacturers or otherwise) to make it more difficult than it would otherwise be, absent such action, for any subscribers of mobile telecommunications networks operated by itself or its Subsidiaries within the EEA, who wish to access a portal via their mobile handset, to (assuming that technology, and in particular handset technology, so allows):

1. access any portal they choose via the Vizzavi front page, either by typing in the url address of such other portals or by linking to them via their own pre-programmed bookmarks;
2. manually select a default portal, including but not limited to, choosing an alternative default portal from among the other preset portals if any, to replace the Vizzavi default portal, and which will appear when the users access a portal via their mobile handset; and
3. agree with another provider of portal-related activities that that provider may change the default portal(s) on their mobile handset on their behalf, for example by sending, with the subscriber's consent, an SMS message to the subscriber's mobile phone.

In this respect (i.e. in its role as a mobile operator) Vodafone AirTouch shall treat other providers of portal-related activities on non-discriminatory terms. For the avoidance of doubt, it is understood that Vodafone AirTouch may designate Vizzavi as the initial default portal and that, where a handset allows for a number of portals to be preset, Vodafone AirTouch may enter Vizzavi as a preset option that cannot be deleted.

This Undertaking will apply to Vodafone AirTouch and to all mobile telecommunications operators which are, directly or indirectly, wholly owned by Vodafone AirTouch, or in which it has a majority shareholding or majority board representation ("**Subsidiaries**"), i.e. over which Vodafone AirTouch has sole control. In addition, Vodafone AirTouch undertakes that it shall use its rights and entitlements in order to cause any mobile telecommunications operator in the EEA in which it has a shareholding that gives rise to joint control but not sole control (in the meaning of the Merger Regulation) not to engage in any of the above actions.

For the avoidance of doubt, this Undertaking does not commit Vodafone AirTouch to intervene or change its dealings with third parties not under its control to try and ensure that those third parties behave in a way that would achieve or facilitate the purpose of this Undertaking. In particular, Vodafone AirTouch will remain free to deal with the hardware and software suppliers of its choice.

This Undertaking shall take effect upon completion of the Joint Venture Agreement and shall remain in effect for a period of 3 years.

Signed On behalf of Vodafone AirTouch Plc

Signed on behalf of Vivendi

UNDERTAKING

Case COMP/ JV. 48 – Vodafone/ Vivendi/ Canal+

Pursuant to the Joint Venture Agreement signed on 16 May 2000 (the "JV Agreement"), Vivendi S.A., Canal+ S.A. ("Canal+") and Vodafone AirTouch plc have agreed to set up a jointly controlled company ("the JV Company") to develop and operate a multi-access horizontal portal, to be known as Vizzavi. The JV Agreement was notified to the European Commission pursuant to Council Regulation (EEC) No 4064/89 as amended (the "Merger Regulation") on 6 June 2000.

Pursuant to Article 6(2) of the Merger Regulation, and on the condition that the European Commission approves the creation of the JV Company pursuant to Article 6(1)(b) of the Merger Regulation, Canal+, on behalf of itself and of its subsidiaries which will now or in the future participate in the Vizzavi portal as set forth in the JV Agreement ("Subsidiaries"), undertakes as follows:

1. It will not take any action to prevent any subscribers to pay television services using a set top box that can be used for Internet access from (assuming that technology so allows) accessing any other Internet portal they choose via the Vizzavi front page by typing in the url address of such other portals or by linking them via their own pre-programmed bookmarks.

2. Assuming that technology so allows, Canal+ or a Subsidiary will make the necessary modifications to the software of the set top box to allow technically the user (a) manually to select a default portal other than Vizzavi or (b) to have Canal+ or a Subsidiary change the default portal on the user's behalf.

In this respect (i.e. in its role as the provider of pay television services where it controls the management of the user's set top box capable of Internet access), Canal+ shall treat providers of horizontal portals on commercial but non-discriminatory terms. For the avoidance of doubt, it is understood that Canal+ and its Subsidiaries may designate Vizzavi as the initial default portal and that, if a set top box allows for a number of portals to be preset, Canal+ and its Subsidiaries may enter Vizzavi as a preset option that cannot be deleted.

This Undertaking shall take effect upon completion of the JV Agreement. At the end of a period of 3 years Canal+ shall review with the Commission whether there is a need to continue all or part of the present Undertaking for an additional period to be determined at that time.

Signed on behalf of Canal+