EN

Case No COMP/M.2211 - UNIVERSAL STUDIO NETWORKS / DE FACTO 829 (NTL) / STUDIO CHANNEL LIMITED

Only the English text is available and authentic.

REGULATION (EEC) No 4064/89
MERGER PROCEDURE

Article 6(1)(b) NON-OPPOSITION
Date: 20/12/2000

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PUBLIC VERSION

MERGER PROCEDURE
ARTICLE 6(1)(b) DECISION

To the notifying parties

Dear Sir/Madam,

Subject: Case No COMP/M.2211 - Universal Studio Networks/De Facto 829 (NTL)/Studio Channel Ltd
Notification of 17 November 2000 pursuant to Article 4 of Council Regulation No 4064/89

1. On 17 November 2000 the Commission received a notification of a proposed concentration pursuant to Article 4 of Council Regulation (EEC) No 4064/89[1] ("the Merger Regulation") by which Universal Studio Networks (Studio Channel) UK Limited ("USN") and De Facto 829 Limited ("DFL") will acquire joint control over The Studio Channel Limited ("Studio Channel") a full function joint venture.

2. The notification became effective within the meaning of Article 4(2) of Commission Regulation (EC) 447/98 on 20 November 2000.

I. THE PARTIES

3. USN is a company incorporated in England and Wales which has been formed for the purpose of participating in Studio Channel. USN is a company within the Universal Studios group ("Universal") which is ultimately owned by Seagram. The principal activities of Seagram are in two core segments: entertainment and beverages. The entertainment businesses (which include the music and film businesses previously acquired from PolyGram N.V.), are organised into three major segments: music; films; and recreation.

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[1] OJ L 395 of 21.12.1989 p.1; corrected version OJ L 257 of 21.09.1990, p.13; as last amended by Regulation No 1310/97, OJ L 180 of 30.06.1997, p.1; corrigendum in OJ L 40 of 13.02.1998, p.17.

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4. Seagram is being acquired by the entity resulting from the merger between Vivendi and Canal +. This acquisition was the subject of a notification to the Commission made on 31st August 2000,[2] and was cleared by the Commission (subject to conditions) on 13 October 2000.

5. DFL is a company incorporated in England and Wales and is a wholly-owned subsidiary of NTL. DFL's only current investment interest is a […]% shareholding in ITN News Channel Limited, a joint venture company which is owned as to […]% by Independent Television News Limited.

6. NTL is a Delaware corporation listed on the NASDAQ stock exchange in New York. However, the overwhelming majority of its activities take place, and the majority of its turnover is generated, in the UK. NTL is engaged in: national telecommunications services; residential; and broadcast transmission and tower services.

7. NTL is acquiring a […]% shareholding in Noos S.A. (a new company which will acquire certain cable television operations of Suez-Lyonnaise des Eaux and France Telecom) in France. This acquisition was notified to the Commission on 14 September 2000,[3] and was cleared by the Commission without conditions on 16 October 2000.

II. THE OPERATION

8. The purpose of Studio Channel is to create, market and distribute a film channel to be supplied to and distributed by retail pay-TV operators solely in the United Kingdom and Ireland. The new channel is not intended to be a premium channel but is intended to be supplied as part of the basic-tier package supplied by retail pay-TV operators at no additional fee being payable by the consumer to view the channel as an individual channel as opposed to part of a package. The channel is intended to carry second window and library films (i.e. which have already been shown for the first time on pay-TV).

III. CONCENTRATION

A. Joint Control

9. Under the proposed operation, USN and DFL have entered into a Subscription and Shareholders' Agreement on 21 September 2000 ("the Shareholders' Agreement"), whereby each will subscribe for […]% of the share capital of Studio Channel. Under the Shareholders' Agreement, the day-to-day affairs of Studio Channel will be managed by the managing director which will be Universal Studios Networks (Managing Director) UK Limited ("Managing Director") (a company within the Universal group) or such other designee of Universal. […]Under Clause 4.16 of the Shareholders' Agreement, the Managing Director is obliged to implement the Annual Budget and Business Plan jointly agreed by the parties.

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2 Case No. Comp./M 2050, *Vivendi/Canal+/Seagram*.

3 Case No. Comp./M.2137, *SLDE/NTL/MSCP/Noos*.

B. Full Function Joint Venture

10. The Studio Channel is intended to perform on a lasting basis all the functions of an autonomous economic entity. It is also intended that Studio Channel will have all the resources to operate independently on the market. In particular:

10.1. after a start up period of […], it is expected that Studio Channel will purchase […]% of its programming requirements in terms of licensing fees (and close to […]% in terms of running time) from third parties (including local and other European producers); and

10.2. although initially, Studio Channel will be carried, on a non-exclusive basis, by cable systems operated by subsidiaries of NTL; it is the intention of the parties to market the channel actively to other retail pay-TV operators, including direct to home ("DTH") satellite, digital terrestrial television ("DTT"), digital subscriber line ("DSL"), and other cable operators with the intention that after a short start-up period, revenues paid by NTL will account for approximately […]% of the channel's total licensing income and that by year four, licensing fees from NTL will account for just over […]% of total licensing fees.

11. Consequently, the proposed operation constitutes the formation of a full function joint venture within the meaning of Article 3(2) of the Merger Regulation.

IV. COMMUNITY DIMENSION

12. The undertakings concerned have a combined aggregate world-wide turnover of more than EUR 5 billion[4]. Each of Seagram and NTL have a Community-wide turnover in excess of EUR 250 million, but they do not achieve more than two-thirds of their aggregate Community-wide turnover within one and the same Member State.[5] The notified operation therefore has a Community dimension.

V. RELEVANT PRODUCT AND GEOGRAPHIC MARKETS

A. Relevant product markets

13. The Commission has in previous decisions held that there is a separate market for pay-TV (without distinguishing between analogue or digital pay-TV), which is distinct from free-access television, financed by advertising or through State contributions.[6] Moreover, in *Vivendi/Canal+/Seagram*,[7] the Commission found that films for pay-TV are exhibited under different timing and windows, ranging from theatrical exhibition, to video rentals, to

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4 Turnover calculated in accordance with Article 5(1) of the Merger Regulation and the Commission Notice on the calculation of turnover (OJ C66, 2.3.1998, p25). To the extent that figures include turnover for the period before 1.1.1999, they are calculated on the basis of average ECU exchange rates and translated into EUR on a one-for-one basis.

5 Although NTL achieves more than two-thirds of its Community wide turnover in the United Kingdom.

6 Case No. COMP/JV.37 – BSkyB/Kirch Pay TV of 21.03.2000; Case No. COMP/IV.M933 – Bertesmann/ Kirch/ Première of 27.05.1998.

7 Case No. COMP/M.2050 of 13.10.2000.

pay-per-view, then first and second windows, until they become available as library programming available for the free TV market.

14. The parties identified the following markets relevant to the notified operation:

    14.1. the market for the production and supply of programming for pay-TV,

    14.2. the market for the wholesale supply of pay-TV channels to pay-TV operators, and

    14.3. the market for the retail distribution of pay-TV channels to the final consumer be it via cable, DTH, DTT or DSL.

15. In addition to the above market characterisation, in their notification, USN and DFL distinguished between separate markets for the provision of films through basic-tier pay-TV channels (consisting mainly of second window and library programming), pay-per-view channels and premium pay-TV channels (consisting mainly of first and second window programming).

16. Looking at the wholesale level, distinguishing between programming and channels for free-to-air TV, basic-tier pay-TV and premium pay-TV may be inappropriate. The Commission's decision in *Vivendi/Seagram/Canal+*, for example, distinguished between windows (first, second) for premium film rights. The sale of certain sports rights also suggests that a clear distinction is difficult to draw. The position in the UK may be complicated by the fact that at the retail level consumers cannot subscribe to premium pay TV services without first subscribing to a basic-tier pay-TV package. It is not necessary to decide these points in this case since, even if there were separate markets for basic-tier and premium pay-TV channels respectively at the wholesale or the retail level, the establishment of Studio Channel would not lead to the creation or strengthening of a dominant position in either market, within the meaning of Article 2(3) of the Merger Regulation, considered in more detail under Section VI. A. below. Nor is the concentration likely to lead to an appreciable restriction of competition within the meaning of Article 2(4) of the Merger Regulation which is considered in further detail under Section VI. B. below.

17. By contrast, the results of the Commission's market investigation point towards there being separate markets for the provision of "pay-per-view" films and/or channels, as distinct for example from premium film channels, at both the wholesale and retail levels. This is because:

    17.1. On the supply side, pay-per-view films are made available much earlier after theatrical release than films shown on basic-tier or premium pay-TV channels. This novelty factor attracts a price premium so that the per-subscriber wholesale price attached to pay-per-view films is higher than that attached to basic-tier or premium films. Moreover, whereas pay-per-view films are licensed on a *per film basis*, basic-tier films are licensed as part of a selection of films available in a library.

    17.2. On the demand side, these supply side considerations are reflected in the fact that the consumer chooses to purchase a given film for an additional fee (approximately £3 a film). By contrast, consumers do not have to pay to view basic-tier films on a *per film basis* nor do they pay for them on a *per channel* *basis* (as is the case with premium pay-TV film channels which generally carry first window films).

However pay-per-view services are not yet well-developed, and it is difficult to assess at this stage the extent to which video rentals, or near-video-on-demand services (alone or in conjunction with products such as digital personal video recorders) may act as a competitive constraint on pay-per-view services in the future. Again, it is not necessary to determine this point for the purposes of the present notification.

18. In conclusion, the Commission considers that in this case the creation of Studio Channel must be assessed in the context of the following markets (although no firm conclusion on market definition is necessary as it would not affect the outcome of the case):

18.1. the market for the production and supply of programming for television (hereinafter also referred to as the "content market"),

18.2. the market for the wholesale supply of basic-tier pay-TV channels to pay-TV operators (hereinafter also referred to as the "wholesale market"), and

18.3. the market for the retail distribution of pay-TV channels to the final consumer be it via cable, DTH, or DTT (hereinafter also referred to as the "retail market").

B. Relevant geographic market

19. According to the notifying parties, the market for the production and supply of programming for pay-TV is largely global even though the licensing of the rights in question is done on a national basis. In addition, the parties consider that programming produced for a national or regional market may at times compete with such international programming. This issue need not be decided in this case since the concentration is unlikely to lead to the creation or strengthening of a dominant position on the upstream market for the production and supply of programming for pay-TV given Universal's comparatively low and variable market shares even if this were taken on a national basis. Nor is the concentration likely to lead to an appreciable restriction of competition within the meaning of Article 2(4) of the Merger Regulation which is considered in further detail under Section VI. B. below.

20. By contrast, the notifying parties have submitted that the market for the wholesale supply of pay-TV channels to pay-TV operators is national in scope. This is consistent with the Commission's findings in previous cases such as *Kirch/Richemont/Telepiu*[8] where the Commission found that the conditions of competition on the market for wholesale supply of pay-TV channels to pay-TV operators vary considerably from on Member State to another. This was confirmed by the Commission's market investigation in this case.

21. The notifying parties have stated that the same is also true for the market for the retail distribution of pay-TV channels to the final consumer be it via cable, DTH, or DTT. This was found to be the case by the UK Competition Commission in the course of its recent examination of the *NTL/CWC ConsumerCo* merger where it concluded that the market for

8 Case No. IV/M410, decision dated 2 August 1994.

retailing of pay-TV channels was national in scope.[9] This was confirmed by the Commission's market investigation in this case. Previous Commission decisions have left open the question of whether the relevant geographic market is national or sub-national, and it is not necessary to decide this point for the purposes of the present case.

VI. COMPETITIVE ASSESSMENT

A. Dominance - impact of the joint venture on the relevant markets

22. Before considering the impact of Studio Channel on the relevant product and geographic markets identified above, it is necessary to underline that the Commission's market investigation in this case is predicated on the premise that Studio Channel will not operate in France under any guise. This has been confirmed by the notifying parties in their notification and in response to further questions put to them in this regard. This is considered as an essential fact underpinning the Commission's assessment in this case. The reason is that, following the Commission's decisions in *Vivendi/Canal+/Universa*l and *Suez-Lyonnaise des Eaux/France Telecom/NTL/Noos*, Universal will be present in all three relevant markets in France through its link with Canal+ (which the Commission considers as a dominant player in France for pay-TV)[10] and *NTL* will acquire an enhanced presence in the retail market.

23. In particular, the notifying parties have emphasised, *inter alia* that Studio Channel has been created for the UK and Irish markets only. The channel will be distributed only in the UK and Ireland. This limitation on the scope of the channel is made clear in the terms of the Shareholders' Agreement. For instance Clause 2.1 of the Shareholders' Agreement provides that:

"The business of the Company shall be the development, production, operation, promotion, distribution and exploitation of the Channel in the Territory (the UK), the Isle of Man, the Channel Islands and the Republic of Ireland) […]….."

24. In addition, the notifying parties have argued that:

24.1. There is no incentive for USN to extend the scope of Studio Channel to operate outside the UK and Ireland because it has already successfully established its own basic subscription television service under the brand "Studio Universal" in other Member States: Germany, Italy and Spain. In the UK, NTL is an attractive joint venture partner for Universal because it can, and as part of the joint venture has agreed to, provide substantial carriage in the UK market. The only Member State (other than the UK and Ireland) where NTL has other cable systems is France, but following the *Vivendi/Seagram/Canal +* transaction, Universal already has access to Canal +'s subscriber base , which is larger than that of NTL in France.

24.2. Moreover, acquiring rights in other territories, even if available, would require substantial expenditure in licence fees which must be offset by committed

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9 UK Competition Commission Report – NTL Incorporated and Cable & Wireless Communications plc 24.02.2000, Cm 4666.

10 See paragraph 39 of Case No. COMP/M.2050 - *Vivendi/Seagram/Canal +*.

distribution, which Studio Channel will not have. In the case of the proposed channel for the UK:

24.2.1. The programming licence between Universal and the channel is restricted to the UK and Ireland;

24.2.2. Programming secured from third party licensors for the channel has been and will be licensed only for the UK;

24.2.3. The NTL Carriage Agreement provides only for carriage in the United Kingdom of Great Britain and Northern Ireland and the Channel Islands.[11]

The effect of the foregoing is that if the channel were to be sold outside the UK and Ireland it would infringe the Shareholders' Agreement as well as the broadcasting rights of third parties in other jurisdictions.

25. As for the link between Universal and BSkyB in the UK and Ireland, this is unlikely to pose any competition concerns given that Universal has undertaken to divest its stake in BSkyB as a pre-condition for the approval of *Vivendi/Seagram/Canal+* referred to above.

26. Moreover, the fact that Studio Channel will be marketed as a basic-tier pay-TV channel consisting mainly of library and second window films has been taken into account as an essential factual element informing the scope of the Commission’s decision in this case. Consequently, any future agreements between the Studio Channel and its parents or third parties which would have the effect of enhancing Studio Channel’s activities to cover pay-per-view, premium pay-TV, video-on-demand or any other enhanced or interactive programming services are not covered under this decision.

27. Finally, third parties stated that notwithstanding the existence of a number of technical or regulatory barriers which may limit the number of viable platforms available to households in a given geographic area; cable, DTH and DTT do compete in the same market for the retail distribution of pay-TV channels to the final consumer.[12] This is so because the products and services offered by each platform are similar and/or highly substitutable; and no distribution platform can price in isolation from competing platforms. The question of whether it could be argued that upgraded cable networks provide services in a distinct product market by virtue of their technological and/or commercial advantage over other digital delivery systems in the near future as regards their ability to meet a distinct consumer demand for the provision of a “triple play”[13] of services, may be left open in this decision in view of the limited scope of the proposed concentration.

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11 […] Confidential business secrets deleted.

12 See Case IV/36.539 – *British Interactive Broadcasting/Open*, OJ [1999] L 312/1; Case IV/M.993 Bertelsmann/Kirch/Premiere, OJ [1999] L53/1; Case IV/36.237 TPS, OJ [1999] L 90/6; as well as the UK Competition Commission Report – NTL Incorporated and Cable & Wireless Communications plc 24.02.2000, Cm 4666.

13 I.e. interactive digital television, high speed internet access, and telephony.

28. Based on the information provided to the Commission by the notifying parties it is considered unlikely that the proposed concentration would lead to the creation or strengthening of a dominant position in any of the relevant product and geographic markets identified above. This is supported by the results of the Commission's market investigation in this case.

29. Looking at the market for programme production and supply, the creation of Studio Channel will provide producers of programming with an additional outlet for their product since it is envisaged that Studio Channel will purchase […]% of its programming requirements in terms of licensing fees (and close to […]% in terms of running time) from third parties (including local and European producers). Even if Studio Channel were to source all of its requirements from Universal, this is unlikely to lead to the creation or strengthening of a dominant position on the market for programme production and supply in view of the fact that based on historical information regarding the development of the market shares of basic-tier pay-TV channels such as Universal's Sci-Fi channel for instance, at least in the UK market, the market share of Studio Channel is likely to be *de minimis* in the medium term (i.e. less than […]%). In any event, the results of the Commission's market investigation suggests that it would not be in Studio Channel's commercial interest to purchase content exclusively from Universal, as it would risk compromising the depth and breadth of its coverage and potential desirability of the channel to pay-TV operators.

30. Studio Channel will be active in the wholesale supply of (a basic-tier) film pay-TV channel to pay-TV operators in the UK and Ireland. Universal is also active in this market through the supply of the Sci-Fi channel in both the UK and Ireland. In addition, in the UK, NTL, has a […]% stake in Front Row a pay-per-view film channel which it owns together with Telewest, a rival cable operator. It also has a […]% stake in ONrequest (through its participation in the S4C Digital Networks Limited), which is another pay-per-view film channel in which ONdigital also participates.

31. NTL is also active in the downstream market for retail provision of pay-TV services both in the UK (market share of approximately […]%) and Ireland (market share of approximately […]%). In addition, Universal is active in the upstream market for the production and supply of programming to pay-TV, on the narrowest market definition of film programming for pay TV, in both countries with market shares which varied from […]% to […]% to […]% from 1997 to 1999 respectively, within the UK and Ireland.[14] Whilst its share of the UK market for pay and free TV was […]% to […]% to[…]% from 1997 to 1999 respectively. For Ireland the same market shares for 1997 to 1999 are […]%, […]% and […]% respectively.

32. In their notification, the parties have submitted that there is no overlap between Studio Channel and Front Row/ONrequest because these channels belong to separate product markets. This was borne out the Commission's market investigation. Even if all channels belonged to the same market, and even the market shares of all these channels were to be added together the degree of horizontal overlap is unlikely to lead to the creation or strengthening of a dominant position given that the market share of Front Row is […]% and Sci-Fi is […]% of the pay-TV market in the UK.[15] Front Row is not

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14 Based on Motion Picture Association data.

15 Based on Independent Television Commission data.

offered in Ireland. Sci-Fi is broadcast in Ireland on the Sky analogue platform and on Cable Management Ireland's platform. Its market share is estimated to be less than […]%.

33. Finally, the creation of Studio Channel is unlikely to lead to the creation or strengthening of a dominant position on the market for the retail distribution of channels by pay-TV operators to the final consumer in the UK and Ireland. This is partly because of the nature of Studio Channel which is a basic-tier movie channel consisting primarily of library catalogue available on free-TV which have already been shown previously on pay-TV. It is unlikely for such channels to become a key factor in driving pay-TV subscriptions. Consequently, to maximise revenue, the channel will need to be offered to all pay-TV platforms in the UK. This is reflected in a number of provisions in the Shareholders' Agreement which indicate that Universal is likely to seek to license the channel as broadly as possible to all platforms in the UK, namely:

    33.1. […]

    33.2. […]

    The business plan for Studio Channel which is scheduled to the Shareholders' Agreement […].

34. Even if Studio Channel were reserved for distribution exclusively *via* NTL to the exclusion of its competitors, this is unlikely to result in the creation or strengthening of a dominant position for NTL on the market for the retail distribution of channels by pay-TV operators to the final consumer in the UK and Ireland since any incremental increase in NTL's existing market shares both in the UK and Ireland is likely to be *de minimis* in the medium term (i.e. less than 1%), based on historical figures regarding the evolution of market shares for basic-tier channels in the UK and Ireland.

B. Co-ordination of competitive behaviour

35. Pursuant to Article 2(4) of the Merger Regulation, to the extent that the creation of a joint venture has as its object or effect the co-ordination of the competitive behaviour of undertakings that remain independent, such co-ordination shall be appraised in accordance with the criteria set out in Articles 81(1) and (3) of the EC Treaty.

36. In order to establish a restriction of competition in the sense of Article 81(1) of the EC Treaty, it is necessary that the co-ordination of the parent companies' competitive behaviour is likely and appreciable and that it results from the creation of the joint venture be it as its object or effect.

37. Moreover, under Article 2(4) second sub-paragraph of the Merger Regulation, the Commission must, when making its appraisal, take into account in particular whether two or more parent companies retain to a significant extent activities in the same market as the joint venture or in a market which is downstream or upstream from the joint venture or in a neighbouring market that is closely related to this market.

38. The proposed concentration is unlikely to lead to co-ordination of competitive behaviour within the meaning of Article 2(4) of the Merger Regulation, since Universal and NTL do not have significant activities in the same market as the joint venture, nor do they both operate in downstream or upstream or neighbouring markets from that of the joint venture.

39. Nevertheless, in the course of the Commission's market investigation, third parties voiced concerns regarding the increased risk of bundling which is in any event not uncommon in the UK pay-TV market. For example, Universal could when marketing Studio Channel, seek to tie its content output deals with pay-TV operators to carriage of Studio Channel; or it could seek to use the future success of Studio Channel, to maximise leverage over a number of perhaps less successful other pre-existing channels owned by Universal and NTL (notably Front Row, ONrequest and Sci-Fi), by tying the supply of Studio Channel to these other channels.

40. Even if the parents to the joint venture were to co-ordinate their activities with a view to leveraging Studio Channel with some of their pre-existing channels, this would not lead to an appreciable restriction of competition on any of the affected markets identified in this case, *inter alia,* since the market shares of the channels in question (i.e Front Row and/or Sci-Fi) are very small (less than […]%). Moreover, it does not seem that any attempt by Universal to leverage its presence in the upstream market for the supply of programming would result from any co-ordination of its activities with NTL as opposed to from the vertical integration occasioned by virtue of its move into the downstream market for the wholesale supply of pay-TV channels to pay-TV operators.

VII. ANCILLARY RESTRICTIONS

41. It became apparent in the course of the Commission's market investigation, that third party concerns referred to in Section VI. B. above, in fact stemmed from the fact that on 7 September 2000 NTL entered into a Carriage Agreement with BSkyB ("the BSkyB Carriage Agreement"). Under the BSkyB Carriage Agreement, each of NTL and BSkyB agree to offer to the other for distribution on the other's platform in the UK and (in some circumstances Ireland), new services which that party introduces or develops during the term of the BSkyB Carriage Agreement (approximately five years) […][16]. This includes future channels, pay-per-view sports events and enhanced and interactive television services […]but not pay-per-view movies.

42. […][17]Consequently, the existence of these […] agreements together with the fact that Universal has an exclusive output deal with BSkyB may raise the risk of co-ordination of the competitive behaviour of Universal and NTL on any of the affected markets identified in this case.

43. The BSkyB Carriage Agreement was notified to the Office of Fair Trading on 30 October 2000. Clause 2 of the Agreement makes its implementation conditional on the approval of the Director General of Fair Trading. Consequently, the risk of co-ordination of competitive behaviour (if any) referred to above would not result from the establishment of Studio Channel itself but would only come about (if at all) as a result of the entry into force of the BSkyB Carriage Agreement which falls outside the scope of the Merger Regulation.

44. […] [The parties entered into various agreements in connection with the joint venture. None of the restrictions contained in those agreements are directly related and

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16 Confidential business secrets referring to the precise terms of the mutual offer provisions deleted.

17 Confidential business secrets referring to ancillary carriage arrangements deleted.

necessary to the implementation of the proposed concentration.][18] Consequently, its effect on competition may fall to be examined either under Regulation 17 or under national competition rules in the UK and/or Ireland.

VIII. CONCLUSION

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

For the Commission,

[18] Text added to replace text deleted earlier because containing confidential business secrets.