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6A Market Place, Cirencester GL7 4YF, UK

P O Box 323, Eliot ME 03903-0323, USA

Tel & Fax (44) (0) 1451 861 464

Tel & Fax (1) (207) 439 5932

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Unfinished business

This year ends with a great deal of unfinished business, especially in the field of mergers, acquisitions and joint ventures. At the time of writing, the future of some of the operations of United Biscuits is uncertain. The Commission has cleared the acquisition by Heinz Company (USA) of the frozen and chilled food business of United Biscuits; but French interests have now come into the picture. (The Commission is sometimes called on to clear concentrations which do not, in the event, take place. The arrangements planned a year or two ago between American Airlines and British Airways are a case in point.) Another uncertainty hangs over the future course likely to be taken by British Aerospace: whether it will look across the Atlantic or whether it will decide to cement its relationship with the European aerospace industry. One other case, the outcome of which will be looked at throughout the world, even though the case itself is being conducted in the United States, concerns Microsoft. The US Court found that there was a monopoly and appointed a senior judge to discuss with Microsoft and the Department of Justice the basis on which the case might be settled. At present, the position is that the Court's factual determination stands and, in the absence of a satisfactory settlement, will lead to a further hearing in 2000 on the legal steps to be taken to follow up the factual findings.

State aids and national courts

State aids continue to be a factor in the distortion of competition in the European Union. The Commission hopes that national courts will play a bigger role in enforcing the state aid rules. (A study of the problem was completed earlier this year: "Application of EC State aid law by the Member States' courts", Office for Official Publications.) On the face of it, there are at least two reasons for a corporation to hesitate before taking a state aid case to a national court. The first is the lack of transparency in state aid schemes: corporations may not even know what advantages are enjoyed by their competitors. The second is that litigation may well be slower and far more expensive than the process of making a complaint to the Commission. While it is true that national courts may play a part in enforcing decisions made by the Commission, their role in the earlier stages of a state aid case may be limited by the fact that the very concept of aid requires interpretation. The Commission points out that national courts can ask it for advice; but not all national courts are keen to seek from an administrative body help in the determination of what is essentially a judicial function. ■

MARKET SHARING (STEEL TUBES): THE STEEL TUBE CARTEL CASE

Subject: Market sharing
Fines

Industry: Steel tubes
(Implications for other industries)

Parties: British Steel Limited (United Kingdom)
Dalmine SpA (Italy)
Mannesmannröhren-Werke AG (Germany)
Vallourec SA (France)
Kawasaki Steel Corporation (Japan)
NKK Corporation (Japan)
Nippon Steel Corporation (Japan)
Sumitomo Metal Industries Limited (Japan)

Source: Commission Statement IP/99/957, dated 8 December 1999

(Note. This is a classic case of a number of corporations agreeing to share the markets, in particular by applying restrictions to the trading carried out by firms in the four European countries in which other firms were established. The fines imposed were heavy, but moderated both by the special circumstances of the European steel industry and by the cooperation afforded to the Commission by Vallourec and Dalmine.)

The Commission's Decision

On 8 December, the Commission adopted a decision under Article 81 of the EC Treaty which imposed fines totalling € 99 million on eight producers of seamless steel. The producers colluded until 1995 over the observance of their respective domestic markets for certain seamless tubes used in oil and gas prospecting and transportation. "The decision concerns the straightforward sharing of markets in basic products," the Commissioner for Competition said. "The infringement, which is the first cross-border cartel case I have handled, is a very serious breach of the principles of competition and calls for a really dissuasive penalty. It must remain an example of what should be studiously avoided."

The Products and Parties concerned

The products in which there was a cartel are standard steel borehole pipes (commonly known as "oil country tubular goods", or OCTG) and project transportation pipes (commonly known as "line pipe"); both varieties are used in the exploration and transport of oil and gas. The four European

Community and four Japanese firms are among the largest producers of seamless tubes in the world.

Operation of the cartel

To coordinate their behaviour on the standard OCTG and project line pipe markets, the European and Japanese producers set up a cartel, which they called the Europe–Japan Club. The cartel restricted competition in the common market by requiring that the domestic markets of the different producers (that is, the German, French, Italian, British and Japanese markets) should be respected: the supply of seamless tubes to Member States of the Community where a national producer was established was limited by the other producers party to the agreement refraining from delivering tubes to those markets. Other parts of the cartel agreement, which related to certain other markets, were not covered by the decision, since the Commission could not provide evidence of a restrictive effect within the European Union. As regards duration, the Commission decided that the infringement lasted from 1990 to 1995 (except in the case of British Steel, which ceased producing the pipes in 1994).

Fines

In fixing the amounts of the fines, the Commission took account of the fact that, by definition, an agreement aimed at the observance of the domestic markets of the participating firms constitutes a very serious infringement of Community law, since it undermines the proper functioning of the single market. Moreover, the four Member States in question account for most of the consumption of seamless OCTG and line pipe in the EC and hence constitute an extensive geographic market. However, the Commission also considered that the standard OCTG and project line pipe sold in the Community by the firms to which the decision is addressed account for only about 19% of Community consumption of seamless OCTG and line pipe. Lastly, the sales of these products in the four Member States in question by the firms to which the decision is addressed were only about € 73 million a year during the period 1990-95. As a result, in practice, the infringement has had only a limited impact on the market. Attenuating circumstances were that the sector was in a long-term crisis and that its position had deteriorated since 1991; coupled with the increasing flow of imports, these factors have resulted in capacity reductions and plant closures. Pursuant to the Commission's Notice on the non-imposition or reduction of fines in cartel cases, the fines on Vallourec and Dalmine were reduced, since the firms had cooperated with the Commission in the establishment of the facts. The fines imposed were as follows (in €): Mannesmannröhren-Werke (13,500,000); Vallourec (8,100,000); British Steel (12,600,000); Dalmine (10,800,000); Sumitomo Metal Industries (13,500,000); Nippon Steel Corporation (13,500,000); Kawasaki Steel Corporation (13,500,000); NKK Corporation (13,500,000). ■

TRADE BETWEEN MEMBER STATES (SPORTS): THE UEFA CASES

Subject: Trade between Member States
Sports as trade

Industry: Sports

Parties: UEFA (Union of European Football Associations)
Mouscron
Communaute Urbaine de Lille

Source: Commission Statement IP/99/965, dated 9 December 1999

(Note. Sport is organised largely on a national basis; and, on the face of it, any rules which operate on a national basis tend to hamper trade between Member States. However, if the rules have no economic importance, trade as such is unlikely to be affected by the existence of those rules, as in sporting events. The Commission has therefore, quite sensibly, taken the view that in general the rules on competition do not apply to the rules made by sporting organisations where the rules are designed mainly to regulate such matters as fixtures on home grounds. A complaint that the European body responsible for the rules on matches had abused its dominant position by refusing to allow a match to be held on an away ground was rejected.)

Two Decisions adopted by the Commission demonstrate the limits to the application of the EC Treaty's competition rules to sport. It highlights three key aspects of the Commission's policy in this sector: First, the Commission recognises the regulatory powers of sports organisations as regards the non-economic matters arising from the specific nature of the sport. Second, the rules of sports organisations that are necessary to ensure equality between clubs, uncertainty as to results and the integrity and proper functioning of competitions, are not, in principle, caught by the Treaty's competition rules. Third, the Commission investigates only those cases that have a Community dimension and significantly affect trade between Member States.

The first decision (the *Mouscron* case) rejects once and for all a complaint lodged by the Communauté Urbaine de Lille against UEFA. The Commission takes the view that the UEFA Cup rule to the effect that each club must play its home match at its own ground ("at home and away from home" rule) is a sports rule that does not fall within the scope of the Treaty's competition rules. In its opinion, there is no Community interest that would justify looking more closely into whether UEFA had abused any dominant position it might have by applying exceptions to that rule without taking account of the integration that exists between certain frontier regions.

The other decision, which was taken following a notification made by UEFA on 14 October 1999, allows publication in the Official Journal of the European Communities of a notice calling on interested third parties to submit their observations on the UEFA rule book entitled "Integrity of UEFA Club Competitions: Independence of the Clubs" (ownership of more than one club). The Commission's preliminary view is that the rule in question, which does not allow more than one club belonging to the same owner to take part in the same competition, could also fall outside the Treaty's competition rules. Before confirming this view by adopting an exemption decision, it must ascertain whether there are not less restrictive means of ensuring the integrity of competitions where more than one club belongs to the same owner. The Commission hopes that the observations of interested third parties will provide it with the information necessary to settle this question.

The Commissioner responsible for competition policy has emphasised that the adoption of these two important decisions would contribute to achieving one of the objectives set by the Commission for this sector, namely to draw over time a dividing line between the practices of sports organisations that fall outside the competition rules and prohibited practices. A third category, namely practices that may be exempted, will also be identified on a case-by-case basis.

According to the Commission, this guideline for applying the competition rules to sport will make it possible to create a framework that provides the world of sport with the legal certainty which it legitimately seeks. The Mouscron case stems from a complaint lodged against UEFA with the Commission on 31 December 1997 by the Communauté Urbaine de Lille. The complaint challenged UEFA's decision not to allow the UEFA Cup game between Excelsior Mouscron (the football club of a Belgian town located near the French border) and FC Metz to be held at the ground of Lille-Métropole. As a result, the Communauté Urbaine de Lille was unable to hire out the stadium to Excelsior Mouscron. UEFA based its decision on the UEFA Cup rules, which stipulate among other things that every club must play its home match at its own ground, except in a number of very exceptional circumstances.

The Commission considers that the "at home and away from home" rule and the exceptions to that rule (which do not rule out the possibility of the host club playing its home match in its opponent's country) are needed to ensure equality between clubs. It argues, therefore, that, by adopting this rule and the exceptions to it, UEFA has exercised its legitimate right of self-regulation as a sports organisation in a manner which cannot be challenged by the Treaty's competition rules.

However, when it comes to applying the exceptions laid down, UEFA has introduced a further condition that prevents a club from playing its home match in its opponent's country. In the Commission's view, there is not sufficient Community interest in examining more closely whether this further condition and its application could constitute examples of improper exercise of UEFA's regulatory powers that might significantly affect trade between Member States. The lack of any Community interest is justified by the fact that the probability of establishing that Article 82 of the Treaty (which prohibits abuses of dominant positions) has been infringed is reduced for three reasons in particular: In the first place, this case must be assessed within the context of the national geographical organisation of football in Europe, which is not called into question by Community law. In the second place, the case is the only one that has been brought to the Commission's notice and is an isolated case that gave rise to a dispute in the past. In the third place, the investigations needed would be disproportionate to the probability of establishing that an infringement had taken place. ■

Competition in Electricity Markets

Most harmonisation measures in the European Union are only indirectly concerned with the promotion of competition. However, Directive 96/92/EC of the European Parliament and of the Council, concerning common rules for the internal market in electricity, is intended to open up gradually the electricity production and supply markets to competition.

Member States were supposed to adopt the measures necessary to incorporate the provisions of the Directive into national law by 19 February 1999, with the exception of Greece (19 February 2001), Belgium and Ireland (19 February 2000). Ten of the Member States which were supposed to adopt measures by 19 February 1999 have already transposed the Directive into their national laws and have notified the texts to the Commission.

Two Member States, France and Luxembourg, which should also have adopted the necessary incorporating measures by this date, have not yet notified them to the Commission. Both states have had difficulty in ensuring the passage of the necessary legislation through their respective parliaments. The Commission has therefore decided to send letters of formal notice to France and Luxembourg for failing to incorporate into national law the provisions of the Directive. This procedure for initiating proceedings in the Court of Justice is based on Article 226 (formerly 169) of the EC Treaty.

Source : Commission Statement IP/99/881, dated 24 November, 1999.

JOINT VENTURES (SPACE): THE ASTRIUM CASE

Subject : Joint ventures
Dominant position

Industry : Space
(Some implications for other industries)

Parties : Astrium
Matra Marconi Space
DASA

Source : Commission Statement IP/99/943, dated 6 December 1999

(Note. On the principle that, among the scores of cases approved by the Commission during first-phase inquiries into proposed concentrations, a few cases are subject to a second-phase investigation and are therefore inherently interesting, the following case is reported here. The Commission considers, on the face of it with some justice, that the proposed joint venture may strengthen a dominant position on the European space market. It may also encourage vertical integration. A high proportion of cases subject to second-phase investigation are approved, often with conditions. The present case will be watched with interest.)

The Commission has decided to open a full investigation under the Merger Regulation into the proposed creation of ASTRIUM, a joint venture of the German DaimlerChrysler Aerospace AG (DASA), Stuttgart, and the Netherlands-based Matra Marconi Space NV (MMS), The Hague. The main areas of concern are the strong position of ASTRIUM in observation and scientific satellites, space infrastructure and launchers in Europe.

MMS, jointly controlled by Matra Hautes Technologies S.A.S. and by Marconi Electronic Systems Limited, and DASA belonging to the DaimlerChrysler group have both activities in the manufacture and supply of satellite systems and sub-systems, space infrastructure and launchers. ASTRIUM will combine all space activities of MMS and the major part of the DASA space activities.

In general, demand for space systems comes from either commercial customers or institutional customers such as the European Space Agency (ESA), national space agencies and, for military applications, from Ministries of Defence. There is demand from commercial customers primarily on the world-wide markets for telecommunication satellites, on which the concentration does not lead to competition concerns. As to institutional markets, MMS and DASA are both active as prime contractors for space systems and as manufacturers of equipment. As prime-contractors they

source the necessary sub-systems and equipment either in-house or from independent suppliers. ASTRIUM will by far have a leading position as a prime-contractor for observation and scientific satellites and space infrastructure in Europe. The concentration will increase the degree of vertical integration, since ASTRIUM will be able to manufacture most of the required equipment in-house.

At this stage of the investigation, the Commission has identified serious concerns that the operation could lead to the creation of a dominant position on certain institutional markets for space systems in Europe. On the prime contracting level, ASTRIUM will have a leading position in observation and scientific satellites and space infrastructure and is an important supplier of certain components to its main competitors, namely, Alcatel Space and Alenia Aerospazio. ASTRIUM may therefore be in a position to foreclose these prime contracting markets. Similarly, there are risks that the operation could have adverse effects at the component level, as ASTRIUM could use its strong position as a purchaser to favour in-house suppliers and therefore foreclose such markets to third party suppliers.

Any investigation under the Merger Regulation is conducted under a legally binding timetable. From the date the Commission is fully informed of the details of the transaction (by formal notification), the Commission has a period of one month to make an initial assessment of the notified transaction. If the Commission comes to the conclusion that there are serious doubts whether an operation is compatible with the competition rules in the common market, it initiates a full investigation. The Commission has a further four months to investigate the facts and to adopt the final decision whether or not to allow the proposed transaction to proceed. The opening of a full investigation is a procedural step without prejudice to the final outcome of the case.

With the decision to open a full investigation in the case, the Commission will continue a detailed-fact finding exercise, using as a legal test the likelihood that the joint venture may create or reinforce a dominant position. ■

Fairford Press

Fairford Press, which *publishes Competition Law in the European Communities*, has a web-site in course of preparation. It is expected to be operational before the end of January, 2000. In the section of the web-site dealing with the newsletter, there will be a reference to the contents of the current issue, in the form of questions about EC competition rules, to which reports in the issue in question provide the answers.

STATE AIDS (MOTOR VEHICLES): THE VW CASE

Subject: State aids

Industry: Motor vehicles

Parties: Volkswagen AG (VW)
Automobilmanufaktur Dresden GmbH

Source: Commission Statement IP/99/888, 24 November 1999

(Note. State aids to large motor vehicle manufacturers are an incongruous element in a competition policy; but the so-called "motor vehicle framework" offers a certain amount of latitude. Even so, Germany is having some difficulty persuading the Commission that its proposed aid for VW meets even those generous criteria.)

The Commission has decided to begin a thorough investigation into regional aid totalling € 100 million (DEM 194 million) which Germany plans to grant to Automobilmanufaktur Dresden GmbH, a wholly owned subsidiary of Volkswagen AG (VW). The Commission has so far not been able to establish whether the planned aid meets the requirements of the motor vehicle framework. In July 1999 the German authorities notified their plans for granting regional aid of a nominal amount of € 100 million (194 million DM) for investment in Dresden, Saxony, by a subsidiary of the VW group. The project concerns a top-of-the-range vehicle, for which VW will develop new technological and commercial concepts, including the construction of an open, transparent factory where future buyers will be able to watch the final assembly of their vehicles. Productive investment will total € 740 million (1,536 million DM) over the period 1999-2002. Production capacity will amount to 37,500 vehicles a year and 2,000 jobs will be created or secured in the long term.

The information provided by Germany was not sufficient to demonstrate that the planned aid would be in line with the principles contained in the motor vehicle framework, in particular as regards the mobility of the project and the cost/benefit analysis. Furthermore, the case would not appear to justify the exemption provided for in Article 87(2)(c) of the EC Treaty. Under Article 87(2)(c), aid which is granted to certain areas of the Federal Republic of Germany affected by the division of Germany is compatible with the common market insofar as it is required to compensate for the economic disadvantages caused by that division. The information in the Commission's possession is not such as to enable it to take a final decision and it has thus given Germany one month to supply all the necessary information for the assessment of the case. ■

STATE AIDS (MOTOR VEHICLES): THE FIAT CASE

Subject: State aids

Industry: Motor Vehicles

Parties: FIAT (Melfi)

Source: Commission Statement IP/99/885, dated 24 November 1999

(Note. Here is another automobile manufacturer seeking State aid; and, again, the Commission is sceptical about the merits of the case.)

The European Commission has decided to initiate detailed investigation proceedings concerning aid amounting to € 40 million (LIT 78 billion) earmarked for the Fiat plant in Melfi (Basilicata). At this stage the Commission has not been able to establish that the planned aid meets the criteria of the Community framework for state aid to the motor vehicle industry and has asked Italy to forward any comments within one month. In March 1999, Italy notified a regional aid project involving a nominal amount of € 40 million (LIT 78 billion) concerning investments carried out by Fiat Auto in its plant in Melfi (Basilicata).

Fiat Auto owns factories in Italy, Poland, Turkey and South America. The concern produced 2.9 million vehicles in 1998, 1.6 million of them in Italy. It has 62,000 workers in Italy, including 6,300 at the Melfi plant. The plant produces 1,200 Puntos and 400 Lancia Ys a day. The notified project does not affect capacity; it is basically designed to develop new flexible bodywork and assembly lines in connection with the launch of the new Punto. Investments € 224 million (LIT 436 billion) are being carried out between 1997 and 2000. The Italian authorities claim that the Fiat Group could put the investment into their plant in Tychy, Poland. They therefore carried out a cost-benefit analysis, comparing the cost of producing 1,200 new Puntos a day in Melfi with that of splitting production between Melfi (800 cars a day) and Tychy (400 cars a day) and established that Melfi would have a comparative disadvantage of 27.3%, which was sufficient to justify 15.3% aid. Although it is technically possible to produce the new Punto in Poland, the Italian authorities have failed to provide sufficient evidence that the investor really intended to switch part of the production of the new model to Tychy.

On the information currently in the Commission's possession, the aid in question does not appear likely to benefit from exemption. The Commission has therefore decided to open a detailed investigation and asked Italy to provide all the information necessary for the examination of the case within one month. ■

JOINT VENTURES (BROADCASTING): THE BiB CASE

Subject: Joint ventures
Cooperative joint ventures
Exclusive supply agreements
Exclusivity ("first refusal")
Non-competition clauses
Market access
Pricing policy
Advertising restrictions
Exemption
Conditions of exemption

Industry: Broadcasting
(Some implications for other industries)

Parties: British Interactive Broadcasting (BiB – renamed Open)
BSkyB Ltd,
BT Holdings Ltd
Midland Bank plc
Matsushita Electric Europe (Headquarters) Ltd

Source: Commission Decision, published in the Official Journal of the European Communities, L.312, dated 6 December 1999

(Note. This decision has a number of interesting and unusual features. It concerns the creation of a joint venture in the field of digital interactive broadcasting: in addition to the legal interest of the case, there is a also a technical interest, which is both intelligible and in the long run probably important to the layman. Since there is, in the Commission's view, a risk of coordination between the parent companies, the joint venture is treated as cooperative and is therefore assessed under Article 81 of the EC Treaty and not as a concentration under the Mergers Regulation.

From a legal point of view, the decision covers a wide range of competitive issues. The matters referred to in the headnote above are listed in recital 145 of the decision ("the following contractual provisions and agreements restrict competition ..."). It will be noted that item 6 in this list refers to pricing policy; but the subsequent recitals do not fully develop this point. Nor, at least directly, do the conditions on the basis of which the Commission decided to exempt the agreements.

These conditions represent the most unusual and striking feature of the case. They are set out at length in the text of the decision itself - in Article 2 – and are detailed and complex. There are ten basic conditions: the report below summarises their content. The Commission explains, in recital 136, in the course of a brief review of third party observations, that the conditions take account of third party concerns and that, in the interests of legal certainty, the conditions have been spelled out in detail in the decision.

Much of the factual material in the early recitals is picked up in the Legal Assessment and is therefore omitted or summarised below. As is often the case in the factual recitals, the Commission itself omits sensitive material, so that those recitals are full of tantalising statements to the effect, for example, that the expected revenue of the joint venture will be [...]. There are even some of these incomplete statements in the Legal Assessment.)

Facts

(1) On 13 June 1997, the parties notified to the Commission the creation of a joint venture company, British Interactive Broadcasting Ltd (BiB, now named Open) and requested negative clearance and/or exemption pursuant to Regulation No 17. BiB's parent companies are BSkyB Ltd, BT Holdings Ltd, Midland Bank plc and Matsushita Electric Europe (Headquarters) Ltd.

(2) BIB is to provide a new type of service, digital interactive television services, to consumers in the United Kingdom. This involves putting in place the necessary infrastructure and services to allow companies, such as banks, supermarkets and travel agents, to interact directly with the consumer. An important element of this infrastructure is a digital set-top box. BiB wHl subsidise the retail selling price of digital satellite set-top boxes, satellite dishes and low-noise blocks (LNBs). (A low-noise block converter (LNB) detects she signal relayed from the feed, converts it to an electrical current, amplifies it and lowers its frequency.)

(3) The same infrastructure will be used by television companies, as it will allow them to integrate interactivity into their services: for instance, interactive advertisements and voting in quiz shows.

(4) BiB will also provide certain services direct to the consumer, such as e-mail, 'walled garden' Internet access (the parties use this term to describe access to a limited amount of Internet cnntent) and downloading of computer games. Its service is expected to begin in the autumn of 1999.

The Parties

(5) BT Holdings Ltd is a wholly-owned subsidiary of British Telecommunications plc (BT). BT is licensed to run certain telecommunications services in the United Kingdom. It supplies telephone exchange lines to homes and businesses; local, trunk and international (to and from the United Kingdom) telephone calls and other telecommunications services and equipment for customers' premises.

(6) British Sky Broadcasting Ltd (BSkyB) is a wholly-owned subsidiary of British Sky Broadcasting Group plc. News Corporation owns 39.88% of the shares of BSkyB Group plc's shares.

(7) BSkyB is a broadcaster of analogue pay television ('pay-tv') services delivered by the ASTRA satellites for direct-to-home (DTH) and cable reception in the United Kingdom and Ireland. BSkyB operates at both retail and wholesale levels in these areas. It launched a digital satellite pay-tv service on 1 October 1998 using the digital set-top box, satellite dish and low-

noise block which BiB will subsidise. BSkyB Group is also active in the provision of conditional access services and other technical services necessary for pay television.

(8) Midland Bank plc is a public limited company authorised by the Bank of England to carry on a banking business. It is part of the HSBC group of companies and a direct subsidiary of the holding company, HSBC Holdings plc. Midland and the other companies in the HSBC group provide a range of banking and financial services in the United Kingdom and around the world.

(9) Matsushita Electric Europe (Headquarters) Ltd (Matsushita) is a wholly-owned subsidiary of Matsushita Electric Industrial Co. Ltd. (MEI). MEI is a designer, developer and manufacturer of electronic and electrical products and associated software and information technology for home, industrial and commercial uses. The MEI group operates world-wide and manufactures and/or trades through a number of subsidiaries in the United Kingdom and other Member States.

The relevant markets

(10) BiB will be principally active on the digital interactive television services market and on the technical services market. Two of its parent companies, BSkyB and BT, are present in markets which are closely related to one or more of these markets.

(11) The following services will form part of the BiB digital interactive television service': home banking, home shopping, holiday and travel services, down-loading of games, learning on-line, entertainment and leisure, sports, motor world, a limited collection of 'walled garden' Internet sites provided by a third party and e-mail and public services. BiB describes retailers which offer goods or services over its infrastructure as 'content providers'.

[Paragraphs 10 ff identify the following additional product markets]

(a) Digital Interactive Television Services
(b) Pay Television
(c) Wholesale supply of films and sports channels for pay television
(d) Technical services for digital interactive television services and pay television
(e) customer access infrastructure market for telecommunications and related services

[Subsequent paragraphs - 40 ff - consider the geographical market; this is, almost exclusively, the United Kingdom]

Third Party Observations

(135) Following the publication of a notice pursuant to Article 19(3) of Regulation No 17, interested third parties submitted observations to the Commission. Broadly speaking, third parties welcome the conditions that the Commission proposed to apply to BiB and under which an Article 81(3) exemption could he granted. Concerns expressed in these observations included:

- the restrictions on competition between the participants in BiB are not indispensable;

- the duration of the exemption;
- the Commission should continue to monitor the joint venture over a number of years in particular in the field of access to the local loop if there were a risk that BT might have an incentive to slow the development of broadband services in the UK because of its stake in BiB;
- BSkyB should be required to enter into negotiations with other interactive service providers who wish to add interactive enhancements to BSkyB programming.

(136) The Commission carefully reviewed all third-party observations and concluded that concerns expressed therein have been addressed during the notification procedure. The conditions attached to this Decision take sufficient account of these concerns, and third-party observations have not therefore affected the Commission's substantive position as described in the Article 19(3) notice. However, in the interest of legal certainty the Commission has spelled out in greater detail in this Decision the scope of certain conditions imposed on the parties and the fulfilment of the four conditions which govern exemption under Article 81(3).

(137) In addition, the Commission considered it necessary, as a result of third-party observations, to extend the scope of the condition on the availability of a clean-feed. The condition imposed in this Decision allows more flexibility to companies which distribute BSkyB's movies and/or sport programming with interactive applications. The distributor's option to remove or keep all of the icons is extended, subject to an agreement for the carriage of BiB or BSkyB's services, to allow a situation where some of the icons remain on the screen whilst some of the icons are removed.

Legal Assessment

(138) The Commission has concluded that the notified arrangements as amended fall within the scope of Article 81(1) of the EC Treaty but that, subject to certain conditions, the criteria of Article 81(3) of the EC Treaty are met.

(139) The joint venture has to be assessed under Regulation No 37 because there is a risk of coordination between the parent companies in the market of the joint venture and in neighbouring markets such as video-on-demand entertainment services.

Article 81(1)

(140) BSkyB and BT's participation in BiB results in an appreciable restriction of competition on the market for digital interactive television services. This restriction of competition affects trade between Member States. The creation of the BiB joint venture therefore falls within the ambit of Article 81(1). The Commission cannot give negative clearance to the agreements as requested by the parties in their notification.

(141) Before the conclusion of the BiB joint venture, BT and BSkyB were potential competitors in the provision of digital interactive television services. Both have sufficient skills and resources to launch such services and both would be able to bear the technical and financial risks of doing so alone. The creation of BiB eliminates this potential competition. Given the market positions of BT and BSkyB in markets related to the one in which BiB will be active, the restriction of competition between them is appreciable.

(142) The fact that BT is a potential competitor reflects a more general world-wide development in the telecommunications sector for operators to seek to expand the number and types of services provided over their networks. This diversification increases the return on the capital employed to build, or in the case of BT, maintain the network. More particularly, by virtue of the Digital Subscriber Line family of technologies, traditional copper-line telecommunications customer access infrastructure, such as that of BT, can be upgraded to allow for the provision of services such as those to be provided by BiB in addition to other services such as video telephony, video-on-demand and high-speed Internet access. One operator in the United Kingdom, Kingston Communications, has already committed itself to such an upgrade of its infrastructure. In other European countries, trials are under way. BT has conducted extended residential trials. The latest trial ran until March 1999. Some service providers will offer a range of services, including on-demand entertainment, news and information programming. home shopping and home banking.

(143) The general tendency towards diversification of telecommunications operators to provide services similar to those of BiB has been accepted by the parties. Indeed, the parties themselves have stated that 'the main telecommunications operators (other than BT) could become competitors to BiB'. The parties' claim that BT's competitors should be regarded as potential competitors, whereas BT itself should not, cannot be accepted. The joint venture agreement itself envisages that BT will upgrade its network to allow provision of services such as those to be provided by BiB.

(144) BSkyB is also a potential competitor in the provision of digital interactive television services. BSkYB has extensive experience in running a popular mass market television service. It is the digitisation of such services which allows digital interactive television services to be introduced. There are significant common costs in the technical services and infrastructure required for both. In the absence of BiB, BSkyB would have required a digital set-top box for its own pay-television business and would have subsidised its retail selling price itself (ONdigital is subsidising the retail selling ptice of the digital set-top boxes necessary for its service). The marginal cost increase in producing a set-top box capable of allowing interactivity is relatively small in comparison with the overall cost of the set-top box - the parties have estimated the marginal cost to be approximately [...] Given the common infrastructure costs, and given that subsidisation of set-top boxes is BiB's largest single cost over the first [...] years of its operation, the marginal cost increase of establishing an interactive service once the decision has been made to launch a digital television service is relatively small.

Applicability of Article 81(1) to contractual provisions

(145) The following contractual provisions and agreements restrict competition:

- The non-competition provision between the parties contained in Clause 3.3 of the joint venture agreement, as amended at the demand of the Commission.
- The parties' agreement that a shareholder who wishes to provide digital interactive television services by means of a broadband system may do so only where it has given BiB a right of first refusal to provide such a service and BiB has not agreed to provide such a service on terms at least as favourable as those offered by a third party within six months of the offer or 31 March 1999, whichever is the later.

- The exclusive supply agreements between BiB and Midland Bank in respect of merchant acquiring and transaction management services.
- The provisions of the JVA requiring certain advertising of the BIB service to be integrated with BSkyB advertising.
- The commitment of the parties to promote only digital satellite set-top boxes which are capable of receiving the BiB service for so long as BiB is subsidising set-top boxes. However, BSkyB may promote any other set-top box where the purpose of such promotion relates to the use of such boxes in homes which already have a BIB-subsidised set-top box and BSkyB agrees to spend a substantial amount of money on the marketing of its digital pay-television service.
- BSkyB's commitment that the subscription price for its digital pay-television service will be no higher than that of similar analogue packages of satellite entertainment services and its commitment to use reasonable endeavours to ensure that all programmes broadcast on BSkyB's analogue satellite service will be broadcast simultaneously on BSkyB's digital satellite service.

(146) These clauses are directly related and necessary restrictions to the creation and operation of BiB with the exception of the prohibition in the non-competition clause on holding more than a 20% interest in a company competing with BiB, for the following reasons.

(147) Subject to recital 149, the agreement among the parties not to compete in the provision of digital interactive television services is necessary for, and directly related to, the establishment of BiB, given the technical and financial risks involved in entering a new market, and the level of investment required. The uncertainty inherent in such a joint venture, and the need to ensure a stable base of operations in its early years, justify this non-competition clause.

(148) The fact that the non-competition clause continues to apply to a shareholder for a period of 12 months after that shareholder loses joint control provided that the loss occurs within three years of the date on which this Decision takes effect, is justified as a protection for the joint venture and for the investors against a parent company withdrawing from the joint venture and taking unfair advantage of the know-how acquired during its participation in the joint venture in order to compete in the same market.

(149) The Commission has examined the prohibition contained in the non-competition provision, which precludes the BiB parent companies from holding more than a 20% interest in a company competing with BiB. The clause is not limited to the acquisition of material influence hut it does include the purchase of shares for investment purposes only. Therefore, this restriction cannot be considered directly related and necessary to the operation of the joint venture. The Commission needs to examine whether the clause fulfils the criteria set out in Article 81(3).

(150) This clause [BiB's right of first refusal] limits the scope of the non-competition provision. BiB's right does not go beyond the scope of activities which fall under the non-competition obligations between the parent companies. This provision is of particular relevance to BT, which could in the future be interested in the provision of digital interactive television services via broadband networks. BiB's right of first refusal shows the commitment of the parent companies to ensuring the success of BiB and of their investments.

(151) Both a transaction management system and merchant acquiring services are essential parts of the infrastructure necessary for BiB Platform Co's service. Midland was willing to bear the full cost of developing the software necessary for the transaction management system, in return for a fee equivalent to a percentage of each transaction. This allowed BiB to reduce its initial capital requirements and to match its payments to income in an economically efficient manner. The financial risk of the development costs remains with Midland. However, a period of exclusivity allows Midland the opportunity to recoup its initial investment, with no guarantee that it will do so. In terms of merchant acquiring services, Midland has undertaken to provide the services at an advantageous fixed rate to help with the establishment of BiB. Midland, on the other hand, requires a guarantee that BiB will not change suppliers once it is established. Moreover, neither agreement prevents other providers of digital interactive services from seeking transaction management or merchant acquiring services from companies other than Midland. The exclusive agreements, which will play with regard to content providers and end-users using the BiB platform or contracting BiB services, thus constitute the necessary quid pro quo for Midland's willingness to incur up-front capital costs for the benefit of the operation of the joint venture. They are thus crucial to its participation in BiB and cannot be considered in isolation from the joint venture

(152) These provisions [commitments of the parent companies in markets related to BiB's] are necessary to the establishment of BiB and to the penetration in the market of a new package of services. BSkyB will concentrate its efforts on the development of BiB's services. These obligations on BSkyB are intended to enable BiB to enter the new market successfully. These clauses are necessary for and directly related to the operation of the joint venture.

Effect on trade between Member States

(153) An agreement which may have an influence, direct or indirect, actual or potential, on the pattern of trade between Member States meets the criterion of effect on trade between Member States (see for example Case 42/84, *Remia v Commission*).

(154) The BiB joint venture agreement limits the territory within which the parties will initially provide digital interactive television services to the United Kingdom, Isle of Man and Channel Islands. However, the service is technically capable of being provided in other European countries, although certain technical modifications due to continuing differences in currency would be required. The parties have stated that the difficulties of provision of the service in other countries are likely to decrease in the future.

(155) BSkyB's analogue pay-television service is currently available via both satellite and cable in Ireland. It is likely that its digital service will be available there in the near future, at least via satellite. Given the absence of linguistic barriers, the presence of BSkyB, and the presence of certain retailers in both the United Kingdom and Ireland, it cannot be excluded that the BiB service, or a localised version, will be made available in Ireland. If BSkyB enters the pay-television markets in other Member States, the geographic scope of activity of BiB may be similarly extended thereafter.

(156) However, even if this is not the case, the agreement affects the competitive structure for the provision of digital interactive television services throughout the United Kingdom (Cases 6 and 7/73 *Commercial Solvents v Commission*, paragraphs 30 to 35). As a result of this

operation entry in the relevant market in the United Kingdom is made more difficult to other possible Community competitors. The latter is also applicable to the prohibition to the BiB's parent companies in the non-competition provision. of holding more than a 20% interest in a competing company. Potential entrants in the digital interactive television services market in the United Kingdom cannot rely on the investments of BiB's parent companies. Finally, by establishing a prime mover with substantial advantages, BiB is likely to procure certain services from other non-British content providers. There will thus be an effect on the flow of trade.

(157) On the basis of recitals 153 to 156, the agreements are likely to affect trade between Member States.

Article 81(3)

(158) The notified agreements satisfy the criteria for an exemption set out in Article 81(3) of the EC Treaty, for the following reasons.

1 Improvement in distribution of goods and technical and economic progress

(159) In developing the BiB joint venture, the parties have overcome the current technological limitations of both satellite broadcast technology and narrowband telecommunications customer access infrastructure. The former is, for the time being, capable of only one-way communication and could not alone provide interactive services of the type envisaged by BiB. The latter, while capable of the two-way communication inherent in telephony is not, at the moment, suitable for services which require a higher bandwidth. In combination, however, their use enables provision of a new form of service which had not been offered yet, available to the vast majority of consumers in the United Kingdom. Retailers of goods and services also obtain a new outlet for their products. The creation of the joint venture, therefore, contributes to an improvement in the distribution of goods and technical and economic progress (see Commission Decisions 98/536/EEC (*Film purchased by Gernior television stations*) (OJ L 284, 3.10.1989, p. 36, recital 49); and 90/25EEC (*Concordato Incendio)* (OJ L 15,19.1.1990, p.25, recital 25).

(160) The improvements attained as a result of this operation would not materialise without the prohibition set out in the non-competition provision on the holding or more than a 20% interest in a competing company. This clause eliminates the economic incentive for the parties to transfer to a competitor any ideas and strategies that are being developed by BiB. Such ideas and strategies are of enormous value in a new and fast-moving industry such as the digital interactive television services market. for instance, the right moment to launch the service and the modalities of entering the market; special offers, pricing structure, whether the set-top box should be offered free of charge to potential subscribers. These ideas and strategies, which have been first tested in BiB from the synthesis of the four parents' contributions, are not covered by the prohibition of the non-competition clause on the transfer of the greater part of the know-how to a competitor.

(161) The digital interactive services could also be provided by upgrading BT's copper network. If the medium term effect of BT's participation in the joint venture were to be a reduction in its economic incentive in upgrading its narrowband telecommunications

customer access infrastructure, the Commission's positive assessment of BiB's impact on technical and economic progress would require reconsideration in the light of the broader developments in the market. As was explained in recital 86, BT owns the only such nation-wide infrastructure and has a very high market-share of fixed residential lines in use. If upgraded, it would provide an alternative national transmission mechanism for the provision of broadband interactive services. In addition, it could carry other services, such as video telephony, broadband internet access and video-on-demand. One telecommunications operator in the United Kingdom has already upgraded its network and it is being used for provision of BiB-type services. BT itself is conducting trials.

(162) Evaluation of the impact of BT's participation in BiB on the development of the customer access infrastructure market, and therefore on the services market using that infrastructure, is premature. If PT's commercial interest in maintaining and upgrading its exiting network were lessened as a result of its participation in BIB, then this would constitute a significant impediment to technical and economic progress. The result would depend, in part, on developments in the geographic coverage of broadband cable infrastructure in the United Kingdom.

2 Benefit to consumers

(163) Until recently, services comparable to those of BiB have been available only via the Internet and using personal computers as a display screen. However, the still limited penetration of personal computers in the United Kingdom has prevented such services from reaching the mass market. Almost all households in the United Kingdom possess a television set. Purchase of a BiBI BSkyB digital set-top box would give them access to interactive services via television screens. The introduction of a new service of this type is of benefit to consumers.

(164) The benefits for the consumers resulting from this operation would not materialise if it were not for the prohibition. set out in the non-competition clause, on any holding of more than a 20% interest in a competing company. This clause prevents the parties from transferring to a competitor the ideas and strategies that are being developed by BiB in its new market and ensures the commitment of the parties to BiB and eventually to BiB's success in the market.

(165)]n addition, the Commission has imposed a condition whereby the parties shall provide information both to end-users and to their agents for the sale of set-top boxes, that end-users need not subscribe to BSkyB's digital pay-television service as a condition of the purchase of a BiB-subsidised set-top box. The condition ensures both that the original requirement is not reintroduced at a later date and that end-users are provided with accurate information. Consequently, the condition ensures that consumers are given a choice either to acquire the set-top box with BSkyB's pay-television package or to acquire it without subscribing to BSkyB's pay-television offer.

3 Indispensability

(166) BT and BSkyB have the necessary expertise to provide some form of interactive services individually. However, by cooperating together in BiB they are able to provide a better service

and to do so more quickly. Their participation, together with Midland Bank and Matsushita, is thus indispensable to the creation of BiB, and to its ultimate establishment on a new market. BT has gained skills and experience in the course of its past interactive television trials in the development and integration of interactive multimedia services which it contributes to the joint venture. This is in addition to its expertise in the provision of telecommunications services which have been vital to the operation of the BiB telecommunications return path and its connections with the servers. BSkyB contributes its experience in set-top box design and operation, together with its knowledge of consumer demand for pay-television. Midland contributes expertise in the area of merchant acquiring and transaction management, and the integration of these services into the BiB infrastructure. Finally, Panasonic contributes its technical expertise, particularly in the area of set-top box design.

(167) The prohibition on holding more than a 20% interest in a competing company is indispensable for this operation. The success of BiB would be jeopardised in case of a transfer to a competitor of the unique ideas and strategies, which are being developed by the parties in BiB.

4 Non-elimination of competition in respect of a substantial part of the products

(168) Companies other than BiB, notably the various cable operators, have plans to launch digital interactive television services. The BiB parties have estimated that a subscriber base of at least one million subscribers is necessary to achieve the necessary scale for the provision of digital interactive television services. Following the consolidation in the United Kingdom cable industry, the cable networks of Cable & Wireless Communications, NTL and Telewest each have a reach of more than one million homes. NTL has already launched a commercial trial. Cable operators have an advantage in the provision of such services as their cable networks have two-way capability. This allows them alone, or in cooperation with third parties, to use the network for interactive services. Other companies also have plans to introduce digital interactive television services, in particular WebTV and Videonet.

(169) However, both BSkyB and BT have very important positions in the United Kingdom, in markets neighbouring and closely related to that in which the BiB joint venture will be active. Their positions in these markets are safeguarded, at least in the medium term, by the existence of barriers to entry. Both therefore possess a degree of market power which is central to the legal assessment of the impact of the elimination of potential competition between BT and BSkyB as a result of the creation of the BiB joint venture.

(170) Accordingly, the Commission considered that the combination of the very significant market power of BT, and in particular of BSkyB in related markets, with that in which BiB will be active such as the customer access infrastructure market, the technical services for pay-television and digital interactive services, the pay-television market and the market for the wholesale supply of film and sport channels for pay-television, risked eliminating a substantial part of competition on the markets for digital interactive television services. The conditions set out in this Decision should ensure that this risk does not materialise and, in particular, that competition to BT comes from the cable networks, that third parties are ensured sufficient access to BiB's subsidised set-top boxes and to BSkyB's films and sport channels and that set-top boxes other that BiB's set-top box can be developed in the market, so that the digital interactive television services remain open to competition.

(171) Even given the prohibition in the non-competition clause, preventing BiB's parent companies from holding more than a 20% interest in a competing company, there is no chance that competition will be eliminated as a result of the creation of BiB. The conditions imposed upon the parties ensure that the relevant market will remain open and that BiB will face significant competition. The conditions imposed on the parties can be summarised as follows.

(a) Competition from the cable networks

(172) In the customer access infrastructure market and in the corresponding telecommunication and interactive services markets that can be provided via this infrastructure, the most significant competition facing BT comes from the actual and potential owners of the cable networks who can compete with BT in the provision of telecommunication services and with BiB in the provision of digital interactive services. BT provided 86% of residential fixed lines in use and is the only telecommunication operator in the United Kingdom with a network which covers almost the whole of the country. Consequently, it is important to safeguard and encourage competition coming from the cable segment. If BT were to expand its cable interests and at the same time participate in the operation of BiB, BT would not have an incentive to develop, through its cable networks, digital interactive television services of the kind to be provided by BiB, and it would not have an incentive to facilitatc third parties to compete with BiB in the provision of these digital interactive television services via its cable networks. Therefore, it is a condition of exemption that BT has agreed not to expand its existing cable television interests in the United Kingdom. The Commission notes that it has further agreed to divest itself of its existing interests. This will allow competition in the provision of broadband cable infrastructure to develop independently of BT throughout the United Kingdom and to counterbalance the restrictive effects of the combination of BT and BSkyB in BiB.

(b) *Third party access to BiB-subsidised set-top boxes*

(173) BiB is to subsidise the set-top box which will be used both for its own service and for BSkyB's digital pay-television service. BSkyB and BiB together control the access of competing digital interactive television services and pay-television operators to those boxes. BSkyB's control is ensured by its position on the technical services market - that is, by the supply of conditional access and access control services. BiB controls access by means of the operation of the subsidy recovery mechanism which requires all providers of encrypted services to contribute to its historic and ongoing subsidy costs as part of their conditional access and access control payments.

(174) Third party access to BiB-subsidised set-top boxes is important because of the market position of BSkyB. BSkyB has a market share of some [...]% in the pay-television market. In theory, competitors to BiB and BSkyB which wished to provide services using digital satellite could launch a competing set-top box. However, the capital costs of establishing a competing infrastructure, combined with the general reluctance of consumers to acquire more than one set-top box, makes this unlikely. This conclusion is reinforced by BSkyB's control of film and sports. In practice, therefore, they are more likely to seek access to BiB/BSkyB's existing set-top box infrastructure (see *Bertelsmann/Kirch/Premiere*, recital 56). This has been the case in respect of analogue pay-television services in the United Kingdom. There is no reason to

presume that it will be different in respect of digital services, where the investment costs of establishing a set-top box infrastructure are even larger.

(175) If competing providers of digital interactive services were to be denied access to BiB-subsidised set-top boxes, or were to be granted access on terms less favourable than BiB andlor BSkyB, then a substantial part of competition on the downstream services markets would be eliminated.

(176) Pursuant to the amended joint venture agreements, BiB will establish legally separate companies for BiB's activities in respect of the subsidisation of set-top boxes and the recovery of monies from third party users of the box and the creation and operation of the BiB interactive services. Each company will have separate management and each will publish annual audited accounts. In addition, it has been imposed as a condition of exemption that auditors shall certify that all transactions between the two companies have been carried out at arm's length, in accordance with the principles set out in the OECD transfer pricing guidelines. This should ensure transparency and non-discriminatory treatment between the two operations, and prevent the subsidy mechanism from being used as an artificial barrier to entry on the market for digital interactive television services.

(177) The Commission has imposed a condition on the operation of the subsidy recovery mechanism which seeks to ensure that it is transparent and non-discriminatory. The operation of the subsidy recovery mechanism also falls to be regulated by the United Kingdom authorities pursuant to Directive 95/47/EC and to national measures. The Commission considers that compliance with the condition will be presumed where the parties comply with the British arrangements.

(178) According to the condition, third parties will have an option either to pay an initial sum, or to pay subsidy contributions on an ongoing basis. The subsidy contributions will be related to usage of the box -meaning the number of conditional access cards issued or the number of access control authentications. This condition ensures that a smaller operator will not pay the same as a larger operator in order to facilitate market entrance.

(179) BiB Platform Co., as an operating provider for digital interactive services, will contribute to subsidy recovery in the same way as its competitors. These payments will form part of its cost base to be covered through its charges to content providers. BSkyB will also contribute to subsidy recovery in the same way as other pay-television operators.

(180) First, the Commission has imposed a condition that BSkyB shall offer to develop and operate Simulcrypt arrangements with interested parties subject to appropriate commercial agreements. This should ensure that users of other conditional access systems will be in a position, should they so choose, to address customers who own BiB digital satellite set-top boxes.

(181) Secondly, downstream service providers which wish to use BiB-subsidised set.top boxes, and those which do use the boxes, require information about the technical specifications of the set-top box, including proposed changes to the specifications. In the absence of such information, they would be unable to develop their own services and to continue to up-date them in response to any changes to the specifications of the set-top box.

The Commission has therefore imposed a condition that such information be provided to interested parties. (The parties have raised with the Commission as a possible means of complying with this condition the use of a website, parts or all of which may be password protected, for the provision of the non-disclosure agreement and/or the supplemental technical agreement and/or the technical information. The Commission considers that this is one of the ways in which the parties could fulfil this condition. However, the choice of mechanism is a matter appropriately left to the parties.). It now appears likely that the majority of the relevant information will be held by BSkyB. However, this position may change. To ensure that there is no gap in the parties' duty to provide relevant information to third parties, information provision conditions are imposed on both BSkyB and BIB McCo.

(c) *Third party access to BSkyB's pay-television channels*

(182) BSkyB's channels are supplied both to cable operators and to the digital terrestrial operator, ONdigital. The channels are then offered to subscribers as part of the latter's own pay-television service. However, they act only as distributors of the channels and must distribute them without modification of their content. They may not add, or indeed remove, any elements without BSkyB's consent. The parties have indicated that it is their intention, subject to the conclusion of the necessary agreements, to make the BiB service available to end-users via cable networks or digital terrestrial television.

(183) BiB's cable and digital terrestrial competitors will not be able to place interactive links in the most popular pay-television channels in the United Kingdom. This would be possible only if both technical and commercial obstacles were overcome, They would require them to reach an agreement with a competitor BSkyB, which has significant market power in upstream markets and an incentive to foreclose the downstream digital interactive television services market.

(184) It is, therefore, necessary to impose a condition on BSkyB's wholesale supply of its film and sports channels to its cable and digital terrestrial competitors. BSkyB will be obliged to offer to distribute its film and sports channels either with or without ('clean-feed') interactive applications, at the choice of the purchaser on a nondiscriminatory basis. This prevents BSkyB from bundling interactivity at the wholesale supply level with its channels to the detriment of both competitors to BiB on the digital interactive television services market and its own competitors in pay-television. BiB's competitors would not be able to integrate their own interactive services into these channels. However, they would be able to do so in respect of channels which are not owned by BSkyB... it would also be possible for BiB's competitors to negotiate agreements for the use of their different interactive services in respect of film pay. per-view services. Thus competition with BiB will not be eliminated.

(d) *Contribution to the development of alternative set-top boxes*

(185) It is a condition of exemption that BSkyB limits the exercise of its veto rights in the joint venture agreement to the extent that it will be obliged in certain circumstances to support any proposal to subsidise other set-top boxes as part of an agreement for carriage of the BiB service on cable and/or digital terrestrial television. Given that companies requesting BiB to subsidise other set-top boxes would in practice be competitors of BSkyB on its core market, this condition is intended to address BSkyB's conflict of interest in its decisions as a BiB

shareholder and its interests as a pay-television operator. This should ensure that BiB as a commercial company is free to take decisions in relation to BSkyB's competitors on commercial grounds, and is not limited by BSkyB's other commercial interests.

(e) *Anti-avoidance*

(186) Given both the complex nature of the arrangements between the parties, and the ongoing development of the BiB joint venture itself, it is conceivable that conditions imposed on one party could be avoided by actions of other parties or BiB itself. This applies in particular to the conditions relating to the information to the retailers that there is no requirement that a purchaser of a BiB set-top box should take out a subscription to any pay-television services, the subsidy recovery mechanism and the provision of information to third party users of the set-top box. This condition is intended to prevent this.

Conclusion

(187) The Commission concludes that the BiB transactions meet all four conditions for an individual exemption pursuant to Article 81(3) of the EC Treaty.

[After paragraphs 188 to 194, which consider the duration of the exemption, the formal text of the Decision is set out as follows]

Article 1

Pursuant to Article 81(3) of the EC Treaty and subject to Article 2 of this Decision, the provisions of Article 81(1) of the EC Treaty are hereby declared inapplicable, for a period of seven years from 4 August 1998 to:

(a) the joint venture agreement for the creation of a joint venture company, British Interactive Broadcasting Ltd (now named Open) by BSkyB Ltd, BT Holdings Ltd, Midland Bank plc and Matsushita Electric Europe (Headquarters) Ltd, as notified on 13 June 1997 and amended on 4 August 1998;

(b) all the related agreements notified to the Commission for the creation of British Interactive Broadcasting Ltd set out in Annex II to this Decision.

Article 2

The exemption set out in Article 1of this Decision shall be subject to the following conditions:

Condition No 1: (Legal separation of BiB box and services operations - auditors)

Condition No 2: (Information on the removal of subscription tie between BiB boxes and BSkyB services)

Condition No 3: (Availability of a clean feed)

Condition No 4: (Divestiture of cable)

Condition No 5: (Veto rights)

Condition No 6: (Conditional access and Simulcrypt)

Condition No 7: (Subsidy recovery)

Condition No 8: (Provision of information by McCo)

Condition No 9: (Provision of information by BskyB)

Condition No 10: (Anti-avoidance)

[The full text of the conditions, running to many pages of detail, forms part of Article 2]

Article 3

Breaches of Conditions Nos 7, 8 and 9 set out in Article 2 or, where relevant, breaches of the British regime shall not be considered an infringement of those conditions unless, in relation to the achievement overall of the objects of those conditions:

(a) such breaches have been clear and serious; or

(b) such breaches have had serious and material adverse affects on a third party; or

(c) such breaches have resulted in irreparable and serious damage to a third party; or

(d) although the individual breaches are minor, there have been several breaches demonstrating a persistent failure properly to comply, provided that, if a breach is shown to exist in a contractual term used in more than one contract or in a commonly used commercial practice, only one breach shall be considered to have occurred, irrespective of the number of such contracts or examples of such practice; or

(e) where such breaches relate to interested parties who are currently providing services using BiB boxes, the breaches have been of long duration, no regard being made to the duration of any dispute resolution procedure, and provided that in the case of a breach shown to exist in a contractual term, time shall run for the purpose of this indent only when the circumstances to which the term relates have arisen and for so long as they continue.

Article 4

(Definitions - Annex II)

Article 5

(Addressees of Decision)

[Annex I comprises a list of all the notified agreements; Annex II a list of definitions] ■