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II

(Acts whose publication is not obligatory)

COMMISSION

COMMISSION DECISION

of 27 May 1998

relating to a proceeding pursuant to Council Regulation (EEC) No 4064/89

(Case No IV/M.993 — Bertelsmann/Kirch/Premiere)

(notified under document number C(1998) 1439)

(Only the German text is authentic)

(Text with EEA relevance)

(1999/153/EC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the opinion of the Advisory Committee on Concentrations ⁽³⁾,

Having regard to the Treaty establishing the European Community,

Whereas:

Having regard to the Agreement on the European Economic Area, and in particular Article 57(2)(a) thereof,

Having regard to Council Regulation (EEC) No 4064/89 of 21 December 1989 on the control of concentrations between undertakings ⁽¹⁾, as amended by Regulation (EC) No 1310/97 ⁽²⁾, and in particular Article 8(3) thereof,

Having regard to the Commission Decision of 22 January 1998 to initiate proceedings in this case,

Having given the firms concerned the opportunity to make known their views on the objections raised by the Commission,

(1) On 1 December 1997 the Commission received notification pursuant to Article 4 of Council Regulation (EEC) No 4064/89 (the Merger Regulation) of a proposed concentration whereby CLT-UFA SA (CLT-UFA) and Taurus Beteiligungs-GmbH & Co. KG (Taurus) would acquire joint control, within the meaning of Article 3(1) of the Merger Regulation, of Premiere Medien GmbH & Co. KG (Premiere), BetaDigital Gesellschaft für digitale Fernsehdienste mbH (BetaDigital) and BetaResearch Gesellschaft für Entwicklung und Vermarktung digitaler Infrastrukturen mbH (BetaResearch). The proposed concentration was to be effected through the purchase of shares.

(2) On 15 December 1997 the Commission decided to suspend implementation of the proposed concentration pursuant to Articles 7(2) and 18(2)

⁽¹⁾ OJ L 395, 30.12.1989, p. 1; corrigendum: OJ L 257, 21.9.1990, p. 13.

⁽²⁾ OJ L 180, 9.7.1997, p. 1.

⁽³⁾ OJ C 57, 27.2.1999.

of the Merger Regulation, pending adoption of a final decision.

- (3) By letter dated 22 December 1997 the German Government informed the Commission pursuant to Article 9(2) of the Merger Regulation that the concentration threatened to create or strengthen a dominant position, as a result of which effective competition would be significantly impeded on six markets in Germany, each constituting a separate geographic market within the meaning of Article 9(7) of the Merger Regulation.
- (4) On 22 January 1998 the Commission decided pursuant to Article 6(1)(c) of the Merger Regulation and Article 57 of the EEA Agreement to initiate proceedings in this case.
- (5) The Advisory Committee discussed the draft of the present Decision on 6 May and 25 May 1998.

I. THE PARTIES

- (6) Bertelsmann AG (Bertelsmann) is the common parent company of the leading German media group. The Bertelsmann group has activities primarily in book and magazine publishing, book clubs, printing, music publishing and sound recording, and has holdings in commercial television. CLT-UFA is a joint venture between Bertelsmann and Audiofina SA, in which the parent companies have merged their European television interests. These include the shareholding in Premiere.
- (7) Taurus is a holding company belonging to the Kirch group (Kirch). Kirch is the leading German supplier of feature films and entertainment programmes for television and is also active in commercial television. The group operates mainly in Germany.

II. THE PROPOSED CONCENTRATION

- (8) The German pay-TV supplier Premiere is currently owned by CLT-UFA and Canal+ SA (Canal+), which have a 37,5 % share each, and by Kirch,

which has 25 %. It is proposed that Canal+ should divest itself of its shareholding and that CLT-UFA and Kirch should increase their shares in Premiere to 50 % each. At the same time Kirch will close down its own digital pay-TV channel DF 1 and transfer DF 1's assets to Premiere. It will also bring its sports channel DSF into Premiere and place its pay-TV and pay-per-view rights at Premiere's disposal by sublicensing them [...] ⁽⁴⁾. Premiere will become a digital pay-TV programme and marketing platform using the d-box technology made available to it by Kirch, which operates with a proprietary encryption system. To this end Premiere will assemble in-house or bought-in TV programmes into programme packages and market them. In addition, it will provide subscriber management services (SMS) both to Premiere Digital and to other programme companies. It will build up the decoder infrastructure (in the form of set-top boxes) needed to receive digital television. For digital television transmitted by satellite, it will also administer a system of conditional access.

- (9) At the same time, CLT-UFA will acquire a 50 % interest in BetaDigital, currently a wholly owned subsidiary of Kirch. BetaDigital operates a playout centre for satellite-transmitted digital television and will in future provide to Premiere, and to any interested third parties, the services connected with processing and broadcasting, such as encryption, video compression, multiplexing and satellite uplink. BetaDigital currently provides satellite uplink for DSF, PRO 7 and [...].
- (10) CLT-UFA will also acquire a 50 % interest in BetaResearch, currently likewise a wholly owned Kirch subsidiary. BetaResearch is the holder of exclusive, open-ended licences — granted for Germany, Austria and the German-speaking part of Switzerland — for Beta encryption technology for scrambling programmes, based on the d-box decoder. The licensor of the access technology is DigCo BV, in which Kirch and Irdeto BV, owned by the South African group MIH, each have a

⁽⁴⁾ Deleted for publication. In what follows, all particulars of *inter alia*, market shares and turnover have, for reasons of confidentiality, been replaced by magnitudes given in square brackets. Likewise, text of a confidential nature has been replaced by suspension marks in square brackets.

50 % stake. BetaResearch is active in the development of decoder software and will continue to develop the encryption and operating software for the d-box technology. It will license this technology to Premiere, Deutsche Telekom AG (Telekom), other programme suppliers and decoder manufacturers. In addition, BetaResearch will itself manufacture conditional access modules (CA modules) and smart cards for supply to d-box manufacturers, and will carry out contract and project work for third parties; it has already received orders for such work from [...].

- (11) In the Agreement on a cable platform for digital television which is neutral as far as programme suppliers are concerned, Telekom has become party to the arrangement between Kirch and Bertelsmann regarding Beta access technology based on the d-box decoder, thereby obtaining a technical platform for the digital distribution of pay-TV programmes via its cable network. It intends to acquire a stake in BetaResearch in order to ensure that it has the necessary rights in the d-box decoder based Beta access technology. This operation forms the subject-matter of proceeding IV/M.1027 — Deutsche Telekom/BetaResearch. Although, technically speaking, the two projects constitute separate concentrations and have therefore also been notified separately, in fact they are closely linked. Taken together, they will provide the framework for the introduction of digital television in Germany.

III. THE CONCENTRATION

- (12) Premiere is currently controlled jointly by CLT-UFA, Kirch and Canal+, since all three partners have veto rights with regard to market-related decisions. The operation will lead to a change in the nature of the control. Once Canal+ has withdrawn, CLT-UFA and Kirch will each have a 50 % interest in Premiere and will control it jointly, having henceforth to take strategic business decisions affecting it by mutual agreement. At the same time, Kirch will contribute to Premiere substantial market-relevant assets both in the form of DF 1 and the sports channel DSF and through the transfer of its pay-TV and pay-per-view rights. The transfer to Premiere of Kirch's digital interests will result in a sizeable extension of Premiere's business activities.

- (13) Premiere will perform on a permanent basis all the functions of an autonomous economic entity, and

should not lead to coordination of the competitive behaviour of CLT-UFA and Kirch. It will continue to operate pay-TV in Germany and will develop, alongside the previously predominant analogue pay-TV programmes, digital pay-TV both as a programme supplier and at the level of the programme and marketing platform. Although at present it still obtains pay-TV broadcasting rights from Taurus, once the agreements concluded by Taurus with the licensors have expired Premiere will itself acquire those rights [...]. Once the proposed merger has been completed, Kirch and CLT-UFA/Bertelsmann will be active on the market for pay-TV and the market for pay-TV broadcasting rights only through their participation in Premiere. The increase in the size of the stakes held by CLT-UFA and Kirch in Premiere after the withdrawal of Canal+ together with the simultaneous development of Premiere into a digital programme and marketing platform, therefore constitutes a concentration within the meaning of Article 3(1)(b) of the Merger Regulation.

- (14) CLT-UFA and Kirch will each have a 50 % interest in BetaDigital and will control it jointly. BetaDigital will perform on a permanent basis all the functions of an autonomous economic entity, and should not lead to coordination of the competitive behaviour of CLT-UFA and Kirch. Although at the present time the purchasers of BetaDigital's technical services are predominantly firms associated with CLT-UFA and Kirch, the provision of such services to third parties is not only planned but to some extent already a reality. It may be assumed from this that, once digital television is more widespread in Germany, kBetaDigital will act increasingly on behalf of third parties. BetaDigital is accordingly to be regarded as a full-function enterprise. Since in the field of technical services for digital television only CLT-UFA is active to any extent (through Cologne Broadcasting Centre GmbH), there will be no coordination here either of the competitive behaviour of CLT-UFA and Kirch. CLT-UFA's participation in BetaDigital therefore constitutes a concentration within the meaning of Article 3(1)(b) of the Merger Regulation in the form of a concentrative joint venture.

- (15) To begin with, CLT-UFA and BetaTechnik, which is owned by the Kirch group, will each have a 50 % interest in BetaResearch. Once Telekom has acquired a stake in BetaResearch, Telekom, CLT-UFA and Kirch will control BetaResearch

jointly. In the Agreement on the restructuring of BetaResearch (the restructuring agreement), it is stipulated that important business decisions [...] are to be taken by the proprietors' meeting, acting unanimously. BetaResearch will perform on a permanent basis all the functions of an autonomous economic entity; this should not lead to coordination of the competitive behaviour of CLT-UFA and Kirch. BetaResearch will not only license d-box technology to firms — such as Telekom and BetaDigital — which seek to offer technical services for digital television, but it will also grant licences to programme suppliers who wish to provide the necessary technical services themselves. It will grant licences to interested decoder manufacturers and supply them with CA modules, and develop decoder software for third parties. Besides its business dealings with its parent companies and with companies associated with them, it can therefore be assumed that BetaResearch will also transact licensing business to a not inconsiderable extent with third parties and will hence have its own access to the market. BetaResearch is accordingly to be regarded as a full-function enterprise. Since only CLT-UFA is active in the field of digital encryption technology for pay-TV, through Bertelsmann's stake in Seca SA, there is no risk of coordination of competitive behaviour between CLT-UFA and Kirch. CLT-UFA's participation in BetaResearch accordingly constitutes a concentration within the meaning of Article 3(1)(b) of the Merger Regulation in the form of a concentrative joint venture.

IV. COMMUNITY DIMENSION

- (16) Bertelsmann and Kirch together have an aggregate worldwide turnover of more than ECU 5 billion. Each of them has an aggregate Community-wide turnover of more than ECU 250 million. Kirch is alone in realising more than two thirds of its aggregate Community-wide turnover within one and the same Member State, namely Germany. The concentration therefore has a Community dimension and does not constitute a case of cooperation under the EEA Agreement.

V. ASSESSMENT UNDER ARTICLE 2 OF THE MERGER REGULATION

- (17) The proposed concentration affects mainly the markets for:

- pay-TV,
- technical services for pay-TV.

A. RELEVANT PRODUCT MARKETS

1. Pay-TV

- (18) Pay-TV constitutes a relevant product market separate from that for free-access television (free TV), i.e. advertising-financed private television and public television financed through fees and partly through advertising⁽⁵⁾. While, in the case of fee- and advertising-financed television, there is a trade relationship only between the programme supplier and the advertising industry, in the case of pay-TV there is a trade relationship only between the programme supplier and the viewer as subscriber. The conditions of competition are accordingly different for the two types of television. Whereas in the case of fee- and advertising-financed television the audience share and the advertising rates are the key parameters, in the case of pay-TV the key factors are the shaping of programmes to meet the interests of the target groups and the level of subscriptions. According to a study by GfK-Fernsehforschung (GfK TV Research), pay-TV subscribers devote on average 90 % of their daily viewing time to free TV and 10 % to pay-TV. The fact that subscribers, despite comparatively little use, are prepared to pay considerable sums for pay-TV indicates that the latter is a clearly distinguishable product with specific extra utility. As digitalisation continues to spread, there could admittedly, with the passage of time, be a certain convergence between pay-TV and free TV, particularly if, at some future stage, free-TV channels too should largely be supplied in digital bouquets by pay-TV operators. However, this possible future development is not enough now to justify the acceptance of a common market for pay-TV and free TV. The market for pay-TV also includes pay-per-channel and pay-per-view. The pay-TV market cannot be subdivided into

⁽⁵⁾ See Commission Decision 94/922/EC, MSG Media Service (OJ L 364, 31.12.1994, p. 1, paragraphs 32 and 33).

analogue and digital pay-TV. Digital pay-TV is only a further development of analogue pay-TV and therefore does not constitute a separate relevant product market. Moreover, account should be taken of the fact that in the next few years analogue broadcast pay-TV will be completely superseded by digital broadcast pay-TV. Under Premiere's business plan, analogue subscriptions will be continually transformed into digital ones, so that by [...] the only subscribers will be digital ones.

distribution, on the other hand, the processed television signals are first beamed down from the satellite transponder to a cable head-end, where they are converted for cable transmission and then fed into the cable network. Despite the separate transmission technology for satellite and cable transmission, a corresponding subdivision of the market for technical services for pay-TV into two independent sub-markets does not seem imperative. Both satellite and cable transmission require the same technical services for the operation of pay-TV. Ultimately the question can be left open, however, as it does not affect the outcome of the assessment under the Merger Regulation.

2. *Technical services for pay-TV*

B. RELEVANT GEOGRAPHIC MARKETS

(19) The operation of pay-TV requires a special technical infrastructure in order to encrypt the television signals and to decrypt them for the authorised viewer. This is done by a decoder which is installed in the home of every pay-TV subscriber. Decoders for receiving digital pay-TV do not only decrypt the signals encrypted in the access system, but they also convert them to enable digital television signals to be received on analogue TV sets. Different decoders are used for cable and satellite TV.

(22) The relevant geographic market for the product markets described above is confined to Germany, or at all events to the German-speaking region consisting of Germany, Austria and the German-speaking parts of Belgium and Switzerland. Given the viewing habits of the population, Luxembourg too can be included in the German-speaking region.

1. *Pay-TV*

(20) In addition to a decoder base, pay-TV requires a system of conditional access. This system comprises the transmission of encrypted data, which contain information on the programmes or packages of programmes subscribed to and on the entitlement of the pay-TV subscribers to receive the programmes, together with the television signal, and possibly smart cards which are made available to the viewer and are able to decipher the encrypted authorisation data and transfer them to the decoder.

(23) Despite the fact that, in certain niche markets, channels such as the sports channel Eurosport are broadcast throughout Europe, television broadcasting is still generally organised on a national basis. As the Commission has already stated in a number of decisions ⁽⁶⁾, owing primarily to different regulatory regimes, language barriers, cultural factors and other different conditions of competition prevailing in the individual Member States (e.g. the structure of the market for cable TV), the markets for the organisation of television are national in nature.

(21) The infrastructure described above forms the basis for the services relating to the operation of pay-TV. These involve primarily the handling of conditional access and the marketing of decoders and smart cards. Technical services for pay-TV require specific technology for the transmission of digital television signals via satellite and via cable. In the case of satellite transmission, the television signal is processed by the playout centre and sent to the respective satellite transponder, from where it can be beamed down and received directly by each satellite TV subscriber using a decoder designed for satellite reception. In the case of cable

(24) Germany is accordingly the relevant geographic market for pay-TV. The Commission came to the same conclusion in the MSG Media Service case, although it indicated in that Decision that, bearing in mind the lack of any language barrier, a market might in future be assumed to exist for German language pay-TV ⁽⁷⁾. The Commission's investigation in the present proceeding brought to light a number of grounds for considering that the

⁽⁶⁾ See MSG Media Service footnote 5, paragraph 46; Commission Decision 96/346/EC, RTL/Veronica/Endemol, (OJ L 134, 5.6.1996, p. 32, paragraph 25).

⁽⁷⁾ See footnote 5, paragraph 51.

relevant geographic market for pay-TV here extends beyond Germany and, in view of the lack of any language barrier, comprises the entire German-speaking area. This question can, however, be left open in the last analysis, as the competition assessment of the concentration would be the same even on the assumption of a market encompassing the whole of that region.

2. *Technical services for pay-TV*

- (25) Technical services for pay-TV are closely bound up with the supply of pay-TV. In its decision in *MSG Media Service* ⁽⁸⁾ the Commission assumed that the relevant geographic market was confined to Germany, but at the same time it stated that, to the extent that German providers of digital pay-TV also acquired subscribers in other German-speaking regions, MSG's service market would probably also spread to such areas. In the present case, the market for technical services for pay-TV may, whether there is assumed to be a separate market for satellite transmission or an overall market for satellite and cable transmission, be deemed to encompass the entire German-speaking area.

C. EFFECTS OF THE CONCENTRATION

1. *Organisation of pay-TV in Germany after the concentration*

(a) *Programme platform*

- (26) Premiere will build up a programme and marketing platform and distribute its programmes both through the cable networks (using Telekom's technical platform) and via satellite (using its own technical platform). It will assemble in-house and/or commissioned TV programmes into programme packages, which it will market either by way of direct marketing or through the trade and it will provide subscriber management services not only for Premiere Digital but also for other programme suppliers. As a matter of priority, it will build up the decoder infrastructure (set-top boxes) needed to receive digital TV.

(b) *Technical platform*

- (27) The technical platform in the narrower sense, i.e. the controlling of conditional access and the provision of the technical services connected therewith, will be organised differently in the case of satellite transmission and in that of cable transmission. The technical platform encrypts the signals of the programme to be broadcast that are sent by the programme supplier and transmits them to subscribers. In the case of satellite transmission, access control and the related technical services will be handled by BetaDigital, while in the case of cable distribution access control will be handled by Telekom, which will provide an electronic programming guide in the form of a base navigator.
- (28) The decoder technology is part of the technical platform. CLT-UFA, Kirch and Telekom have agreed to use d-box technology and Beta access control technology — the latter co-developed by Kirch — for encryption purposes in connection with the cable distribution and satellite broadcasting of programmes. In order to ensure the use of Beta access technology by Premiere and Telekom from a structural point of view, CLT-UFA and Telekom will acquire a stake in BetaResearch, which owns the rights to the encryption and decoder systems.

2. *Market for pay-TV*

(a) *Market domination*

- (29) The proposed concentration will lead to the creation or strengthening of a dominant position for Premiere on the pay-TV market in Germany.
- (i) *Premiere will have a near-monopoly as pay-TV supplier*
- (30) At the present time, Premiere and DF 1 are basically the only pay-TV suppliers in Germany. Although Canal+ is active in Germany, providing the 'Multithématiques' programme bouquet consisting of three pay-TV special-interest channels, the bouquet is currently broadcast using DF 1's platform. Premiere has approximately 1,5 million subscribers (November 1997 position), including some 100 000 Premiere Digital subscribers (December 1997 position). DF 1 has

⁽⁸⁾ See footnote 5, paragraphs 52, 53 and 54.

approximately [$<100\,000$] subscribers to its digital programme package (November 1997 position). These figures indicate that Premiere already occupies a dominant position on the pay-TV market. This position is not as yet unassailable though, since Kirch has extensive and important films and sports rights and Premiere is especially dependent on the former's pay-TV broadcasting rights. Even if Kirch, as explained in recital 2, was able to exercise joint control over Premiere, there has hitherto been an intensive competitive relationship between Premiere and DF 1. Despite its position as a partner in Premiere, in 1996 Kirch began, with DF 1, to set up a digital pay-TV platform in competition with Premiere. This behaviour triggered intense competition between Premiere and DF 1 and resulted in numerous court proceedings. One of the consequences of this competition was that, prior to the agreement reached in June 1997 on the proposed merger, Kirch and Premiere were each running separate decoder projects. Once the proposed concentration has taken place, this competition will cease and for all practical purposes there will be only one pay-TV-supplier, which will combine the programme resources of both CLT-UFA and Kirch.

(ii) *Premiere will be the only programme platform for digital pay-TV*

(31) At present Premiere provides an analogue pay-TV channel which broadcasts mainly premium films (first transmission of currently showing feature films and sports events. Premiere Digital provides a further two channels which broadcast the analogue programme with staggered showing times. The digital supply includes feature films on a pay-per-view basis. DF 1 offers a basic bouquet consisting of 20 channels (including a few foreign free-TV channels and Canal+'s Planet pay-channel). It also offers three additional packages (films, sport and science fiction), four special-interest channels, which can be subscribed to separately (including two belonging to Canal+), and feature films on a pay-per-view basis.

(32) The conversion of Premiere into a 50/50 joint venture between CLT-UFA and Kirch and the cessation of the activity of DF 1 as an independent pay-TV supplier mean that in the near future Premiere will be the only pay-TV programme and marketing platform in Germany. Once the concentration has taken place, Premiere will have

taken over substantial assets [...]. DF 1's broadcasting and other activities will thereupon cease. Taurus Film will, moreover, transfer [...] to Premiere in return for the assumption by the latter of its responsibilities as employer. Premiere will acquire the sports broadcaster DSF, which will in future supply sports channels for Premiere's programme bouquet and operate an additional free TV sports channel. It is also taking over the operation of [<20] of DF 1's transponders and [<10] of CLT-UFA's, together with responsibility for the contract between Kirch and Nokia for an order of over 1 million d-box decoders.

(33) [...].

(iii) *Premiere will have access to the most attractive and most comprehensive programme resources*

(34) Access to programme resources is vital to the successful provision of pay-TV. Particularly important is access to premium films and major sporting events; broadcasting these on the premium channels known as 'anchor channels' awakens interest in a pay-TV bouquet among potential subscribers. Access to a stock of films that have already been shown on television and to television productions suitable for repeat broadcasting is also important. 'Library' programmes of this kind can be used especially in order to run special-interest channels, such as feature film channels or science fiction, comedy and documentary channels.

(35) Premiere will have access to programme resources unparalleled in Germany through its parent companies CLT-UFA and Kirch on account of their positions on the upstream markets for programme rights. For reasons of confidentiality no detailed figures can be given here.

(36) Kirch is the leading German supplier of feature films and entertainment programmes for television. In its Decision in MSG Media Service⁽⁹⁾, the Commission noted that Kirch had at its disposal a stock of about 15 000 films of all types and 50 000 hours of television programmes, and also had extensive production activities in the area of films and television. Since that Decision, in the years [...], Kirch has concluded exclusive output deals for pay-TV rights with numerous film studios, including almost all the Hollywood

⁽⁹⁾ See footnote 5, paragraph 76.

majors, and has thereby acquired a commanding position in the area of programming. Furthermore, the proportion of pay-TV rights which is not now in the hands either of Kirch or of CLT-UFA or Premiere is [...]. As a result of the output deals concluded by Kirch for pay-TV rights in particular, the [...] monopoly in premium films for pay-TV which Premiere will enjoy as a result of the transaction will continue for the foreseeable future.

(37) Kirch and CLT-UFA also hold [...] sports rights, which in many cases are complementary. For example, CLT-UFA has the pay-TV rights to German Bundesliga football matches, while Kirch has [...]. In tennis, Kirch has the rights to [...], while CLT-UFA has the rights to [...]. Both have rights to a large number of other sports. Kirch, for example, has the rights to [...].

(38) [...].

(39) [...].

(40) [...].

(41) [...].

(42) [...]. When the parties contend that some of the said rights are granted to them for only a relatively short time with the result that they would soon have to try and get them renewed, this is of course quite true. In this respect, the list given here reflects only the current situation. When, however, the parties already hold a quite considerable number of these important sports rights, which are usually granted only for a relatively short period, then it is to be expected, after their resources have been bundled in Premiere, that they will also be awarded such rights in future, at least on the same scale but probably to a greater extent. The parties have not contended otherwise. As regards the parties' contention that the Prime Ministers of the *Länder* had, on the basis of European Parliament and Council Directive 97/36/EC of 30 June 1997 amending Directive 89/552/EEC on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities⁽¹⁰⁾, provisionally agreed on

a list of particularly important sporting events to be transmitted by free TV, it should be emphasised that these involve only the Olympic games and a few football matches of outstanding importance.

(iv) Premiere's scope for competitive action will not be controlled to any considerable extent by public television suppliers

(43) In their reply to the Commission's objections, the parties contend that in its examination the Commission did not pay enough attention (a) to the strong competitive interrelation between public and commercial free TV on the one hand and pay-TV on the other hand and (b) to the resulting controlling influences of free TV on pay-TV. In particular, the Commission took absolutely no account of the massive competitive pressure exerted by public television in Germany on pay-TV.

(44) The Commission does not deny that, although pay-TV and free TV constitute two different markets, there is an interrelation between them. As explained more fully in section (c), the more varied and attractive the programmes supplied by free TV, the less incentive there is for viewers to subscribe in addition to pay-TV. It is not convincing to say, however, that on account of this interrelation Premiere's scope for action on the pay-TV market is already considerably restricted, especially by the public broadcasters. There is no direct competitive relation between free TV and pay-TV. When the parties object, on the contrary, that such competition does exist, particularly in regard to audience share, this is immediately contradicted by their further statements. The parties cite a study by GfK-Fernsehforschung (GfK TV Research), according to which pay-TV subscribers devote on average 90 % of their daily viewing time to free TV and 10 % to pay-TV. If, however, pay-TV subscribers are prepared, in addition to the existing broadcasting fees of about DEM 30, to pay an extra DEM 50 for a pay-TV subscription, although they use this for only 10 % of their viewing consumption, this shows that the economic success of pay-TV is not exactly dependent on the audience share. What is decisive is the subscriber base, which exists independently

⁽¹⁰⁾ OJ L 202, 30.7.1997, p. 60.

of the actual extent to which pay-TV is used at any one time. The fact that subscribers, despite comparatively little use, are prepared to pay a considerable price for pay-TV shows, moreover, that pay-TV is a clearly distinguishable product with specific extra utility.

(i) *No other firm will have the programme resources necessary to establish a programme platform*

(45) When the parties further contend that an increase in broadcasting fees affects the demand for pay-TV and that, hence, the elasticity of demand for pay-TV depends in the long term on the amount of the fees charged by public broadcasters, this is not evidence, either, of a competitive relation between pay-TV and the public broadcasters. To begin with, a fee increase and hence a charge on the 'cultural budget' would have to be fairly drastic to affect the existing willingness to pay DEM 50 a month for a pay-TV subscription. Furthermore, it is fair to speak of a competitive relation with regard to the amount of the fees, and possibly the price of a pay-TV subscription, only if the public broadcasters could set the fees autonomously. But this is precisely what they cannot do.

(b) Duration of dominance

(46) The parties concede that Premiere will have a very strong position on the market in pay-TV over the next five years. But they argue that this position will be limited in time. As soon as Premiere has succeeded in establishing a broad decoder base, other pay-TV suppliers will be able to use it to offer their own pay-TV marketing and programme platforms and to provide and distribute their own programmes in competition with Premiere. Telekom in particular will be able to set up an alternative programme and marketing platform for cable, and to market programmes and to service and manage subscribers for other programme suppliers.

(47) This argument cannot be accepted. It must be assumed that Premiere's dominant position will be established on a lasting basis. As a result of the transaction, Premiere will continue to be the only programme and marketing platform for the cable and satellite sector on the pay-TV market in Germany for a long time to come.

(48) Access to programme rights is even more important in the case of pay-TV than it is in the case of free TV, since, in order to entice the consumer to subscribe, or to take particular productions on a pay-per-view basis, certain specific types of content are required. Experience with pay-TV in Europe so far shows that in order to be sufficiently attractive a pay-TV bouquet must include a combination of premium rights for the first broadcasts of films produced at the major Hollywood studios and for popular sporting events. This is especially true in Germany, where every household with television can already receive more than 30 free-access channels. The importance of premium films and sporting events for the organisation of pay-TV is borne out by the programme costs estimated in Premiere's business plan. [60 % to 80 %] of all licensing costs in 1998 are accounted for by premium films ([30 % to 50 %]) and sports rights ([20 % to 40 %]). An alternative programme platform can therefore be built up only by somebody who has access to premium content so that he can offer a promising pay-TV bouquet.

(49) But programme resources are in short supply, since, as a general rule, the broadcasting rights for premium content of this kind are given on the basis of longer-term exclusive contracts. In the German-speaking area CLT-UFA and Kirch hold [...] pay-TV broadcasting rights for premium films, as a result of output deals with the Hollywood majors, and [...] sports rights too. As CLT-UFA and Kirch are to transfer their pay-TV broadcasting rights to Premiere, the transaction will initially make Premiere the only operator to dispose of the programme content for a premium channel. For the duration of the existing contracts no other supplier will have access to Premiere's programme resources. Thus potential competitors will not be in a position to create an alternative programme platform for the German-speaking area. They might be able to show particular programmes in specific pay-TV niches, but to do so they would be dependent on Premiere's programme and marketing platform.

- (50) Nor is it likely that the situation will change in any way once the current contracts for pay-TV rights have expired. In theory, pay-TV services could be supplied in Germany and the German-speaking area by other European and non-European television operators, such as BskyB Ltd or Canal+, or even the major Hollywood studios. But in order to establish an alternative programme platform it is not enough to conclude just a few individual output deals. The output deals concluded by Kirch and CLT-UFA run for different terms. Four of the ten output deals of Kirch, whose rights will be sub-licensed to Premiere, have a term of [<20] years. These are at least [...]. Most of the output deals with the Hollywood majors run till [<2005] or longer. Potential competitors would have to succeed in acquiring rights under several output deals over a number of years before they could offer an attractive pay-TV bouquet.
- knowing whether it could achieve the guaranteed figure. In view of the advantages which Premiere will consequently enjoy over any potential competitor in the negotiation of contracts for premium content, it is unlikely that outsiders will be able to secure adequate access to content of that kind.
- (52) It is also unlikely that Telekom will establish an alternative programme and marketing platform. Telekom would in any event be able to establish a platform only for cable. But Telekom does not hold film and sports rights. To build up a competing bouquet it would have to have premium content and only an operator with access to premium content can successfully market other programmes that are suitable for bundling. These are programmes which are not so attractive in themselves that they might induce viewers to subscribe. Thus Telekom would be able to build up an alternative platform open to potential competitors with Premiere only if it had access to premium content or to a premium channel. In its agreements with CLT-UFA and Kirch, however, Telekom has expressly undertaken not to market Premiere itself. It is difficult to see, therefore, how Telekom could build up an attractive, marketable pay-TV bouquet.
- (51) Given the market position Premiere will have established by then, competitors' prospects of securing any substantial volume of attractive pay-TV broadcasting rights will be small. To have any hope of acquiring broadcasting rights, it is vital to have access to an established subscriber base, since rightholders usually want to see their product distributed widely. This is true of premium films, and even more so of sports events. The holders of sports rights are especially interested in having their events broadcast as widely as possible, as this attracts further sponsors and increases advertising revenue. Premiere will already have an established subscriber base, which will enable it to guarantee more extensive distribution than a bidder who has still to build up a subscriber base. In addition, the prices of pay-TV rights are usually determined by reference to the number of subscribers, subject to a stated minimum. This is certainly what is done in output deals. As Premiere's subscriber base can be expected to be large in the next few years, it follows that a sale of rights to Premiere should secure a considerably higher price than sale to a newcomer. Moreover, a newcomer would run a considerable financial risk by concluding output deals, since it would have to guarantee a minimum subscriber base, without
- (ii) *The transaction enables Premiere to combine the advantages of its subscriber base with the enormous programme resources of Kirch*
- (53) Premiere is already the biggest pay-TV supplier, and as such already has a subscriber list that it can use for the future digital pay-TV. As can be seen from Premiere's marketing of the d-box, which was suspended last December, an existing body of analogue TV subscribers is an important factor in the successful marketing of a digital pay-TV bouquet. Premiere offered its subscribers the digital programme, including the hire of the d-box, at the small extra charge of DEM 10 over that analogue subscription. Between the beginning of November and the middle of December, when the marketing of the d-box came to an end, Premiere secured [50 000 to 100 000] subscribers to Premiere Digital, and placed a corresponding number of

d-boxes on the market. There were [$<20\,000$] d-boxes exchanged for [. . .], [50 000 to 70 000] d-boxes exchanged for analogue decoders being used by Premiere subscribers, and only [10 000 to 30 000] new subscribers for Premiere Digital. Anyone wishing to compete with Premiere on the market in pay-TV would have to acquire a similar subscriber base first, or in other words, as compared with Premiere, to start from scratch.

(54) In addition, it should be borne in mind that the CLT-UFA programme resources at Premiere's disposal would allow it to develop different programme packages tailored to the needs of particular target groups which could be offered to those groups at advantageous subscriber prices. Experience in countries in which the pay-TV business has already developed further shows that the assembly of individual programmes into packages is an important component in success in the pay-TV business. Premiere will be the only operator with premium content available, and will be able to increase the attractiveness of its premium content still further by bundling it with other programme rights.

(55) CLT-UFA and Kirch also conduct extensive free-access commercial TV operations. Together with Bertelsmann they have over 50 % of the free TV audience and 90 % of the advertising market, through programme suppliers linked to CLT-UFA, namely RTL, RTL 2, Super RTL and VOX, and those in Kirch's sphere of influence, namely SAT 1, DSF, PRO 7 and Kabel 1. CLT-UFA and Kirch can use their strong presence in free TV to promote Premiere Digital intensively. This was the strategy followed for the marketing of Premiere Digital between the beginning of November and the middle of December last year. Of course, as a general rule, potential competitors would also be able to advertise on free TV in this way. But it is questionable whether they would be able to advertise on terms comparable with those available to Premiere.

(iii) *Bertelsmann and Kirch control the decoder infrastructure*

(56) Potential competitors from Germany and abroad who propose to offer their own programmes and channels on the German market are dependent on access to the d-box. In theory, a pay-TV operator has a choice between distributing programmes via an existing decoder infrastructure or building up a

new decoder infrastructure. In practice, however, a new programme supplier entering the market will have to use the services and infrastructure of the pay-TV operator already established on the market. This follows in particular from the fact that the economic risk is too great to justify installing a new infrastructure for a new programme. Households will not normally be prepared to procure another decoder in order to receive another pay-TV bouquet. This is true whether the new decoder is for sale or for hire.

(57) In addition, an alternative decoder infrastructure could in any event be established only for satellite transmission. There are some 7 000 000 to 9 000 000 households receiving satellite broadcasts in Germany, while about 18 500 000 households are connected to broadband cable networks. In the restructuring agreement, however, CLT-UFA, Kirch and Telekom have agreed that when Telekom provides technical services for the relay of digital TV programmes via its broadband cable networks, it will use only Beta access technology on the basis of the d-box decoder. Any pay-TV operator seeking access to the 18 500 000 cable households would therefore have to use the d-box decoder in any event. It can be concluded, therefore, that future competitors Premiere in pay-TV will be dependent on access to the d-box decoder base for the broadcasting of their bouquet.

(58) The d-box works with a proprietary conditional access system, so that a potential pay-TV operator will have to acquire a licence from BetaResearch for the use of the Beta access technology. But BetaResearch is two-thirds controlled by CLT-UFA and Kirch. Through their stake in BetaResearch, therefore, CLT-UFA and Kirch, would be in a position to exercise a powerful influence over any competition offered by future pay-TV operators to Premiere, and to a great extent to channel it as they saw fit. With their controlling interest in BetaResearch, they could ensure that the terms for the use of Beta access technology, and in particular the price structure applied, were advantageous to Premiere and unfavourable to potential competitors' programmes. Artificially inflated

prices, for example, would favour CLT-UFA and Kirch, since unlike their competitors they share in BetaResearch's profits. Moreover, as explained below (see recital 112), in view of the control of access technology it should be assumed that in the satellite field there will be hardly any other suppliers of technical services on the market apart from BetaDigital. Potential competitors of Premiere will therefore have to let access to their programmes be controlled by BetaDigital.

- (59) Control of the decoder infrastructure also enables the parties to influence the positioning of their competitors' programmes. The range of programmes possible in digital television makes it necessary to provide users with an 'electronic programming guide' (EPG), which allows programming and other information to be presented to the viewer in an easy-to-read form. A navigation system known as TONI is contained in the d-box which provides the basic functions of an EPG. This is a proprietary solution developed for the d-box. All programme suppliers are dependent on the performance of this EPG. At present outside programme suppliers are unable to operate their own EPG on the d-box. They have to be included in the d-box EPG.

- (60) Programme suppliers such as ARD see the EPG as a means of differentiating themselves from the competition. Creative design of EPG content, and the possibility for interactive services such as games, is an important competitive parameter. Unlike other systems already on the market, which make it easy to create one's own EPG, the d-box EPG currently offers only rudimentary functions.

- (61) Lastly, control of the Premiere programme and marketing platform and the decoder infrastructure gives CLT-UFA and Kirch considerable advantages in terms of information. As Premiere is to carry out subscriber management and servicing not only for Premiere Digital but for other programme suppliers too, it would have information on competitors' programme plans and customer structure, and more generally on the behaviour of competitors' subscribers entrusted to their subscriber management system (SMS). Premiere would not need access to individual customer data. Access to anonymous data, which might for example give information on the age structure of the audience for different programmes, would suffice. With interactive pay-TV services such as pay-per-view, anonymous data could also be

obtained showing which specific group preferred which kind of programme content and to what extent. Information of this kind confers considerable competitive advantages by making it much simpler to develop programmes or programme packages tailored to particular target groups. The parties object, on the contrary, that it is possible for other suppliers simply to operate their own SMS or to use corresponding services supplied by third parties. This objection is unconvincing. As the Commission has already established in MSG Media Service ⁽¹¹⁾, it is not to be expected that the average pay-TV subscriber would wish to have dealings with several subscriber management operators. It is in the viewer's interest to have as far as possible a single body dealing on his behalf with all questions relating to the taking of pay-TV (e.g. extension of the subscription to additional programmes, reduction of programmes subscribed to, settlement of the subscription). Whichever service supplier can provide the largest number of programmes and the most attractive programmes will thus occupy a favoured position against which the other service suppliers will have difficulty in asserting themselves. As explained above, however, this will always be Premiere.

- (iv) *Given the present structure of the German cable network, cable operators would not be able to offer an alternative programme platform even if they had access to Premiere programmes*

- (62) Without access to Premiere's premium programmes it would in any event be impracticable for private cable operators to try to establish an alternative programme platform. Premiere has the most attractive programme rights (feature films and sports events), so that other operators, if they tried to enter the market at all, would have to market their own offering via the Premiere platform, and consequently would not be available for the construction of an alternative programme platform. Even if they did not offer their programme via the Premiere platform, other programme suppliers would not be able to achieve

⁽¹¹⁾ See footnote 5, paragraph 71.

the critical mass of attractive programmes needed to build up an alternative platform, because of the concentration of premium programmes in the hands of Premiere.

that regardless of the question of access to premium content the private cable operators are not at present in a position to offer an alternative programme platform in competition with Premiere.

(63) But because of the historical development of the structure of cable distribution in Germany, it would not in fact be possible for private cable operators to establish an alternative programme platform even if they did have access to the premium programmes in Premiere's platform. In Germany there are 18,5 million households connected to cable, that is to say over half of all households with TV. At network level 4, the level of household distribution and local supply networks, about one third of connected German households are serviced by Telekom. The other households with cable are connected to a large number of sometimes very small private cable operators. These private operators normally handle small level 4 'cable islands', which are frequently not connected between themselves, and are supplied by a 'backbone' level 3 network belonging to Telekom. Private cable operators also operate to a limited extent at level 3.

(64) This means that private cable operators are usually dependent on upstream level 3 services supplied by Telekom. Before the private cable operators set up an alternative programme platform, they would certainly have to integrate their cable islands by means of level 3 supply networks. As a result of the planned transaction, however, the level 3 networks operated by Telekom would not be available for the creation of an alternative platform, so that the cable operators would have to establish their own level 3. But the private cable operators would not have the financial capacity to carry out the investment necessary over the whole territory.

(65) Even if the private operators did set up their own level 3, the creation of an alternative programme platform would still be at best a technical possibility. The marketing of such a platform would still pose problems which would be extremely difficult to resolve in practice, owing to the more or less random geographic distribution of the private cable networks. The fragmentation of the German cable television business and the position of Telekom as practically the only operator of level 3 supply networks mean

(v) *As the sole programme platform, Premiere can dictate the conditions of market entry for other suppliers*

(66) In principle a pay-TV operator has a choice between building up his own infrastructure or offering his programmes as part of an existing bouquet. As has been exhaustively explained here, however, the construction of a new infrastructure is at best a theoretical alternative, certainly for operators who do not possess sufficient programme resources to be able to offer a premium channel. Canal+, for example, has a programme bouquet known as 'Multithématiques', consisting of three digital pay-TV programmes, 'Planet', 'Seasons' and 'Cine Classics I + II'; it has decided to offer it via DF 1, with 'Planet' forming part of the DF 1 basic package, and 'Seasons' and 'Cine Classics I + II' being broadcast via DF 1's platform but also available on a subscription separate from the DF 1 basic package. 'Seasons' has just under [1 000 to 5 000] subscriptions, and 'Cine Classics' just under [1 000 to 5 000]. Hollywood studios likewise prefer to have their own pay-TV channels included in existing bouquets. Kirch has concluded [...] on behalf of DF 1. Kirch also concluded [...].

(67) An outsider will usually be able to gain access to an existing programme bouquet more easily if he has a choice between several competing bouquets; such a choice existed in Germany before the planned concentration. In the absence of an alternative programme and marketing platform in Germany, however, potential competitors from at home and abroad who want to offer their own programmes and channels on the German market will in future be dependent on access to Premiere's platform. This means that every pay-TV operator is obliged to have his programmes included in a bouquet to be made up by Premiere. Premiere thereby gains control of these competitors' activities, and would be in a position to determine the conditions under which other operators compete with it.

(68) Premiere could refuse outright to allow a pay-TV provider access to the Premiere platform, or could impose its own conditions. There has already been one case which makes it clear how Premiere might proceed with outsiders wishing to offer their own pay-TV programmes in Germany after the concentration. The [...] between Kirch and [...].

(vi) *The fact that DF 1 has had only limited success so far does not mean that the conditions of competition will be the same with or without the concentration*

(69) It was not until they responded to the Commission's objections that the parties asserted that the concentration would not result in the establishment or strengthening of a dominant position for Premiere on the pay-TV market. [...]. Premiere already has a subscriber base, so that the acquisition of DF 1's subscribers forms an increase in subscribers and not, as would be the case with a different acquirer, a new start-up in pay-TV.

(70) In its decision, in Kali and Salz/MdK/Treuhand⁽¹²⁾, in the mean time upheld by the Court of Justice, the Commission recognised that a merger which should normally be considered to lead to the creation of reinforcement of a dominant position on the part of the acquiring firm can be regarded as not causing such a position on the market if, even in the event of the merger's being prohibited, the acquirer would inevitably achieve or reinforce a dominant position. Accordingly, a merger generally is not the cause of the deterioration of the competitive structure if it is clear that:

- the acquired firm would in the near future be forced out of the market if not taken over by another firm,
- the acquiring firm would take over the market share of the acquired firm if it were forced out of the market,

— there is no less anti-competitive alternative purchase.

Moreover, the Commission made it clear in the Kali and Salz Decision that this is an exceptional situation; normally, there would be a presumption that a concentration which results in the creation or strengthening of a dominant position is the cause of this deterioration in the competitive structure. Consequently, the burden of proof of a missing link of causality lies with the merging firms.

(71) It should be made clear from the outset that the present case, unlike Kali and Salz, does not involve a whole company apparently being forced out of the market; in fact, DF 1 GmbH & Co. KG, as will be shown below, forms only part of Kirch's pay-TV business. Even if Kirch completely abandoned its pay-TV business the position would not be comparable with that in the Kali and Salz case since Kirch as a whole would not be dissolved. It would merely relinquish a part of its extensive business. In this instance Kirch's abandonment of the pay-TV market is simply a management decision to give up an area of its business which has not lived up to the management's expectations. Where the 'failing division defence' and not the 'failing company defence' is invoked, particularly high standards must be set for establishing that the conditions for a defence on the grounds of lack of a causal link have been met. If this were not so, any concentration involving the disposal of an allegedly unprofitable area of a business could be justified for merger-control purposes by a declaration on the part of the seller that, without the merger, it would be necessary to close down the seller's business in that area.

(72) The parties' arguments do not suffice to establish the defence of lack of a causal link. Apart from the general considerations set out above, they have failed to adduce any evidence that DF 1 is liable to be forced out of the market, in the short term at least. A mere reference to initial losses of DEM [500 million to 2 billion], without any details, is insufficient to establish why DF 1 would have to cease trading. Moreover, regarding the initial losses arising from the contract between Kirch [...] and from the [...] by Kirch [...], these were incurred by Kirch, forming investments made with a view to

⁽¹²⁾ Commission Decision 94/449/EC, OJ L 186, 21.7.1994, p. 38, paragraphs 70 et seq.; Judgment of the Court of Justice in Joined Cases C-68/94 and C-30/95 France and others v. Commission [1998] ECR I-1375.

entering the digital pay-TV market. Kirch's expectations on entering the market have not been met, particularly as to the number of subscribers. It should, however, be noted at this point that a crucial element in DF 1's lack of success has been made good in the mean time, since, through agreements concluded with Telekom, DF 1, which for long was accessible only by satellite, is now available on cable, so that it has a potential subscriber-base of 18,5 million households with television. After gaining access to the cable network, DF 1 has been able to increase its subscribers from [30 000 to 100 000] in [...] 1998 to [50 000 to 200 000], i.e. more than [...].

- (73) Even if Kirch were now to decide to close down DF 1 in view of the high initial losses and failure to live up to expected growth rates for subscribers, its withdrawal from the pay-TV market would not automatically follow, since DF 1 is merely the marketing platform for Kirch's digital bouquet. The programme rights for Kirch's pay-TV business are held by Taurus, which also produces at least part of the digital channels for DF 1. The technical services for DF 1's digital bouquet are provided by BetaDigital. BetaResearch holds the rights to the Beta encryption technology. Moreover, even if Kirch decided in the near future to dissolve DF 1, DF 1's broadcasting activities would not be terminated immediately. Instead DF 1 would have to terminate its contracts with subscribers and contracts with the other channels transmitted in the DF 1 bouquet and to continue until the end of the contractual period of notice. According to the parties, DF 1 would continue for about a year. Even if DF 1 were dissolved immediately, Kirch would therefore remain in a position, particularly in view of its extensive programme resources in premium films and sport, to review its decision and, either alone or with other proprietors, to establish a new marketing platform and operate in pay-TV.

- (74) In the Commission's view, the parties' arguments that pay-TV viewers' only option would be to change to Premiere, so that the market shares relinquished by DF 1 would in any case fall to Premiere, are inconclusive. If Kirch in fact closed down DF 1's operations, potential pay-TV

operators would have an opportunity, by using Kirch's pay-TV broadcasting rights, to enter the pay-TV market as competitors Premiere. The competitive situation which would arise, with or without the proposed concentration, is by no means the same.

- (75) The parties have [...] that Premiere is the only possible acquirer for DF 1, [...]. In particular, a mere reference to Kirch's lack of success in identifying a partner is insufficient to prove that there is no less anti-competitive alternative available. The Commission's statements in the Kali and Salz/MdK/Treuhand Decision show clearly that it sets stringent requirements for establishing that there is no possible alternative purchaser to the acquiring undertaking and this view has in fact been upheld by the Court of Justice⁽¹³⁾. The parties' arguments are undoubtedly insufficient to establish that these requirements have been fulfilled. They have indicated neither the parties with whom Kirch has negotiated nor the reasons why the negotiations were unsuccessful. In particular, they have not in fact proved that the negotiations failed because of DF 1's inadequate subscriber base and because the prospects of profits were too poor in view of the losses which would arise on the acquisition of a holding. It is consequently impossible to rule out that negotiations between Kirch and interested third parties foundered because Kirch was previously not prepared to relinquish a majority holding in DF 1. Since, as the proposed concentration which has been notified shows, Kirch would now accept joint control, it is entirely possible that negotiations could be successfully concluded with third parties on the basis of a 50/50 holding. In those circumstances, the Commission considers that sufficient evidence has not been adduced that the acquisition of DF 1, in its entirety or of significant parts, by businesses other than Premiere can be excluded.

- (76) Accordingly the parties have fulfilled none of the three conditions laid down by the Commission in the Kali and Salz Decision as necessary to establish a defence on the ground of lack of a causal link. In fact the proposed concentration therefore gives Premiere a monopoly position on the market in pay-TV and brings about a consequent deterioration in the competitive structure. Even if

⁽¹³⁾ Cited in footnote 12.

Kirch terminated DF 1's operations the negative effects on competition would be less severe than if the concentration were carried through, since DF 1's assets and all of its pay-TV distribution rights would not be transferred to Premiere. This would enable competing pay-TV organisations to acquire Kirch's pay-TV distribution rights and enter the pay-TV market in competition with Premiere.

(c) **Interrelation between pay-TV and free TV**

(1) *Free TV — market structure*

- (77) The market for free TV in Germany is shared between the public broadcasters ARD and ZDF on the one hand and a large number of private broadcasters on the other. The private channels are essentially concentrated in two 'clusters' of broadcasters. One of these is made up of broadcasters in which CLT-UFA has holdings. The other consists of broadcasters in which Kirch has holdings, or which belong to Kirch's sphere of influence for other reasons.

(i) *The parties' holdings*

- (78) CLT-UFA has the following holdings in free TV channels in Germany:

RTL	89 %
RTL 2	34,4 %
VOX	24,9 %
Super RTL	50 %

Where CLT-UFA has a minority holding it can be presumed that it exercises joint control.

- (79) Kirch has the following holdings in free TV channels in Germany:

SAT 1	43 %
DFS	100 %

(A plan to acquire a further 16 % in SAT 1 has been notified to the Bundeskartellamt).

Here too it can be presumed that Kirch currently enjoys at least joint control of SAT 1.

- (80) In addition, Mr Thomas Kirch, the son of the owner of Kirch, has the following holdings:

PRO 7	60 %
Kabel 1	60 %

Between PRO 7 and Kirch there are links other than the family relationship between the owner of the one and the majority shareholder in the other. There are also long-term business relations, as PRO 7 is estimated to take something approaching [40 % to 60 %] of its programme requirements from Kirch.

(ii) *Audience shares*

- (81) The German free TV broadcasters had the following audience ratings in 1996:

Public channels:

ARD (first programme)	14,8 %
ARD (third programme)	10,1 %
ZDF	14,4 %
Total	39,3 %

Channels linked to CLT-UFA:

RTL	17,0 %
RTL 2	4,5 %
VOX	3,6 %
Super RTL	2,1 %
Total	27,2 %

Channels linked to Kirch:

SAT 1	13,2 %
PRO 7	9,5 %
Kabel 1	3,6 %
DSF	1,3 %
Total	27,6 %

Other channels	5,9 %
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- (82) Thus the public channels have about 40 % of audiences, and private channels have about 60 %. Private broadcasting is almost entirely in the hands of the two clusters CLT-UFA and Kirch, whose positions are equally strong.

(iii) *Shares of the television advertising market*

- (83) According to the information supplied by the parties, the separate channels have the following market shares in terms of gross advertising turnover:

Public channels:

ARD (total)	4,4 %
ZDF	4,4 %
Total	8,8 %

(2) *Further strengthening of Premiere's dominant position in pay-TV*

Channels linked to CLT-UFA:

RTL	29,9 %
RTL 2	5,5 %
VOX	2,8 %
Super RTL	1,0 %
Total	39,3 %

Channels linked to Kirch:

SAT 1	24,1 %
PRO 7	21,8 %
Kabel 1	3,8 %
DSF	1,8 %
Total	50,7 %

Other broadcasters 1,3 %

(Market shares on the basis of net advertising revenue are much the same, with a few minor differences).

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

(88) The attractiveness of a channel is largely dependent on the programme rights available to it. When a television operator has a leading position in pay-TV and free TV, and also holds the main programme rights for free TV and pay-TV, he is in a position to control the interaction between free TV and pay-TV. After the planned concentration CLT-UFA and Kirch will be in this position.

(84) The public channels' shares of this market are quite different from their audience shares. Their audience share is about 40 %, while their share of the advertising market is less than 10 %. The main reason for this is doubtless the fact that media legislation limits the public channels to 20 minutes' advertising a day, which must be shown before 8p.m Private broadcasters are entitled to fill up to 15 % of their daily broadcasting time with advertising. They may broadcast advertising in prime time after 8pm.

(i) CLT-UFA and Kirch can both be expected to try to purchase pay-TV and free TV rights in combination

(85) The public broadcasters are consequently financed mainly by licence fees, which amount to about DEM 7 billion a year. This sum is roughly equal to the net advertising revenue of all television operators on the German television advertising market in 1996.

(89) During the proceeding the parties declared that purchases of pay-TV and free TV rights were in principle to be made separately. Premiere would be responsible for the purchase of pay-TV rights, and CLT-UFA and Kirch would buy free TV. Only in exceptional cases would one of the parties acquire pay-TV and free TV rights together.

(86) The CLT-UFA and Kirch clusters together take about 90 % of all advertising revenue in German television; Kirch's position, at about 50 %, is somewhat ahead of CLT-UFA's approximately 40 %. Advertising revenue is concentrated on the market leader RTL and on SAT 1 and PRO 7. These three together have a market share of 76 %.

(90) After a press report appeared which claimed, citing internal Bertelsmann documents, that pay-TV and free TV were to be coordinated, Bertelsmann modified its earlier statements. It publicly conceded that cooperation between the free TV channels linked to CLT-UFA and Premiere was being pursued as a logical business goal. The purchase of

rights was included. Shortly afterwards, Dr Dornemann, the Bertelsmann director responsible for television, detailed the advantages of combined purchasing of free TV and pay-TV rights in an interview ⁽¹⁴⁾.

access to a family of channels and to the only pay-TV platform in Germany, once the concentration has made it a joint owner of Premiere. It can therefore be anticipated that Kirch too will seek to purchase pay-TV and free TV rights in combination.

(91) From a business standpoint, a coordinated approach to the purchasing of programme rights by CLT-UFA and Premiere does indeed seem the most probable strategy. Through Premiere and the free TV channels in its broadcasting group, CLT-UFA carries on all forms of exploitation of programme rights, i.e. pay-per-view, pay-TV, free TV (first viewing) and free TV (second viewing). It is therefore an obvious step to acquire the rights for the entire sequence. This would enable CLT-UFA to use the rights to their strategic maximum. For example, rights to sport can be exploited in such a way that the most significant events are broadcast on pay-TV (e.g. football finals) while smaller events are shown on free TV. In the case of film rights the period between transmission on pay-TV and the windows for first and second showings on free TV can be fixed as part of an overall strategy.

(94) The price charged for pay-TV rights is normally determined by the number of subscribers, subject to a specified minimum. With Premiere's increasing numbers of subscribers, pay-TV rights are growing in importance as compared with free TV rights. Their strategic significance for the television business of CLT-UFA and Kirch as a whole is likewise rising. Since Premiere is operated jointly by CLT-UFA and Kirch, however, it would scarcely make sense if the two companies were invariably to make separate purchases of pay-TV and free TV rights at a time when pay-TV business was growing steadily more significant in relation to free TV. But pay-TV business will indeed be growing in importance, at least according to the business plan for Premiere stipulated in the consortium agreement: it is planned that Premiere's net turnover, [. . .].

(92) At present it is only in some cases that the rights to the Hollywood majors' films in particular are sold as a package covering all stages of exploitation; but this could change if purchasers appear who are able to handle the entire sequence. In addition, the demand-side power created by the combination of the intense programme requirements of a Premiere digital bouquet and CLT-UFA's free TV channels might well induce rights suppliers to sell the rights for pay-TV and free TV together.

(ii) CLT-UFA and Kirch will be able to implement programme strategies for free TV channels aimed at securing pay-TV subscribers for Premiere Digital

(93) Bertelsmann's statements concerning combined purchasing of rights for pay-TV and free TV therefore seem convincing and there appears to be no reason why Kirch should not pursue a similar strategy. Like CLT-UFA, Kirch will also have

(95) The parties have repeatedly stated that Premiere's development as a platform for digital pay-TV will require a major investment. In the abovementioned *Süddeutsche Zeitung* interview ⁽¹⁵⁾, Dr Dornemann spoke of investments amounting to DEM 13,5 billion up to the year 2007 and start-up losses amounting to DEM 2,5 billion. It is clear that CLT-UFA and Kirch therefore have a basic interest in securing as many subscribers as possible for Premiere. In view of the interrelation described above between pay-TV and free TV, harmonisation

⁽¹⁴⁾ *Süddeutsche Zeitung*, 25 February 1998, p. 2.

⁽¹⁵⁾ See footnote 14.

of the programming of Premiere and of CLT-UFA's and Kirch's free TV channels might well be a significant step towards attainment of this aim.

- (96) This involves first of all arranging the programming of Premiere and the free TV channels so that they complement each other. As has been explained above, in the case of sporting events, for example, minor fixtures such as the initial rounds in football competitions can be used to arouse the interest of spectators on free TV, and then the big attraction, the final, can be broadcast on pay-TV or pay-per-view. So far as Bertelsmann's television business is concerned, this sort of complementary programming has been facilitated by the 1997 merger between CLT and UFA, in that all its television activities are now grouped together in the hands of CLT-UFA, which has a majority holding in the biggest free TV broadcaster, RTL.

- (97) In the medium term at least, with the increasing significance of pay-TV, CLT-UFA and Kirch have an interest in limiting the attractiveness of free TV channels so as to induce as many viewers as possible to subscribe to pay-TV. Of course a strategy of this kind would normally carry the risk that an increase in subscribers would be gained at the expense of a fall in advertising income. But in the present case this danger is a limited one. As has been explained above, private free TV channels almost all belong to one of the two groups associated with CLT-UFA and Kirch, which together have about 95 % of viewers of private television. A definite strategy on the part of CLT-UFA and Kirch to make free TV less attractive could only displace advertising business to public broadcasters. However, since the latter, with their compulsory restriction of advertising, cannot extend their advertising times, and are not allowed to broadcast any advertising in prime time, it is most unlikely that advertising business will be displaced to them.

- (98) If CLT-UFA and Kirch's free TV channels are together made less attractive, a major loss of

advertising income can be anticipated only if advertisers, confronted with falling ratings, move a large proportion of their advertising budgets from television to other media, primarily printed media. However, this is probable only if there is a dramatic fall in viewer figures. The daily viewing rates for private channels in Germany rose by about 15 % from 1993 to 1996. In the same period, advertising turnover rose by 35 % at 1993 prices. This shows that viewer figures and advertising intensity are not necessarily evenly related. In addition, any loss of advertising income to CLT-UFA and Kirch would have to be set against the profit from lucrative pay-TV.

(3) Conclusion

- (99) The combined acquisition of pay-TV and free TV rights and the complementary programming which are foreseeable will lead to a further strengthening of Premiere's dominant position on the market in pay-TV.

(d) Conclusion

- (100) For the reasons described above it must be anticipated on the basis of the information currently available that the intended concentration will give Premiere a dominant position on a lasting basis on the market in pay-TV in Germany. The combined acquisition of pay-TV and free TV rights and the complementary programming which are foreseeable will lead to a further strengthening of Premiere's dominant position on the market in pay-TV.
- (101) If the market for the provision of pay-TV is taken to be the entire German-speaking area, Premiere can likewise be expected to enjoy a dominant position on a lasting basis. Basically the same considerations apply to this area as for the German market. However, in Austria for instance, unlike Germany, the cable networks are exclusively in the hands of private operators. In Germany, ownership of the cable TV network is fragmented, and Telekom is virtually the sole operator of level 3 supply networks, with the result that private cable operators, even supposing they had access to premium content, are unable to offer any alternative programme platform to compete with Premiere; in Austria, on the other hand, the major private cable operators would, theoretically at

least, be able to put together an alternative programme platform limited to their region. But since in its dealings with Telekom in Germany Premiere has succeeded in having the transport model adopted for cable, it must be expected that it would refuse to have its programmes marketed by cable operators in the other parts of the German-speaking area too. This has been its previous strategy for its analogue programme; for example, in Austria it has hitherto refused to have its programme marketed directly by cable operators. In the autumn of 1997 it did retreat from its requirement that marketing be carried out by Premiere alone, and expressed a willingness to sell its analogue programme to a major Austrian cable network operator. Nevertheless, shortly before the contract was due to be concluded, Premiere withdrew its offer. It must be expected after all that Premiere, after the concentration, will become and remain the only programme and marketing platform in the German-speaking area as a whole, since no other enterprise holds the necessary programme resources to create a programme platform, and Bertelsmann and Kirch control the decoder infrastructure.

3. *The market in technical services for pay-TV*

(a) BetaDigital and Telekom's monopoly position

(102) The concentration will give BetaDigital a monopoly on a lasting basis in technical services for satellites. As a result of the parallel concentration of Telekom and BetaResearch, Telekom will secure a monopoly in the operation of conditional access for cable.

(103) BetaDigital is already the only supplier of technical services for the digital transmission of signals by satellite. According to the statements of the parties, Bertelsmann also provides small-scale, technical services for pay-TV through Cologne Broadcasting Centre GmbH, but further details of these activities have not been provided.

(104) In the near future Telekom will also be the sole supplier of technical services for the digital

transmission of signals on the cable network. CLT-UFA, Kirch and Telekom have stipulated in the agreement on the restructuring of BetaResearch that in providing technical services for the transmission of digital TV programmes on its broadband cable networks Telekom will use only Beta access technology on the basis of the d-box decoder.

(b) Lasting nature of the dominant position

(105) In the market in technical services for the digital transmission of data, at any rate by satellite, BetaDigital will secure a monopoly position in the German-speaking area on a lasting basis. It must also be anticipated that Telekom will remain the sole supplier of technical services for the transmission of pay-TV over the cable network in Germany, and in this area too will secure a monopoly position on a lasting basis. This assessment is based on the considerations set out below.

(i) *Following the concentration, d-box technology will in practice become the digital standard in the German-speaking area*

(106) Pay-TV requires special technical infrastructure. This can be provided either by pay-TV operators or by other parties, mainly cable operators. Because of the structure of the cable networks in Germany, private cable operators are by themselves unable to provide the technical infrastructure for the transmission of pay-TV. This is because their 'cable islands' are mostly too small to justify the investment necessary to acquire their own conditional access and alternative decoder system for pay-TV. Moreover, private cable operators control only parts of the level 3 and 4 networks involved in the distribution of cable television. At network level 3, i. e. from the cable head-end, where the digital programme signal is received and fed into the cable network, to the boundary of the individual house, the great majority of the networks belong to Telekom. This makes it impossible for private cable operators to develop alternative facilities for the transmission of pay-TV without involving Telekom.

(107) After the concentration, Premiere will distribute digital television through d-box technology and

d-box decoders. Telekom will supply services for pay-TV by cable on the basis of Beta access technology and d-box decoders. Thus those companies which would have been qualified to set up an infrastructure for digital television and to provide the corresponding services have committed themselves to Beta access technology based on the d-box decoder. It must therefore be accepted that, in the German-speaking area, there will be no alternative technical platform for digital television in the foreseeable future.

have stated that a proprietary conditional access system was developed for security reasons. Other pay-TV operators, such as Canal+ and BSkyB, who already have experience in the pay-TV market, also prefer to rely on a proprietary conditional access system as it appears to afford better protection against breaches of the security of data transmission. Under the DVB standard, there are two processes available to avoid a viewer of subscriber pay-TV with different conditional access systems having to use a number of decoders, i. e. simulcrypt and common interface (CI).

(ii) *The monopoly position of Premiere's programme platform forms a long-term obstacle to the introduction of other technology*

(108) The installation of an alternative technical infrastructure for the transmission of pay-TV would require a major investment. However, other potential suppliers would be prepared to make that investment only if there were corresponding opportunities for market penetration. That would be so only if it were possible for a second pay-TV operator to set up in Germany. Such an operator could either create his own technical platform, on the basis of alternative access technology, or offer another party an opportunity of developing a technical infrastructure. But as has already been said, it is improbable that a second pay-TV operator will enter the market, given Premiere's established position, with its subscriber base and, especially, its programme resources.

(109) Moreover, alternative access and decoder technology could be developed only for satellite transmission, since CLT-UFA, Kirch and Telekom have stipulated in the restructuring agreement that Telekom, in providing technical services for digital transmission of TV programmes on its broadband cable network, will rely exclusively on Beta access technology on the basis of the d-box decoder. This means that potential pay-TV suppliers and other potential suppliers of conditional access services would in any case be obliged to use Beta access technology and the d-box decoder as far as the Telekom cable network is concerned.

(iii) *All potential conditional access operators will be dependent on BetaResearch's licensing policy*

(110) BetaResearch is the licensor of the conditional access system applied in the d-box. The parties

(111) With CI, widely varying conditional access systems can be used in the same decoder, enabling all other pay-TV operators and service providers to operate access controls using the existing decoder base. It is not necessary with CI, as it is with simulcrypt, to conclude an agreement with the person who installed the decoder base on the linking of one's own access-validation system with the proprietary access system of the decoder. If a proprietary conditional access is to be used, there must be discrimination-free access to the system. In the Commission's view, this requires that the licensor of the decoder technology be able to conduct his business without being influenced by a programme supplier. In the present case the licensor is not independent, since BetaResearch is controlled mainly by enterprises which have their own interests as programme suppliers.

(112) If all actual and potential suppliers of digital pay-TV, and Telekom as supplier of technical services for cable, have committed themselves to Beta access technology and the d-box decoder, it is impossible for an alternative decoder base to be established in Germany. Any other potential supplier of conditional access services will have to use the d-box decoder. The d-box uses a proprietary coding system developed by BetaResearch. Potential suppliers of technical services for pay-TV would therefore have to seek a licence for Beta access technology from BetaResearch. This is the case with both satellite and cable transmission. In managing conditional

access for satellite and cable, however, BetaResearch would have no interest in exposing BetaDigital or its joint parent Telekom to competition on the market in technical services for pay-TV. BetaResearch might therefore use its licensing policy to hamper other service suppliers' access to the market.

functions which are independent of the API. This makes possible the development and operation of an application independent of the API. The parties contended that the DVB specification work on a standardised API which works like a VM will probably be concluded by mid-1998. BetaResearch would then be able to start production development, which will probably take about another six to nine months.

(iv) Control of the decoder infrastructure gives Bertelsmann/Kirch control of possible applications based on the d-box

(113) An application programme interface (API) allows third parties wishing to produce an independent application to have access to the decoder operating system. A typical example of this kind of independent application is the EPG, which shows the choice of programmes available in an on-screen menu form. At present d-boxes do not have a publicly available version of the d-box operating system interface. This means that other persons wishing to use their own independent applications through the d-box would have to have it inserted into the operating system's source code by BetaResearch.

(114) According to the parties, BetaResearch is to develop an API for the d-box and present the interface by the end of 1998 at the latest. However, details of licensing policy, particularly the level of royalties, is not available. It is therefore at present impossible to assess whether BetaResearch's API, compared to the APIs of other suppliers such as OpenTV or MediaHighway, will be made available on market conditions. But it is safe to say, since the introduction of the d-box to the market is to take place in the near future, that the API will probably have only a limited operational scope. This appraisal is corroborated by the fact that other suppliers have continuously improved their APIs over the years after their introduction on the market in order to provide a full use of the operational scope of decoder technology and in this way to promote the development of advanced applications.

(115) According to the parties, the d-box API will have two facilities for running applications. In the first, the application is operated using the functions of the API; these are known as 'native applications'. These applications can operate only on the d-box. In the second, a 'virtual machine' (VM) is built on the API, transforming specific API functions to

(116) As long as a standardised API is not yet available, the d-box API will allow only proprietary applications, so that a licence for the API will be necessary to produce an application. The parties also state that the functions of the future API can be extended at the request of the licensee of the API. However, the licensee would then be obliged to provide detailed information on why and how a particular function should be made available. BetaResearch would decide whether this should be done. It can be assumed that only those functions would be adopted which are in the interest of BetaResearch, i. e. of its controlling enterprises. If the function is to be introduced, the development costs will be borne, wholly or in part, by the licensee. The licensee has no choice in the matter, since BetaResearch is the only licensor of the d-box API. Moreover, the licensee has no means of ensuring that the development work at BetaResearch is carried out rapidly. In this respect, it is already doubtful whether BetaResearch will have enough development capacity at all to take on development work from licensees. It will above all have to focus on the respective acceptance deadlines for new API versions and use its capacity accordingly and not for the rapid execution of additional development work for licensees who are competing with Premiere.

(117) Moreover, the d-box API, compared to other existing systems already on the market, will not at first have comprehensive programming assistance and tools to allow advanced applications to be introduced quickly and cheaply, either by the licensee himself or through another service provider. In this way d-box API licensees are

compelled to leave all work on the development of applications to BetaResearch, since it is the only firm able to carry out advanced developments. The alternative, i. e. that a licensee should produce the application itself, is excluded from the outset, because of cost and especially the licensee's lack of detailed knowledge of the d-box API.

(c) Conclusion

(118) On the foregoing grounds, and in accordance with the information currently available to the Commission, it is to be expected that the proposed concentration will give BetaDigital a dominant position on a lasting basis on the market in technical services for satellite pay-TV, and that given the fact that Bertelsmann and Kirch will control the decoder infrastructure, it will also further strengthen Premiere's dominant position on the pay-TV market. In addition, Premiere's dominant position on the pay-TV market will further strengthen BetaDigital's dominant position on the market in technical services for satellite pay-TV in the German-speaking area. If it is considered that there is one market in technical services for both satellite and cable TV, the concentration, taken together with the parallel concentration between Deutsche Telekom and BetaResearch, will produce a dominant duopoly on this broader market in the German-speaking area. Neither BetaDigital nor Telekom will encounter serious competition on this market. In view of their common technology and of their legal links with BetaResearch, there are no grounds to expect that there will be competition between BetaDigital and Telekom.

VI. PROMOTING TECHNICAL AND ECONOMIC PROGRESS

(119) The parties claim that it is only by pooling the resources of Bertelsmann and Kirch that the infrastructure necessary for the breakthrough of digital television can be established. Building up a decoder base would require about DEM [500 to 1 000] per household connected so that, with an estimated [3 to 10] million subscribers over 10 years, the cost would be around DEM [1,5 to 10] billion. There would be a further investment of DEM [50 to 300] million for setting up the digital transmission centre and for conditional access

technology. Lastly, allowance should be made for programme investments, which would amount to several DEM billion over the next few years. However, after the parties have made the investments to establish a digital infrastructure, other persons would be able to provide a vast range of supplementary services at relatively low cost, particularly as viewers' psychological barriers to additional payments are progressively lowered with the penetration of digital pay-TV.

(120) The parties' claims give rise to considerable doubt in practical terms. It may well be the case that, in the first years of digital television, the necessary decoders will be leased by viewers and not bought, which means that they will have to be financed in advance. However, the financing costs cannot possibly be on the scale indicated by the parties. A d-box is currently leased at about DEM [10 to 30]. In Annex 2(c) to the agreement between CLT-UFA and Taurus, Nokia's average purchase price for a d-box for the period August 1995 to December 1999 is estimated at around DEM [400 to 1 000]. Given a monthly leasing charge of DEM [10 to 30] (DEM [100 to 400] per year), the purchase price to be financed in advance would be written off after [1 to 5] years. It is only over this period that the corresponding interest would be payable and this would in any event be offset by the increasing leasing instalments. After [1 to 5] years the leasing of a decoder would show a profit. Premiere's business plan dated 7 November 1997 [...] tallies with this view. In the plan, the heading for decoder coverage for 1998 gives costs at DEM [100 to 200] million, which steadily fall to DEM [10 to 30] million up to 2002. For the total five-year period, costs thus amount to DEM [200 to 500] million, assuming [2 to 5] million subscribers. The parties have obviously omitted to include the leasing rates in their calculation of the costs of the decoder bases. In any event these costs are not on the scale represented by the parties.

(121) The parties claim that only Bertelsmann and Kirch together are capable of supplying the attractive programmes necessary for the breakthrough of digital television, but no further substantiation for this claim is provided. The claim may well be correct if Kirch, on the one hand, completely withheld its programme resources, particularly its premium rights, from Premiere and, on the other hand, got into financial difficulties as a result of

such a blockade policy based on its wide-ranging financing commitments arising from the output deals concluded by it. However, such a situation, which was looming before the conclusion of the agreement between Bertelsmann and Kirch, will not necessarily occur.

- (122) Lastly, if the parties, by establishing a digital infrastructure and jointly offering an attractive programme, are successful in securing the general acceptance of digital television, as has been indicated above, they will in fact wall off the future market in digital pay-TV and bring it under their control on a lasting basis. The concentration therefore makes it impossible for this market to develop on a competitive basis. Even if it contributes to the general acceptance of digital television and thus promotes technical and economic progress, that contribution is irrelevant under the Merger Regulation. In this connection it should be stressed that the criterion of technical and economic progress contained in Article 2(1)(b) is subject to the proviso that it does not form an obstacle to competition. Moreover, it is extremely doubtful whether the concentration in fact makes a positive contribution to technical and economic progress. Since the parties will wall off and control the market, other potential providers of digital pay-TV and multimedia services will be unable to develop freely and without restriction. There is reason to fear that technical and economic aspects of the development of digital television and other digital services will be adversely affected by this.

VII. UNDERTAKINGS PROPOSED BY THE PARTIES

1. *Undertakings*

- (123) By letters dated 28 April and 4 May 1998 the parties suggested a series of undertakings intended to remove the doubts about the proposed concentration. These consist basically of the following points.

(a) **Programme rights**

- (124) For a certain period, 25 % of the pay-TV rights from Kirch's and CLT-UFA's output deals with the Hollywood studios [...] will be held open for third parties. In each case, the selection procedure for the next year but one takes place every year. The 25 % of the output of each studio comprises, in

each case, 25 % of the pay-TV rights to the [...] categories. The price for the pay-TV rights is proportionate to the contracts concluded with the Hollywood studios, i.e. to the largest pay-TV supplier in each case on the relevant market in each case. The Hollywood studios themselves are excluded from the procedure in their capacity as customers. The tender for the selection and award of 25 % of the output contracts for pay-TV rights is valid only as long as Premiere has access to five of seven output deals for pay-TV rights, and until 1 January 2003 at the latest.

(b) **Bouquet structure**

- (125) Premiere will open up its scheduling by no longer making the subscription to its own basic package a condition for subscription to the film and sports channels. This undertaking will apply as long as no second platform with a premium package has established itself on the market, and until 1 January 2003 at the latest.

(c) **Cable operators**

- (126) The parties to the merger are prepared to cooperate with the cable operators as regards sales. As well as advertising for new customers, this includes marketing information and support. Customer relations will still be Premiere's responsibility, however. Cable operators will receive appropriate financial compensation for their efforts.

(d) **Pay-TV and free TV rights**

- (127) Premiere will itself buy the pay-TV rights it needs and will not acquire any free TV rights, so that there is no bundling through Premiere of the purchase of pay-TV and free TV rights.

(e) **BetaResearch**

- (128) Telekom will set a technical council of experts, which will be accessible to all firms involved in digital television. The council's recommendations will be implemented in accordance with the already existing agreement between Bertelsmann, Kirch,

Telekom, ARD and ZDF. The shareholders of BetaResearch are, moreover, prepared to allocate 25 % of the company's capital to third firms via an intermediate holding company. No veto rights will be associated with this, however. The present veto rights of Bertelsmann, Kirch and Telekom will continue. The leading role of Kirch, in particular as regards management occupancy, is again emphasised by the parties.

- (129) BetaResearch will on request immediately grant every customer who intends to perform encryption services for itself or for third parties a conditional access licence (compulsory licence) on the basis of a generally accessible standard contract. If no agreement is reached on the conditions, in particular the licence fees, an arbitration body will take a final decision as to their appropriateness.
- (130) BetaResearch undertakes to disclose the API interface of the d-box network ('native API') by the end of 1998 and to defer to an arbitration body in the event of licensing disputes. BetaResearch also undertakes to supplement the native API with the interface to be standardised by the DVB, as soon as the DVB has approved such a standard. BetaResearch, moreover, will adopt all future DVB standards.
- (131) BetaResearch will grant manufacturing licences to any interested manufacturer on standardised conditions and defer in the event of disputes about those conditions to an arbitration body. A 'technical verification test' by BetaResearch is the condition on which the decoders may be supplied on the market. Manufacturers may be certified after two to three years by independent third parties.

(f) BetaDigital

- (132) Where third parties wish to use the services of BetaDigital and agreement about the conditions is not reached, BetaDigital will likewise submit to an arbitration body, which will take a final decision.

2. Assessment

(a) Programme rights

- (133) It is unlikely that a potential pay-TV provider would enter the market on the basis of the offer of 25 % of the pay-TV rights from the output deals. Any third party would have to pay the same price

as Premiere. Since this is based on the number of Premiere subscribers (with a minimum guarantee for a certain number of subscribers), a newcomer would run a considerable risk, which would continually increase with the expected rapid rise in the number of Premiere subscribers. According to the parties' submissions, an interested third party has to decide within a certain period every year the scale on which it wishes to acquire rights in the next year but one. Thus the first time a third party could acquire rights would be for the year 2000. But, in the year 2000, Premiere, according to its business plan, will have about [...] million subscribers, on the basis of which figure the price would be calculated. A third party would therefore have to pay about USD 2,3 million per film. In this respect it should be stressed that, as customers (repurchasers), the Hollywood studios themselves have been left out of the undertaking. Thus the parties have in advance excluded the only potential customers who could probably bear the risk associated with acquiring the rights. Moreover, the undertaking is subject to a time limit (end of the year 2002), so the rights would be granted anyway for a period of three years only. Equally, the undertaking covers only the output deals with the Hollywood majors. Sports rights, which with premium films are crucial programme content for premium channels, are not included. All things considered, the undertaking is not likely to provide an opportunity for establishing a second programme platform.

(b) Bouquet structure

- (134) The parties contend that the market entry of potential suppliers of basic packages and sports programmes will be facilitated if subscribers are not forced, as a condition for subscribing to Premiere's premium film and sports channels, to subscribe first to the Premiere basic package. This undertaking may indeed make it easier for an alternative programme platform to win subscribers for a basic package in competition with Premiere. It can, however, hardly contribute to the emergence of such an alternative programme platform, since this could be generated only on the basis of premium channels (anchor channels).

(c) Cable operators

- (135) The parties have offered cooperation with the cable operators only in the area of sales. The cable

operators are thus prevented from marketing Premiere on their own and thereby from developing customer relations and unbundling and repackaging programmes. For the cable operators to develop an alternative programme platform, other than by cooperating with Telekom given the existing network structure, they would require at least to be able to obtain the individual programme packages offered by Premiere, in particular the premium film and sports channels, bundle them with third-party channels and offer them to their cable customers.

(d) Pay-TV and free TV rights

- (136) The wording of the undertaking allows Premiere to purchase the required rights not just from other suppliers but also from Kirch and CLT-UFA. However, CLT-UFA and Kirch would then be able to purchase pay-TV and free TV rights combined. This undertaking is therefore meaningless.

(e) BetaResearch

- (137) Telekom's offer of setting up a technical council of experts is simply a question of opening up the existing council of experts with ARD and ZDF to third parties. It should be noted that under the agreement with ARD and ZDF, this council of experts is able to discuss issues relating to technological development but cannot require operators to comply with its recommendations.

- (138) The possibility for third parties to participate in BetaResearch, as proposed by the parties, might give rise to some transparency in respect of decisions concerning future technological development. However, since this participation is to be limited to 25 % and the intermediate holding company is not to be granted any veto rights, Bertelsmann and Kirch, as the dominant pay-TV suppliers, and Telekom, as the dominant cable operator, retain joint control of BetaResearch and, consequently, of technological development.

- (139) The introduction of a compulsory conditional access licence and an arbitration body for settling disputes concerning conditions, in particular the

level of licence fees, may indeed go some way to ensuring that third parties are not subject to discrimination where licensing is concerned. However, this undertaking again does not alter the fact that the technological development for which licences are granted will be controlled by Bertelsmann, Kirch and Telekom. The undertakings that BetaResearch will disclose the API interface of the d-box network by the end of 1998, that, in the event of licensing disputes, it will defer to an arbitration tribunal, and that it will supplement the native API with the interface to be standardised by the DVB as soon as the latter is available are essentially confirmation of intentions which the parties had in any case stated. Furthermore, although BetaResearch's undertaking that it will grant manufacturing licences to any interested decoder manufacturer on standard conditions and defer to an arbitration body in the event of disputes concerning these conditions might well contribute to creating competition with regard to the manufacture of decoders, it likewise does not alter the fact that Bertelsmann and Kirch, as dominant pay-TV suppliers, and Telekom, as dominant cable operator, control the development of decoder technology.

(f) BetaDigital

- (140) Although BetaDigital will, in the event of disputes concerning terms, also defer to an arbitration tribunal with final say, this undertaking does not in any way alter the fact that BetaDigital will have a long-term monopoly on the market for technical satellite pay-TV services.

(g) Overall assessment

- (141) On the basis of the proposed undertakings, the parties do indeed guarantee a degree of technological transparency and access to d-box technology. However, the parties are not willing to surrender their absolute control of this technology, and in particular of its further development. As far as pay-TV is concerned, the proposed undertakings will not give any alternative programme and marketing platform a realistic chance. Premiere will continue to be able to dictate the terms on which third parties may enter the market. At the same time, the undertakings are rendered even more meaningless by the fact that, without a second programme platform, no alternative technological platform can be expected to be developed.

3. *Further undertakings*

- (142) On 13 and 19 May 1998, the parties supplemented and widened the proposals they had made, as follows.

(a) Cable operators

- (143) In addition to the cooperation on sales already offered, Premiere will, on certain conditions, also allow cable operators to market its programmes and thus develop their own customer relations. Free TV, pay-TV and pay-per-view programme suppliers are in principle excluded from marketing. Marketing will not be exclusive, i. e. Premiere and the cable operators will market Premiere in competition with each other. Generally speaking, each party will pursue customer relations with those subscribers acquired by it. The data of customers acquired by the cable operators would, however, have to be made available to Premiere's subscriber management system so that Premiere could provide the customers in question with additional services (such as pay-per-view) and general customer information. Cable operators will not be allowed to market Premiere's pay-per-view services.

- (144) The cable operators will have to offer the same combination of packages as Premiere. They will not be allowed to unbundle programmes within individual packages or Premiere's package structure. However, cable operators will be able to offer their own services together with the programme package and market the packages and individual programmes of third-party suppliers. Because Premiere no longer insists on linking its basic package with its premium package (see recital 125), the cable operators' customers will have the opportunity of subscribing to a basic package offered by the cable operator alongside the Premiere package combination. However, subscribing to such a basic package must not be made a condition for subscribing to Premiere programmes. The price payable by cable operators for the Premiere package will be calculated on the basis of the transfer price of Premiere on the cable market minus the costs which Premiere will have saved on marketing. Cable operators will, like Premiere, have to offer the d-box decoder for rental and, while supplies last, make use of decoders from the Nokia quota (1 million units).

- (145) Cable operators must not abuse the freedom they have been offered in order to limit their marketing operations in capacity terms with regard to

Premiere programmes, i. e. they must agree to market the Premiere package *in toto*. Otherwise Premiere will not be obliged to make its programmes available for marketing. In the event of capacity shortages, Premiere and the cable operators will either be bound by the instructions of the Land Media Institutes (Landesmedienanstalten) or reach agreement on another objective capacity-allocation procedure.

(b) Cable networks

- (146) Telekom also stated on 20 May 1998 that it will keep, until 31 December 1999 at the latest, two digital channels on the cable TV band open for use by a potential third-party programme supplier. Telekom is also willing, together with level-4 operators, to expand cable capacities on band IV, but only where refinancing is possible for cable operators (levels 3 and 4).

(c) BetaResearch

- (147) As far as the offer to allow third-party firms to acquire a holding in BetaResearch via an intermediate holding company (see recital 128), all shareholders, i. e. Bertelsmann, Kirch, Telekom and the holding company, will have the same rights. For the purposes of obtaining a majority in the event of voting, the statutory rules will apply (no specific quorum). The special rights previously granted to individual shareholders no longer apply.

4. *Assessment*

(a) Cable operators

- (148) The new undertakings proposed by the parties do not create the conditions for the development of an alternative programme and marketing platform for cable operations. The parties themselves point out in their accompanying letter that 'the partners for the establishment of these marketing forms on an economically plausible basis do not at present exist on the German market or at least have not in the past shown any readiness to carry out the necessary investments to develop the corresponding infrastructures'. With the cable-network structure in its present form, it is indeed not possible for private cable operators to set up a programme and marketing platform of their own.

- (149) As indicated in recital 63, private cable operators are predominantly active at level 4 (home link-ups, cable islands). The level-3 networks (cable

head-end to the boundary of a plot of land) are almost entirely owned by Telekom. Private operators are thus generally dependent on obtaining upstream level-3 services from Telekom. Without operating at level 3, however, it is not possible for private cable operators to create an alternative programme platform. Given the fragmentation of the German cable-TV market and Telekom's position as virtually the sole operator of level-3 networks, the private cable operators are not at present able to offer an alternative programme platform which would compete with Premiere.

- (150) In the course of this proceeding, Telekom has not shown any willingness to cooperate with private cable operators in creating an alternative cable platform or at least allow them access to level-3 services. It is true that, when asked on 22 May 1998 how the separation between levels 3 and 4 could be overcome, Telekom stated that, for the purposes of making available its services relating to the digital cable platform and digital marketing platform, contracts would be concluded between Telekom and interested operators (programme suppliers, level-3 operators). If level-4 operators so wished, the technical and operational separation of levels 3 and 4 could also be overcome by combining the services of level-3 and level-4 operators. However, these statements are so vague and general that they do not provide adequate reason to expect that the separation between levels 3 and 4 can be overcome for the purposes of enabling level-4 operators to establish a programme and marketing platform. In particular, as far as combining the services of level-3 and level-4 operators is concerned, it is not explained which services could be provided by Telekom and which by the level-4 operators, nor how indeed they could be combined in technical and economic terms. It is still completely unclear whether level-4 operators will have their own access to level 3 and whether, in particular, they could also operate conditional access to level 3 and whether, in particular, they could also operate conditional access and how this could be made technically possible. On the basis of Telekom's statements, it must therefore continue to be assumed that Telekom ultimately wants to be the sole provider of the necessary technical services, and that, consequently, level-4 operators will be dependent on it. Overcoming the separation of

levels 3 and 4 would, in all probability, only be possible after a restructuring and privatisation of Telekom's cable networks, whereby they would be operated by regional companies in which private cable operators would have a stake. Telekom has not, however, made any binding statements about when and how such restructuring might take place. It will therefore probably not occur until such time as Premiere is so ahead of the field in terms of its subscriber base that it will be difficult for alternative platforms to gain a foothold.

- (151) In addition, cable operators will not, on the basis of the proposed undertakings, be in a position to offer pay-TV programmes on the same competitive terms as Premiere. This is because they will not be allowed to supply programmes for pay-TV and, for example, offer regional programmes produced by themselves. Rather, they will be limited, in their ability to offer additional services, to marketing third-party channels. Moreover, they will not be allowed to market Premiere's pay-per-view services nor offer any pay-per-view services of their own. However, given the lack of exclusivity on pay-per-view rights, allowing them to offer pay-per-view services would be the easiest way of giving them access to the pay-TV market. Cable operators must also offer the Premiere package in the same combination as Premiere itself. This means that they will be completely dependent on Premiere as far as the essential parameter of bundling is concerned.
- (152) Cable operators are further required to make their customer data available to Premiere without any corresponding obligations on Premiere's part. However, the supply of such data would be an entirely uncommon practice in this sector, and would provide Premiere with a considerable competitive advantage. Pricing on the basis of the Premiere transfer price minus the costs saved on marketing gives rise to the risk that cable operators will not be able to market Premiere programmes economically. It remains entirely unclear who will determine these cost savings and what criteria will be used in so doing.

(b) Cable networks

- (153) The reservation of two digital channels in the cable TV band for use by potential third-party programme suppliers might theoretically help make it possible for competing programmes to be supplied given the additional capacity thus made available, but it is not in itself likely to open up an opportunity for the emergence of an alternative programme platform for cable. This is true solely

by dint of the fact that the reservation is limited in time. It would be extremely difficult in only one and a half years to set up an alternative programme platform. Since, moreover, private cable operators are not, if they wish to market Premiere, allowed to supply pay-TV themselves, they will be restricted to offering third-party channels and thus be considerably handicapped in their ability to set up a programme platform which could use the two channels. On the other side of the coin, a programme supplier who wished to set up a programme platform on the basis of the 25 % of pay-TV rights could not make use of those rights until 2000. Moreover, in order to use the two channels, a programme supplier would have to sign a contract for 10 years even though he has access to the 25 % of pay-TV rights from the output deals, as offered by the parties, only until the end of 2002. The creation, as proposed by Telekom, of additional capacities by extending band IV has not been described in any more concrete terms and should therefore be considered merely a general statement of intent.

(c) BetaResearch

- (154) The undertaking that all shareholders in BetaResearch, including the intermediate holding company for third parties, will be granted the same rights might in principle solve the problem of the control of technology by programme suppliers. If CLT-UFA and Kirch no longer have the right of veto and all shareholders have the same rights, shifting majorities are, from a formal point of view, possible within the bodies of the company. However, it should be borne in mind that BetaResearch will only have four shareholders since third parties will be granted a share solely via an intermediate holding company. Majority decision could therefore be taken only with the approval of at least three of the four shareholders. This means that CLT-UFA and Kirch, acting together, would always be able to block decisions and thus continue to ensure that their interests win the day by preventing any decision which goes against those interests from being adopted. The intermediate holding company would, by contrast, only be able to enforce its interest against CLT-UFA and Kirch in conjunction with Telekom if both of them voted against CLT-UFA and Kirch and thereby prevented a majority from being reached. It is obvious, however, that Telekom, given that it will supply technical services for pay-TV on the basis of the d-box technology, is

more likely to have interests which converge with those of CLT-UFA and Kirch than with those of the intermediate holding company for third-party firms. This means that the possibilities for CLT-UFA and Kirch, as dominant pay-TV suppliers, and Telekom, as dominant cable operator, of jointly controlling the technology and its further development may be limited from a formal point of view but might nevertheless remain in practice.

(d) Overall assessment

- (155) It follows from the above that the proposed undertakings, even in their expanded version, are inadequate to solve the existing competition problems. They are unlikely, in particular as far as the pay-TV domain is concerned, to give private operators a realistic chance of establishing an alternative programme and marketing platform. Premiere will thus continue to be in a position to dictate the conditions for market entry by third parties. It is true that opening up the possibility for third parties to take a holding in BetaResearch and the simultaneous abandonment of the veto and special rights of the existing shareholders is an important concession since it will enable the structurally safeguarded control of the technology and its further development to be lifted. However, since no alternative technical platform will emerge without the chance of an alternative programme platform, the undertaking regarding BetaResearch is inadequate, even in connection with the further undertakings proposed by the parties concerning the CA licence, the API and the manufacturing licence, to prevent Premiere and BetaDigital from, in the long term, dominating the market.

VIII. CONCLUSION

- (156) For the above reasons it is considered that the proposed concentration would create or strengthen a dominant position as a result of which effective competition would be impeded in a substantial part of the Community. It must consequently be declared incompatible with the common market under Article 8(3) of the Merger Regulation,

HAS ADOPTED THIS DECISION:

Article 1

The concentration notified to the Commission, which would take the form of the acquisition of joint control by

CLT-UFA SA and Taurus Beteiligungs-GmbH & Co. KG of Premiere Medien GmbH & Co. KG, BetaDigital Gesellschaft für digitale Fernsehdienste mbH and BetaResearch Gesellschaft für Entwicklung und Vermarktung digitaler Infrastrukturen mbH, is hereby declared incompatible with the common market and the functioning of the EEA Agreement.

CLT-UFA SA
Boulevard Pierre Frieden 45
L-2850 Luxembourg

Taurus Beteiligungs-GmbH & Co. KG (KirchGruppe)
Robert-Bürkle-Strasse 2
D-85737 Ismaning.

Done at Brussels, 27 May 1998.

Article 2

For the Commission

Karel VAN MIERT

This Decision is addressed to:

Member of the Commission

COMMISSION DECISION

of 27 May 1998

relating to a proceeding pursuant to Council Regulation (EEC) No 4064/89

(Case No IV/M.1027 — Deutsche Telekom/BetaResearch)

(notified under document number C(1998) 1441)

(Only the German text is authentic)

(Text with EEA relevance)

(1999/154/EC)

THE COMMISSION OF THE EUROPEAN UNION,

digitaler Infrastrukturen mbH (BetaResearch). The proposed concentration was to be effected through the purchase of shares.

Having regard to the Treaty establishing the European Community,

- (2) On 23 December 1997 the Commission decided to suspend implementation of the proposed concentration pursuant to Articles 7(2) and 18(2) of the Merger Regulation pending adoption of a final decision.

Having regard to the Agreement on the European Economic Area, and in particular Article 57(2)(a) thereof,

Having regard to Council Regulation (EEC) No 4064/89 of 21 December 1989 on the control of concentrations between undertakings ⁽¹⁾, as last amended by Regulation (EC) No 1310/97 ⁽²⁾, and in particular Article 8(3) thereof,

- (3) By letter dated 22 December 1997 Germany informed the Commission pursuant to Article 9(2) of the Merger Regulation that that concentration, and also the concentration between Bertelsmann, Kirch and Premiere, threatened to create or strengthen a dominant position as a result of which effective competition would be significantly impeded on six markets in Germany, each of which constituted a separate geographic market within the meaning of Article 9(7) of the Merger Regulation.

Having regard to the Commission Decision of 29 January 1998 to initiate proceedings in this case,

Having given the undertakings concerned the opportunity to make known their views on the objections raised by the Commission,

- (4) On 29 January 1998 the Commission decided pursuant to Article 6(1)(c) of the Merger Regulation and Article 57 of the EEA Agreement to initiate proceedings in this case.

Having regard to the opinion of the Advisory Committee on Concentrations ⁽³⁾,

Whereas:

- (5) The Advisory Committee discussed the draft of this Decision on 6 May and 25 May 1998.

- (1) On 8 December 1997 the Commission received notification pursuant to Article 4 of Council Regulation (EEC) No 4064/89 hereinafter: the Merger Regulation of a proposed concentration whereby Deutsche Telekom AG (Telekom) and BetaTechnik AG (BetaTechnik) would acquire joint control, within the meaning of Article 3(1) of the Merger Regulation, of BetaResearch Gesellschaft für Entwicklung und Vermarktung

I. THE PARTIES

- (6) Telekom is the public telecommunications operator in Germany. It is active, either directly or through subsidiaries, in all areas of telecommunications services, and is the owner and operator of nearly all the German cable-television networks at level 3.

⁽¹⁾ OJ L 395, 30.12.1989, p. 1. Corrigendum (OJ L 257, 21.9.1990, p.13).

⁽²⁾ OJ L 180, 9.7.1997, p. 1.

⁽³⁾ OJ C 57, 27.2.1999.

- (7) CLT-UFA is a joint venture between Bertelsmann AG (Bertelsmann) and Audiofina SA, into which the parent companies have merged their European television interest. These include the shareholding in Premiere Medien GmbH & Co. KG (Premiere).
- (8) BetaTechnik belongs to the Kirch group (Kirch) and does mainly film post-production work such as dubbing. Kirch is the leading German supplier of feature films and television programming and is also active in commercial television.
- (11) Telekom has become a party to the arrangement between Kirch and Bertelsmann regarding the introduction of Beta encryption and decryption (Beta access) technology based on the d-box decoder. Thanks to this technology Telekom will have a technical platform for the digital distribution of pay-TV programmes via its cable network and be able to provide technical services for programme transmission. Telekom aim in taking part in the notified transaction is to ensure that it has the necessary rights in the Beta access technology. The operation is part of a complex set of agreements between CLT-UFA and Kirch on the one hand and CLT-UFA, Kirch and Telekom on the other.

II. THE PROPOSED OPERATION

- (9) BetaResearch which at the present time is still a wholly-owned Kirch subsidiary, is the holder of exclusive, open-ended licences — granted for Germany, Austria and the German-speaking part of Switzerland — for Beta encryption technology for the encryption of programmes on the basis of the d-box decoder. The licensor of the access technology is DigCo BV, in which Kirch and Irdeto BV, owned by the South African group MIH, each have a 50 % stake. BetaResearch is active in the development of decoder software and will continue to develop the encryption and operating software for the d-box technology. It will licence this technology to pay-TV operators, providers of technical services for digital television and decoder manufacturers. It will itself manufacture conditional access modules (CA modules) and smart cards for supply to d-box manufacturers, and will carry out contract and project work for third parties; it has already received orders for such work from Stinnes and MediaGate (Thyssen Telecom).
- (10) First of all CLT-UFA will acquire a 50 % interest both in BetaResearch and in BetaDigital Gesellschaft für digitale Fernsehdienste mbH ('BetaDigital'), likewise a wholly-owned subsidiary of Kirch. These transactions are part of the intended restructuring of the German pay-TV operator Premiere, which is to become a digital pay-TV programme and marketing platform using the d-box technology made available to it by Kirch. This operation forms the subject-matter of proceeding IV/M993 — Bertelsmann/Kirch/Premiere.

III. THE CONCENTRATION

- (12) Telekom, in conjunction with CLT-UFA and Kirch, will exercise joint control over BetaResearch within the meaning of Article 3(1)(b) of the Merger Regulation. In the 'Agreement on the restructuring of BetaResearch' ('the restructuring agreement') it is stipulated that important business decisions, such as [. . .] ⁽⁴⁾, are to be taken by the proprietors' meeting acting unanimously.
- (13) BetaResearch will perform on a permanent basis all the functions of an autonomous economic entity and should not lead to coordination of the competitive behaviour of Telekom, CLT-UFA and Kirch. It will not only license d-box technology to firms — such as Telekom and BetaDigital — which seek to offer technical services for digital televisions, but it will also grant licences to programme suppliers who wish to provide the necessary technical services themselves. It will grant licences to interested decoder manufacturers and supply them with CA modules, and develop decoder software for third parties. Besides its business dealings with its parent companies and with companies associated with them, therefore, it can be assumed that BetaResearch will also do business to a considerable extent with third parties and will hence have its own access to the market. BetaResearch is accordingly to be regarded as a full-function enterprise. Since only CLT-UFA is active in the field of digital encryption technology for pay-TV, through Bertelsmann's stake in Seca SA there is no risk of coordination of competitive

⁽⁴⁾ This version of the Decision has been edited to ensure that confidential information has not been disclosed.

behaviour between Telekom, CLT-UFA and Kirch.

IV. COMMUNITY DIMENSION

- (14) Telekom, Bertelsmann and Kirch together have an aggregate world-wide turnover of more than ECU 5 billion. Each of them has an aggregate Community-wide turnover of more than ECU 250 million. Only Telekom and Kirch realise more than two-thirds of their aggregate Community-wide turnover within one and the same Member State, namely Germany. The concentration therefore has a Community dimension and does not constitute a case of cooperation under the EEA Agreement.

V. ASSESSMENT UNDER ARTICLE 2 OF THE MERGER REGULATION

- (15) The proposed concentration affects mainly the markets for:
- technical services for pay-TV,
 - cable networks.

A. RELEVANT PRODUCT MARKETS

1. *Technical services for pay-TV*

- (16) The operation of pay-TV requires a special technical infrastructure which makes it possible to encrypt the television signals and to decrypt them for the authorised viewer. This is done by a decoder which is installed in the home of every pay-TV subscriber. Decoders for receiving digital pay-TV do not only decrypt the signals encrypted in the access system, but they also convert them to enable digital television signals to be received on analogue TV sets. Different decoders are used for cable and satellite TV.
- (17) In addition to a decoder base, pay-TV requires a system of conditional access. This system includes the transmission of encrypted data, which contain information on the programmes or packages of programmes subscribed to and on the entitlement

of the pay-TV subscribers to receive the programmes, together with the television signal, and possibly smart cards which are made available to the viewer and are able to decipher the encrypted authorisation data and transfer them to the decoder.

- (18) The infrastructure described above forms the basis for the services relating to the operation of pay-TV. These involve primarily the handling of conditional access and the marketing of decoders and smart cards. Technical services for pay-TV require specific technology for the transmission of digital television signals via satellite and via cable. In the case of satellite transmission, the television signal is processed by the playout centre and sent to the respective satellite transponder, from where it can be beamed down and received directly by each satellite TV subscriber using a decoder designed for satellite reception. In the case of cable distribution, on the other hand, the processed television signals are first beamed down from the satellite transponder to a cable head-end, where they are converted for cable transmission and then fed into the cable network. Despite the separate transmission technology for satellite and cable transmission, a corresponding subdivision of the market for technical services for pay-TV into two independent sub-markets does not seem imperative. Both satellite and cable transmission require the same technical services for the operation of pay-TV. Ultimately the question can be left open, however, as it does not affect the outcome of the assessment under the Merger Regulation.

2. *Cable networks*

- (19) Television signals can be broadcast by terrestrial transmitter, satellite or cable. In its Decision on MSG Media Service⁽⁵⁾ (the MSG case) the Commission took the view that there were separate markets for cable TV, direct broadcasting by satellite and terrestrial transmission. It established in that case that there were considerable differences between the technical conditions and financing of the three means of transmission.
- (20) From the point of view of the TV supplier the transmission of his programmes by cable is not

⁽⁵⁾ OJ L 364, 31.12.1994, p. 1.

— in Germany at least — interchangeable with satellite transmission, if for no other reason than the completely different reaches of the two means of transmission. Whereas approximately 18,5 million German households are connected to cable networks, only some 7-9 million receive satellite television. A TV supplier who broadcasts his programmes exclusively via satellite direct to the home would therefore fail to reach two-thirds of all households not receiving television solely from land-based transmitters. In particular, households in large apartment blocks cannot as a rule be reached on a direct-to-home basis as there is usually a clause in the lease restricting the use of satellite dishes.

- (21) For these two means of transmission there are also considerable differences between the costs borne by a TV supplier per viewing household. The cost of analogue satellite transmission comes to approximately DEM [5-25] ⁽⁴⁾ million per transponder per year. With 7 million satellite households, this gives a cost of DEM [1-2] ⁽⁴⁾ per household. With 9 million satellite households, the corresponding figure is still DEM [0,50-2] ⁽⁴⁾. According to data supplied by the firm o.tel.o communications GmbH & Co., the cost of cable transmission comes to approximately DEM 10 000 per analogue channel per month for 500 000 households reached. This is equivalent to DEM 0,02 per month or DEM 0,24 per year per household reached. Since in the case of cable transmission the transponder costs are spread over some 26 million households (18,5 cable households and 7-9 million satellite households), the annual cost per household in this instance comes to DEM 0,38. The total annual cost per cable household accordingly comes to DEM 0,62. In the case of German viewers, cable transmission is therefore much more profitable to a TV supplier. There are therefore strong grounds for believing that, in Germany at least, the operation of cable networks still constitutes a separate relevant product market.

- (22) The question can, however, be left open in the last analysis, as the competition assessment of the concentration would be the same even on the assumption of a uniform market for cable and satellite.

B. RELEVANT GEOGRAPHIC MARKETS

1. *Technical services for pay-TV*

- (23) Technical services for pay-TV are closely bound up with the supply of pay-TV. In the MSG case ⁽⁶⁾ the Commission assumed that the relevant geographic market was confined to Germany, but at the same time it stated that, to the extent that German providers of digital pay-TV also acquired subscribers in other German-speaking regions, MSG's service market will probably also spread to such areas. In the present case, the market for technical services for pay-TV may, if there is assumed to be an overall market for satellite and cable transmission, be deemed to encompass the entire German-speaking area. In so far as technical services for pay-TV in the cable sphere constitute a separate market, however, the relevant geographic market would be confined to Germany. Since even on the assumption of the uniform market for cable and satellite the competition assessment of the concentration would be the same, the question of the relevant geographic market can be left open.

2. *Cable networks*

- (24) The structure of the cable markets in most Member States is subject to different conditions in terms of geography, marketing and legislation ⁽⁷⁾. In the MSG case MSG Media Service ⁽⁸⁾ the Commission established that, as regards the operation of cable television networks, there was already a national German market resulting from Telekom's statutory monopoly on laying and operating cable networks in public roads. Even if the network monopoly has since been abolished and private network operators are now more active at least at level 4, Telekom still has an advantage in that it owns almost all the level 3 cable TV networks in Germany. The conditions of competition in Germany are therefore still substantially different from those in other countries. The Commission considers as a result that in the present case the relevant geographic market for cable networks is to be confined to Germany. This holds true even if the relevant product market were to include cable networks and direct-to home satellite transmission.

⁽⁶⁾ *Loc. cit.* (footnote 5), paragraphs 52, 53 and 54.

⁽⁷⁾ Nordic Satellite Distribution (OJ L 53, 2.3.1996, p. 20).

⁽⁸⁾ *Loc. cit.* (footnote 5), paragraph 54.

C. EFFECTS OF THE CONCENTRATION

1. *Technical services for pay-TV*(a) **Telekom's monopoly of the provisions of technical services for the transmission of pay-TV over cable networks**

(25) It is to be expected that the concentration will result in Telekom's having a monopoly of the management of access control in the cable network market. Following the parallel concentration between Bertelsmann, Kirch and Premiere, BetaDigital will secure a lasting monopoly in technical services on the satellite television market.

(26) In Germany a total of 18,5 million households, or over half of all TV households, are connected to cable. By contrast, satellite television is received in Germany by only 7-9 million households. Because of the historical development of the structure of cable distribution, there are several levels of supply network in Germany. For the supply of cable television, network levels 3 and 4 are of particular importance. Level 3 is the distribution network from the cable head-end to the boundary of a given plot of land. Level 4, on the other hand, is the network infrastructure between that boundary and the junction boxes of TV households. Network 3 is operated in Germany almost exclusively by Telekom: there are 16,5 million households with cable access whose cable signals are carried over a Telekom network level 3. Telekom is also by far the biggest provider of home link-ups: for 6 million households Telekom also operates the cable network at level 4. In comparison, 2 million households are supplied via private level 3 networks, and 12,5 million are connected at level 4 via networks run by private operators. The largest private cable operator has hooked up some 2 million households, the next largest 1,2 million and 0,9 million respectively. All the other private cable operators, whose networks are dotted across Germany, each supply fewer than 0,25 million households. These figures show that Telekom has the preponderant share of the cable network market.

(27) For the time being Telekom is the only provider of technical services for digital signal transmission over cable networks. CLT-UFA, Kirch and

Telekom agreed in the restructuring agreement that, when providing technical services for the transmission of digital TV programmes over its cable networks, Telekom would use exclusively Beta access technology on the basis of the d-box decoder. They also stipulated in that agreement and in the 'understanding on a cable platform for digital television neutral in its effect on programme suppliers' that Telekom was to receive the exclusive right to use Beta access technology to the extent that it was to be granted that right in respect of the cable networks. It is only to other content suppliers that this exclusivity does not apply. This in itself rules out the possibility of other cable operators being granted a licence for BetaResearch's Beta access technology and thereby being able to compete with Telekom in the area of Telekom's cable networks.

(b) **The lasting nature of the dominant position**

(28) Telekom will remain the sole provider of technical services for the transmission of pay-TV over cable networks in Germany in the short term, and that it will also secure a monopoly position in this area on a lasting basis. This assessment is based on the following considerations.

(i) *Premiere will be the only programme platform in Germany in the long term.*

(29) Access to programme rights is even more important in the case of pay-TV than it is in the case of free TV. In order to entice the consumer to subscribe, or to take particular productions on a pay-per-view basis, certain specific types of content are required. Experience with pay-TV in Europe so far shows that in order to be sufficiently attractive a pay-TV package must include a combination of premium rights for the first broadcasts of films produced at the major Hollywood studios and for popular sporting events. This is especially true in Germany, where every household with television can already receive more than 30 free-access channels — unlike, for example, — France or the UK. The importance of premium films and sporting events for the organisation of pay-TV is borne out by the programme costs estimated in Premiere's business plan. About [50-80] % ⁽⁴⁾ of all licensing costs are to be for premium films (about [20-50] % ⁽⁴⁾) and sports rights (more than [10-40] % ⁽⁴⁾). An alternative programme platform

can be built up only by a person with access to premium content so as to be able to offer a promising pay-TV package.

- (30) But programme resources are in short supply since, as a general rule, the broadcasting rights for premium content of this kind are given on the basis of longer-term exclusive contracts. In the German-speaking area CLT-UFA and Kirch hold [...] ⁽⁴⁾ of pay-TV broadcasting rights for premium films, as a results of output deals with the Hollywood majors, and [...] ⁽⁴⁾ of sports rights too. As CLT-UFA and Kirch are to transfer their pay-TV broadcasting rights to Premiere, the transaction will initially make Premiere the only operator to dispose of the programme content for a premium channel. For the duration of the existing contracts no other supplier will have access to Premiere's programme resources. Thus potential competitors will not be in a position to create an alternative programme platform for the German-speaking area. They might be able to show particular programmes in specific pay-TV niches, but to do so they would be dependent on Premiere's programme and marketing platform.

- (31) Nor is it likely that the situation will change in any way once the current contracts for pay-TV rights have expired. In theory, pay-TV services could potentially be supplied in Germany and the German-speaking area by other European and non-European television operators, such as BskyB or Canal+, or even the major Hollywood studios. But in order to establish an alternative programme platform it is not enough to conclude just a few individual output deals. The output deals concluded by Kirch and CLT-UFA run for different terms. They cover periods of [1-10] ⁽⁴⁾ years. Potential competitors would have to succeed in acquiring rights under several output deals over a number of years before they could offer an attractive pay-TV package.

- (32) Given the market position Premiere will by then have established, competitors' prospects of securing any substantial volume of attractive pay-TV broadcasting rights will be small. This is because, to have any hope of acquiring broadcasting rights, it is vital to have access to viewers in the form of

an established subscriber base since rightholders usually want to see their product distributed widely. This is true of premium films, and even more so of sporting events. In addition, the prices of pay-TV rights are usually determined by reference to the number of subscribers, subject to a stated minimum. This is certainly what is done in output deals. As Premiere's subscriber base can be expected to be large in the next few years, it follows that a sale of rights to Premiere should secure a considerably higher price than sale to a newcomer. And a newcomer would run a considerable financial risk by concluding output deals since he would have to guarantee a minimum subscriber base, without knowing whether he could achieve the guaranteed figure. In view of the advantages which Premiere will consequently enjoy over any potential competitor in the negotiation of contracts for premium content, it is unlikely that outsiders will be able to secure adequate access to content of that kind.

(ii) *Following the transaction, d-box technology will in practice become the digital standard in the German-speaking area.*

- (33) Pay-TV requires special technical infrastructure. This can be proved either by pay-TV operators or by other parties, mainly cable operators. Because of the structure of cable networks in Germany, private cable operators are by themselves unable to provide the technical infrastructure for the transmission of pay-TV. Their 'cable islands' are mostly too small to justify the investment necessary to acquire their own conditional access and alternative decoder system for pay-TV. Moreover, private cable operators control only parts of the level 3 and 4 networks involved in the distribution of cable televisions. At network level 3 — that is, from the cable head-end, where the digital programme signal is received and fed into the cable network, to the boundary of the individual house — the great majority of the networks belong to Telekom. Private cable operators are at present dependent on upstream level 3 services supplied by Telekom. This makes it impossible for private cable operators to develop alternative facilities for the transmission of pay-TV without involving

Telekom. The private cable operators' islands would have to be linked by level 3 supply networks before they could set up an alternative infrastructure.

would in any case be obliged to use Beta access technology and the d-box decoder as far as the Telekom cable network is concerned.

(34) After the transaction, Premiere will distribute digital television through d-box technology and d-box decoders. Telekom will supply services for pay-TV by cable on the basis of Beta access technology and d-box decoders. Thus those companies which would have been qualified to set up an infrastructure for digital television and to provide the corresponding services have committed themselves to Beta access technology based on the d-box decoder. It must therefore be accepted that, in the German-speaking area, there will be no alternative technical platform for digital television in the foreseeable future.

(iv) *All potential conditional access operators will be dependent on BetaResearch's licensing policy*

(iii) *The monopoly position of Premiere's programme platform, and the fact that Telekom is to feed it into the cable networks using the d-box technology, forms a long-term obstacle to the introduction of any other technology.*

(37) BetaResearch is the licensor of the conditional access system applied in the d-box. The parties have stated that a proprietary conditional access system was developed for security reasons. Other pay-TV operators, such as Canal+ and BSkyB, who already have experience in the pay-TV market, also prefer to rely on a proprietary access control system for better protection against breaches of the security of data transmission. Under the DVB standard, there are two processes available to prevent a viewer who receives pay-TV subscriptions with different CA systems from having to use several decoders, Simulcrypt and common interface ('CI').

(35) The installation of an alternative technical infrastructure for the transmission of pay-TV would require a major investment. However, other potential suppliers would be prepared to make that investment only if there were corresponding opportunities for market penetration. That would be so only if it were possible for a second pay-TV operator to set up in Germany. Such an operator could either create his own technical platform, on the basis of alternative access technology, or offer another party an opportunity of developing a technical infrastructure. But as has already been indicated, it is improbable that a second pay-TV operator will enter the market, given Premiere's established position, with its subscriber base and, especially, its programme resources.

(38) With CI, widely varying conditional access systems can be used in the same decoder, enabling all other pay-TV operators and service providers to operate access controls using the existing decoder base. It is not necessary with CI, as it is with Simulcrypt, to conclude an agreement with the person who installed the decoder base on the linking of one's own access-validation system with the proprietary access system of the decoder. If a proprietary conditional access system is to be used, there must be discrimination-free access to the system. In the Commission's view, this requires that the licensor of the decoder technology be able to take his business decisions without being influenced by a programme supplier. In the present case the licensor is not independent, since BetaResearch is controlled mainly by enterprises which have their own interests as programme suppliers.

(36) Moreover, alternative access and decoder technology could be developed only for satellite transmission, since CLT-UFA, Kirch and Telekom have stipulated in the restructuring agreement that Telekom, in providing technical services for digital transmission of TV programmes on its broadband cable network, will rely exclusively on Beta access technology on the basis of the d-box decoder. This means that potential pay-TV suppliers and other potential providers of conditional access services

(39) If all existing and potential suppliers of digital pay-TV, and Telekom as provider of technical services for cable, have committed themselves to Beta access technology and the d-box decoder, it is impossible for an alternative decoder base to be established in Germany. Any other potential provider of conditional access services will have to use the d-box decoder. The d-box uses a proprietary coding system developed by

BetaResearch. Potential providers of technical services for pay-TV would therefore have to seek a licence for Beta access technology from BetaResearch. This is the case with both satellite and cable transmission. In managing conditional access for satellite and cable, however, BetaResearch would have no interest in exposing BetaDigital or its joint parent Telekom to competition on the market in technical services for pay-TV. BetaResearch might therefore use its licensing policy to hamper other service providers' access to the market.

their networks, however, the planned introduction of Beta access technology as the digital standard would mean that they would have to approach BetaResearch for licences to use the Beta technology. It has been explained already, however, that in managing conditional access in the cable field BetaResearch would have not interest in exposing its joint parent Telekom to competition on the market in technical services for pay-TV. BetaResearch would have no interest in exposing its joint parent Telekom to competition on the market in technical services for pay-TV. BetaResearch might therefore use its licensing policy to hamper other service providers' access to the market.

(v) *Given the present structure of German cable networks, private cable operators would not be able to provide technical services for pay-TV in their networks.*

(vi) *The merger should also be assessed positively in the light of Telekom's neutralising effect on BetaResearch*

(40) The parties argue that private cable operators would be able to build up and operate a technical platform in competition with Telekom in their networks. This cannot be accepted. The private operators normally handle small level 4 'cable islands' which are often unconnected between themselves and are supplied by a 'backbone' level 3 network belonging to Telekom. This means that private cable operators are usually dependent on upstream level 3 services supplied by Telekom. The same applies to the provision of technical services for pay-TV. In Telekom's cable networks, the signals broadcast by programme suppliers are received centrally at the Telekom playout centre in Usingen, and after processing are distributed from there to the head-ends of the Telekom cable networks. The private cable operator's islands would have to be linked by level 3 supply networks before they could set up an alternative infrastructure. As a rule the construction of a network head-end will not be an alternative, at least for private cable operators who operate only at level 4. Given the fragmented nature of the networks, the investment would not be economically justified.

(42) Telekom has claimed that, through its holding, it will be able to exert a neutralising influence on the competitive conduct of BetaResearch, which would otherwise be controlled solely by the pay-TV operators CLT-UFA and Kirch. Against this claim, it should first be stated that CLT-UFA and Kirch will in any case have a combined two-thirds holding in BetaResearch and that satellite TV is largely outside Telekom's sphere of influence. As long as Telekom is able to exert specific rights of influence in respect of the further development of the d-box, it will have an interest in influencing that development in such a way as to maintain its position as the sole operator of the technical platform for cable TV. The same applies to BetaResearch's licensing policy.

(43) Moreover, Telekom's claim that its acquisition of a holding in BetaResearch actually has a positive impact on competition is conditional on Commission's approval of the merger of the digital activities of Bertelsmann and Kirch, which is the subject of the Bertelsmann/Kirch/Premiere case. However, together with this Decision, the Commission has also declared the proposed parallel Bertelsmann/Kirch/Premiere merger to be incompatible with the common market. In so doing, it has also prohibited the initial 50 % holding by CLT-UFA in BetaResearch covered by the notification in the Bertelsmann/Kirch/Premiere case. Approving this merger proposal involving the acquisition of joint control of BetaResearch by CLT-UFA, Kirch and Telekom would mean that CLT-UFA would also be able to obtain partial control of BetaResearch. It would therefore have

(41) The possibility that private cable operators might be able to offer technical services for pay-TV in their networks is therefore purely theoretical. If they did want to offer pay-TV technical services in

the consequence that the only two pay-TV operators on the market would together control the decoder technology, including the CA system. For that reason alone, it is not possible to claim that this merger has a positive impact on competition.

(c) Conclusion

- (44) On the foregoing grounds, it is to be expected that the proposed transaction will give Telekom a dominant position on a lasting basis on the German market in technical services for satellite pay-TV in the cable field. If it is considered that there is one market in technical services for both satellite and cable TV, the transaction, taken together with the parallel concentration between Bertelsmann, Kirch and Premiere, will produce a dominant duopoly on this broader market in the German-speaking area since, given the number of television viewers there, Germany is by far the largest component in the German-speaking area. Neither Telekom nor BetaDigital are exposed to any significant competition on this market. Moreover, in view of their common technology and of their legal links with BetaResearch, there are no grounds to expect that there will be competition between Telekom and BetaDigital.

2. The market in cable networks

(a) Telekom's dominant position in broadband cable networks

- (45) As has been explained in more detail in paragraph 26, the bulk of the level 3 and 4 cable networks used for the supply of cable television belong to Telekom. Even if Telekom's monopoly over the networks has now come to an end and private network operators are more active, at least on level 4, it can be presumed that Telekom continues to hold a dominant position.
- (46) Telekom would still hold a dominant position if in the future it were to be considered that cable and satellite transmission formed one market. As we have seen, there are 18,5 million households connected to the cable network in Germany. At level 3 Telekom controls 16,5 million of these connections. By contrast, only 7 to 9 million households receive television direct by satellite. If a television channel is to be successful in Germany, therefore, it has to be fed into Telekom's cable network; that is the only way to reach a sufficient

number of viewers. this is borne out by the example of DF 1. Until November 1997 DF 1 was not carried on the cable network. This is generally considered to be one of the reasons why the number of subscribers to DF 1 fell far below expectations.

- (47) On 24 November 1997 the management board of Telekom decided that the entire broadband cable business, including the broadband distribution network, should be made organisationally separate from the rest of the company. The objective of this restructuring operation was ultimately to hive off Telekom's networks to one or more new companies to be set up in partnership with other operators. The final plan, still to be defined, would be implemented with effect from the beginning of 1999. The details of the intended restructuring operation and the time-scale for implementation are not yet certain. In particular, it is not clear whether and, if so, to what extent outsiders may be able to participate in Telekom's cable networks.

(b) Strengthening of Telekom's dominant position

- (48) The proposed concentration between Telekom and BetaResearch will strengthen Telekom's dominant position in cable television networks at the expense of the private cable operators.
- (49) The cable operators approached by the Commission have stated almost without exception that they intend to use their cable networks for as wide a variety of new services as possible. the main such uses are digital television, internet access, multimedia services, and telecommunications services including voice telephony. The Commission's inquiries have shown that the realisation of these plans is threatened by the proposed transaction.
- (50) To set up the technical infrastructure needed to be able to use the cable network for these services requires substantial investment. At network level 4 alone, the investment needed is expected to amount to between DEM 150 and DEM 250 per household. In addition, private cable operators could reasonably develop level 4 only if level 3 is equipped correspondingly. Telekom has so far shown no inclination to undertake any such operation. If the private cable operators want to increase the value added in their cable networks by providing additional services, they will have to expand their activities to level 3 in competition

with Telekom. They are now legally permitted to do so, but this too would require substantial investment.

- (51) The private cable operators would have to finance these investments in the first place form their core business, television. But to do so they would have to be in a position to take part in the added value chain represented by digital television. The technical platform for digital pay-TV already rules this out: only Telekom is to operate the conditional access system on the cable network. If private cable operators did want to offer pay-TV technical serviced in their networks, however, the planned introduction of Beta access technology as the digital standard would mean that they would have to approach BetaResearch for licences to use the Beta technology. In managing conditional access in the cable field, BetaResearch would have no interest in exposing its joint parent Telekom to competition on the market in technical services for pay-TV. Even more important is the fact that the distribution structure for digital pay-TV which is the objective of the proposed transaction will make it impossible for private cable operators to market pay-TV. In connection with the proposed transaction Telekom has adopted a transparent transmission model for digital pay-TV, as it had already done for analogue pay-TV. This means that Telekom has given up the possibility of marketing Premiere's digital programmes itself. The consequence is that private cable operators will not be in a position to introduce a marketing model in which they act as suppliers of pay-TV to the ultimate consumer. This might have been possible in cooperation with Telekom even with the present structure of the cable networks, if Telekom had not confined itself to a purely carrying function in the pay-TV field. And the private cable operators could market pay-TV only if they were to expand their activities to level 3. Marketing by cable operators would also have been possible once Telekom had implemented the restructuring plan described above, if after the hive-off its cable networks were operated with the participation of private cable operators. But Telekom's opting for a transport model excludes all these possibilities.

- (52) In particular, it removes the possibility of an expansion into level 3 on the part of the private

cable operators, because if they are confined to transparent transmission they will not be able to finance the necessary investment. Once Telekom has decided in favour of this model, the private cable operators have no prospect of securing Premiere's agreement to a marketing model of their own. Telekom controls by far the largest proportion of level 3, so that Premiere is in a position to refuse to allow the private cable operators to market its programmes without having to fear any serious loss as a result. There is a theoretical possibility that the private operators might impede transmission at network level 4, but this does not provide any real counterweight. They would not be able to justify filtering out Premiere programmes to their customers for any length of time. This will apply with even greater force if digital pay-TV develops strongly in future.

- (53) It follows that Telekom's opting for the transport model has made it impossible for the private cable operators to finance an expansion of their activities, and that no such expansion will take place in the foreseeable future. This eliminates the potential competition of the private operators at network level 3, and protects and strengthens Telekom's dominant position. It also prevents the development of the cable networks needed if new services are to be introduced, and thus the introduction of such services in the foreseeable future. The scope for competition on the part of the private operators is further limited, even at network level 4, and Telekom's dominant position is strengthened.

(c) Conclusion

- (54) On the foregoing grounds, it is to be expected that Telekom's acquisition of a holding in BetaResearch, and the agreements with Bertelsmann and Kirch which Telekom has concluded in connection with that acquisition, will significantly restrict the scope for competition on the part of the private cable operators, and eliminate competition at network level 3. The transaction will also establish a distribution structure in the German cable network under which there is little prospect that in the event that Telekom's cable activities are hived off, private cable operators would be able and willing to participate in Telekom's cable networks. The transaction is consequently likely to strengthen Telekom's dominant position on the cable network in Germany on a lasting basis.

VI. UNDERTAKINGS PROPOSED BY THE PARTIES

1. Undertakings

- (55) By letters dated 28 April and 4 May 1998 the parties suggested a series of undertakings intended to remove the doubts about the proposed Bertelsmann/Kirch/Premiere and Deutsche Telekom/BetaResearch concentrations. These consist basically of the following points:

(a) Cable operators

- (56) The parties to the merger are prepared to cooperate with the cable operators on sales. As well as advertising for new customers, this includes marketing information and support. Customer relations will still be Premiere's responsibility, however. Cable operators will receive appropriate financial compensation for their efforts.

(b) BetaResearch

- (57) Telekom will set up a technical council of experts, which will be accessible to all firms involved in digital television. The council's recommendations will be implemented in accordance with the already existing agreement between Bertelsmann, Kirch, Telekom, ARD and ZDF. The shareholders of BetaResearch are, moreover, prepared to allocate 25 % of the company's capital to third firms via an intermediate holding company. No veto rights will be associated with this, however. The present veto rights of Bertelsmann, Kirch and Telekom will continue. The leading role of Kirch, in particular as regards management occupancy, is again emphasised by the parties.
- (58) BetaResearch will on request immediately grant every customer who intends to perform encryption services for itself or for third parties a conditional access licence (compulsory licence) on the basis of a generally accessible standard contract. If no agreement is reached on the conditions, in particular the licence fees, an arbitration body will take a final decision as to their appropriateness.
- (59) BetaResearch undertakes to disclose the API interface of the d-box network (native API) by the end of 1998 and to defer to an arbitration body in the event of licensing disputes. BetaResearch also undertakes to supplement the native API with the

interface to be standardised by the DVB, as soon as the standard. BetaResearch, moreover, will adopt all future DVB standards.

- (60) BetaResearch will grant manufacturing licences to any interested manufacturer on standardised conditions and defer in the event of disputes about those conditions to an arbitration body. A 'technical verification test' by BetaResearch is the condition on which the decoders may be supplied on the market. Manufacturers may be certified after two to three years by independent third parties.

2. Assessment

(a) Cable operators

- (61) The parties have offered cooperation with the cable operators only in the area of sales. Cable operators are thus prevented from marketing Premiere on their own and thereby from developing customer relations and unbundling and repackaging programmes. For the cable operators to develop an alternative programme platform, other than by cooperating with Telekom given the existing network structure, they would require at least to be able to obtain the individual programme packages offered by Premiere, in particular the premium film and sports channels, bundle them with third-party channels and offer them to their cable customers.

(b) BetaResearch

- (62) Telekom's offer of setting up a technical council of experts is simply a question of opening up the existing council of experts with ARD and ZDF to third parties. It should be noted that, under the agreement with ARD and ZDF, this council of experts is able to discuss issues relating to technological development but cannot require operators to comply with its recommendations.
- (63) The possibility for third parties to participate in BetaResearch, as proposed by the parties, might give rise to some transparency in respect of decisions concerning future technological development. However, since this participation is to be limited to 25 % and the intermediate holding

company is not to be granted any veto rights, Bertelsmann and Kirch, as the dominant pay-TV suppliers, and Telekom, as the dominant cable operator, retain joint control of BetaResearch and, consequently, of technological development.

- (64) The introduction of a compulsory conditional access licence and an arbitration procedure for settling disputes concerning conditions, in particular the level of licence fees, may indeed go some way to ensuring that third parties are not subject to discrimination where licensing is concerned. However, this undertaking again does not alter the fact that the technological development for which licences are granted will be controlled by Bertelsmann, Kirch and Telekom. The undertakings that BetaResearch will disclose the API interface of the d-box network by the end of 1998, that, in the event of licensing disputes, it will defer to an arbitration tribunal, and that it will supplement the native API with the interface to be standardised by the DVB as soon as the latter has been approved are essentially confirmation of intentions which the parties had in any case stated. Furthermore, although BetaResearch's undertaking that it will grant manufacturing licences to any interested decoder manufacturer on standard conditions and defer to an arbitration body in the event of disputes concerning those conditions might well contribute to creating competition with regard to the manufacture of decoders, it does not alter the fact that Bertelsmann and Kirch, as the dominant pay-TV suppliers, and Telekom, as the dominant cable operator, control the development of decoder technology.

(c) Overall assessment

- (65) On the basis of the proposed undertakings, the parties do indeed guarantee a degree of technological transparency and access to d-box technology. However, the parties are not willing to surrender their absolute control of this technology, and in particular of its further development. Nor will the proposed undertakings give any alternative programme and marketing platform a realistic chance. At the same time, without the chance of an alternative programme platform, the undertakings with regard to technology, or at least to licensing for the purposes of controlling access, are rendered even more meaningless by the fact that, without a second programme platform, no alternative technological platform can be expected to be developed.

3. Further undertakings

- (66) On 13 May 1998, the parties supplemented and widened the proposals they had made, as follows:

(a) Cable operators

- (67) In addition to the cooperation on sales already offered, Premiere will, on certain conditions, also allow cable operators to market its programmes and thus develop their own customer relations. Free-TV, pay-TV and pay-per-view programme suppliers are in principle excluded from marketing. Marketing will not be exclusive, i. e. Premiere and the cable operators will market Premiere in competition with each other. Generally speaking, each party will pursue customer relations with those subscribers acquired by it. The data of customers acquired by the cable operators would, however, have to be made available to Premiere's subscriber management system to that Premiere could provide the customers in question with additional services (such as pay-per-view) and general customer information. Cable operators will not be allowed to market Premiere's pay-per-view services.
- (68) The cable operators will have to offer the same combination of packages as Premiere. They will not be allowed to unbundle programmes within individual packages or Premier's package structure. However, cable operators will be able to offer their own services together with the Premiere package and market the packages and individual programmes of third-party suppliers. Because Premiere no longer insists on linking its basic package with its premium package, the cable operators' customers will have the opportunity of subscribing to a basic package offered by the cable operator alongside the Premiere package combination. However, subscribing to such a basic package must not be made a condition for subscribing to Premiere programmes. The price payable by cable operators for the Premiere package will be calculated on the basis of the transfer price of Premiere on the cable market minus the costs which Premiere will have saved on marketing. Cable operators will, like Premiere, have to offer the d-box decoder for rental and, while supplies last, make use of decoders from the Nokia quota (1 million units).
- (69) Cable operators must not abuse the freedom they have been offered in order to limit their marketing

operations in capacity terms with regard to Premiere programmes, i.e. they must agree to market the Premiere package *in toto*. Otherwise Premiere will not be obliged to make its programmes available for marketing. In the event of capacity shortages, Premiere and the cable operators will either be bound by the instructions of the Land Media Institutes (*Landesmedienanstalten*) or reach agreement on another objective capacity-allocation procedure.

(b) Cable networks

- (70) Telekom also stated on 20 May 1998 that it will keep, until 31 December 1999 at the latest, two digital channels on the hyperband open for use by a potential third-party programme supplier. Telekom is also willing, together with level-4 operators, to expand cable capacities on band IV, but only where refinancing is possible for cable operators (levels 3 and 4).

(c) BetaResearch

- (71) As far as the offer to allow third-party firms to acquire a holding in BetaResearch via an intermediate holding company (see recital 57), all shareholders, i.e. Bertelsmann, Kirch, Telekom and the holding company, will have the same rights. For the purposes of obtaining a majority in the event of voting, the statutory rules will apply (no specific quorum). The special rights previously granted to individual shareholders no longer apply.

4. Assessment

(a) Cable operators

- (72) The new undertakings proposed by the parties do not create the conditions for the development of an alternative programme and marketing platform or an alternative technical platform for cable operators. The parties themselves point out in their accompanying letter that 'the partners for the establishment of these marketing forms on an economically plausible basis do not at present exist on the German market or at least have not in the past shown any readiness to carry out the necessary investments to develop the corresponding infrastructures'. With the cable network structure in its present form, it is indeed not possible for private cable operators to set up a programme and marketing platform and technical platform of their own.
- (73) As indicated in recital 26, private cable operators are predominantly active at level 4 (home link-ups,

cable islands). The level-3 networks (cable head-end to the boundary of a plot of land) are almost entirely owned by Telekom. Private operators are thus generally dependent on obtaining upstream level-3 services from Telekom. without operating at level 3, however, it is not possible for private cable operators to create an alternative programme platform. Given the fragmentation of the German cable-TV market and Telekom's position as virtually the sole operator of level-3 networks, the private cable operators are not at present able to offer an alternative programme platform which would compete with Premiere.

- (74) In the course of this proceeding, Telekom has not shown any willingness to cooperate with private cable operators in creating an alternative cable platform or at least allow them access to level-3 services. It is true that, when asked on 22 May 1998 how the separation between levels 3 and 4 could be overcome, Telekom stated that, for the purposes of making available its services relating to the digital cable platform and digital marketing platform, contracts would be concluded between Telekom and interested operators (programme suppliers, level-4 operators). If level-4 operators so wished, the technical and operational separation of levels 3 and 4 could also be overcome by combining the services of level-3 and level-4 operators. However, these statements are so vague and general that they do not provide adequate reason to expect that the separation between levels 3 and 4 can be overcome for the purposes of enabling level-4 operators to establish a programme and marketing platform. In particular, as far as combining the services of level-3 and level-4 operators is concerned, it is not explained which services could be provided by Telekom and which by the level-4 operators, nor how they could indeed be combined in technical and economic terms. It is still completely unclear whether level-4 operators will have their own access to level 3 and whether, in particular, they could also operate conditional access and how this could be made technically possible. On the basis of Telekom's statements, it must therefore continue to be assumed that Telekom ultimately wants to be the sole provider of the necessary technical services, and that, consequently, level-4 operators will be dependent on it. Above all, this means that there will be no possibility of an alternative platform

emerging because only Telekom will operate the conditional-access system within the cable network. Overcoming the separation of levels 3 and 4 would, in all probability, only be possible after a restructuring and privatisation of Telekom's cable networks, whereby they would be operated by regional companies in which private cable operators would have a stake. Telekom has not, however, made any binding statements about when and how such restructuring might take place. It will therefore probably not occur until such time as Premiere is so ahead of the field in terms of its subscriber base that it will be difficult for alternative platforms to gain a foothold.

- (75) In addition, cable operators will not, on the basis of the proposed undertakings, be in a position to offer pay-TV programmes on the same competitive terms as Premiere. This is because they will not be allowed to supply programmes for pay-TV and, for example, offer regional programmes produced by themselves. Rather, they will be limited, in their ability to offer additional services, to marketing third-party channels. Moreover, they will not be allowed to market Premiere's pay-per-view services nor offer any pay-per-view services of their own. However, given the lack of exclusivity on pay-per-view rights, allowing them to offer pay-per-view services would be the easiest way of giving them access to the pay-TV market. Cable operators must also offer the Premiere package in the same combination as Premiere itself. This means that they will be completely dependent on Premiere as far as the essential parameter of bundling is concerned.

- (76) Cable operators are further required to make their customer data available to Premiere without any corresponding obligations on Premiere's part. However, the supply of such data would be an entirely uncommon practice in this sector, and would provide Premiere with a considerable competitive advantage. Pricing on the basis of the Premiere transfer price minus the costs saved on marketing gives rise to the risk that cable operators will not be able to market Premiere programmes economically. It remains entirely unclear who will determine these cost savings and what criteria will be used in so doing.

(b) Cable networks

- (77) The reservation of two digital channels in the hyperband for use by potential third-party programme suppliers might theoretically help make it possible for competing programmes to be supplied given the additional capacity thus made

available, but it is not in itself likely to open up an opportunity for the emergence of an alternative programme platform for cable. This is true solely by dint of the fact that the reservation is limited in time. It would be extremely difficult in only one and a half years to set up an alternative programme platform. Since, moreover, private cable operators are not, if they wish to market Premiere, allowed to supply pay-TV themselves, they will be restricted to offering third-party channels and thus be considerably handicapped in their ability to set up a programme platform which could use the two channels. On the other side of the coin, a programme supplier who wished to set up a programme platform on the basis of the 25 % of pay-TV rights could not make use of those rights until 2000. Moreover, in order to use the two channels, a programme supplier would have to sign a contract for ten years even though he has access to the 25 % of pay-TV rights from the output deals, as offered by the parties, only until the end of 2002. The creation, as proposed by Telekom, of additional capacities by extending band IV has not been described in any more concrete terms and should therefore be considered merely a general statement of intent.

(c) BetaResearch

- (78) The undertaking that all shareholders in BetaResearch, including the intermediate holding company for third parties, will be granted the same rights might in principle solve the problem of the control of technology by programme suppliers. If CLT-UFA and Kirch no longer have the right of veto and all shareholders have the same rights, shifting majorities are, from a formal point of view, possible within the bodies of the company. However, it should be borne in mind that BetaResearch will only have four shareholders since third parties will be granted a share solely via an intermediate holding company. Majority decision could therefore be taken only with the approval of at least three of the four shareholders. This means that CLT-UFA and Kirch, acting together, would always be able to block decisions and thus continue to ensure that their interests win the day by preventing any decision which goes against those interests from being adopted. The intermediate holding company would, by contrast, only be able to enforce its interest against CLT-UFA and Kirch in conjunction with Telekom if both of them voted against CLT-UFA and Kirch and thereby prevented a majority from being reached. It is obvious, however, that Telekom, given that it will supply technical services for

pay-TV on the basis of the d-box technology, is more likely to have interests which converge with those of CLT-UFA and Kirch than with those of the intermediate holding company for third-party firms. This means that the possibilities of CLT-UFA and Kirch, as dominant pay-TV suppliers, and Telekom, as dominant cable operator, of jointly controlling the technology and its further development may be limited from a formal point of view but might nevertheless remain in practice.

(d) Overall assessment

- (79) It follows from the above that the proposed undertakings, even in their expanded version, are inadequate to solve the existing competition problems. They are unlikely to give private operators a realistic chance of establishing an alternative programme and marketing platform. This also means, however, that an alternative technical platform will fail to emerge in the cable network because only Telekom will operate the conditional-access system in that network. It is true that opening up the possibility for third parties to take a holding in BetaResearch and the abandonment of the veto and special rights of the existing shareholders is an important concession since it will enable the structurally safeguarded control of the technology and its further development to be lifted. However, since no alternative technical platform will emerge without the chance of an alternative programme platform, the undertaking regarding BetaResearch is inadequate, even in connection with the further undertakings proposed by the parties concerning the CA licence, the API and the manufacturing licence, to prevent Telekom from, in the long term, dominating the market for the supply of technical services for cable pay-TV and strengthening its dominant position in the cable network to the detriment of private cable operators.

VII. CONCLUSION

- (80) For the above reasons, the Commission has reached the initial conclusion that the proposed

transaction would create or strengthen dominant positions as a result of which effective competition would be significantly impeded in a substantial part of the Community. The merger should consequently be declared incompatible with the common market under Article 8(3) of the Merger Regulation,

HAS ADOPTED THIS DECISION:

Article 1

The notified concentration consisting of the acquisition of joint control by Deutsche Telekom AG, CLT-UFA SA and BetaTechnik GmbH of BetaResearch Gesellschaft für Entwicklung und Vermarktung digitaler Infrastrukturen mbH is declared incompatible with the common market and with the functioning of the EEA Agreement.

Article 2

This Decision is addressed to:

Deutsche Telekom AG
Postfach 2000
D-53105 Bonn

CLT-UFA SA
Boulevard Pierre Frieden, 45
L-2850 Luxembourg

BetaTechnik GmbH
Betastraße 1
D-85774 Unterföhring.

Done at Brussels, 27 May 1998.

For the Commission

Karel VAN MIERT

Member of the Commission