

II

(Acts whose publication is not obligatory)

COMMISSION

COMMISSION DECISION

of 11 October 2000

declaring a concentration to be compatible with the common market and the EEA Agreement

(Case No COMP/M.1845 — AOL/Time Warner)

(notified under document number C(2000) 3009)

(Only the English text is authentic)

(Text with EEA relevance)

(2001/718/EC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Community,

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(2) thereof,

Having regard to the Commission Decision of 19 June 2000 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,

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

Whereas:

- (1) On 28 April 2000, the Commission received a notification pursuant to Article 4 of Regulation (EEC) No 4064/89 (the Merger Regulation) of a proposed concentration by which America Online, Inc., (AOL) would merge, within the meaning of Article 3(1)(a) of the Merger Regulation, with Time Warner, Inc. (Time Warner) creating a new entity AOL Time Warner.
- (2) By decision of 19 June 2000 the Commission found that the notified concentration raises serious doubts as to its compatibility with the common market and decided to initiate proceedings pursuant to Article 6(1)(c) of the Merger Regulation and Article 57 of the EEA Agreement.
- (3) A hearing took place on 7 September 2000, on the basis of a Statement of objections, which was sent to the parties on 22 August 2000.

⁽¹⁾ OJ L 395, 30.12.1989, p. 1; corrected version in OJ L 257, 21.9.1990, p. 13.

⁽²⁾ OJ L 180, 9.7.1997, p. 1.

⁽³⁾ OJ C 283, 9.10.2001.

I. THE PARTIES

AOL

- (4) AOL is a publicly held company incorporated in Delaware, United States of America, and based in Dulles, Virginia. AOL defines itself as 'the world's leader in interactive services, web brands, Internet technologies, and e-commerce services' ⁽⁴⁾.
- (5) AOL is primarily a provider of Internet online services. Such services include three Internet service providers (ISP), offering connection via a dial-up modem (dial-up access), and also offering a range of content. The three ISPs are:
- AOL, a subscription fee based service with 23,2 million subscribers worldwide as of June 2000 (5,6 million more than last year),
 - CompuServe, a subscription fee based service with 2,8 million subscribers worldwide, and CompuServe Office, which is targeted at business customers, and has (...) ^(*) subscribers in Germany, and
 - Netscape Online, a subscription-free service in the United Kingdom, with approximately (...) ^{*} subscribers.

In total these ISPs account for 27 million subscribers of which 4,3 million are in Europe.

- (6) AOL also offers two instant messaging services ⁽⁵⁾. They are:
- AOL Instant Messenger, with 61 million registered users, of which, according to AOL, more than 20 million are active users. AOL Instant Messenger active users spend on average almost 2,5 hours on this service every time they log on, and
 - ICQ, with 70 million registered users, of which, according to AOL, more than 20 million are active users. On average, ICQ active users keep ICQ connected for almost three hours a day and actively use it for 75 minutes every day.
- (7) Other Internet services offered by AOL are:
- AOL.COM and Netscape Netcenter, two leading Internet portals,
 - the local content network and community guide on the AOL service and the Internet Digital City (Digital City is basically an entertainment and visitor guide for the main cities in the US),
 - AOL MovieFone, the largest on-line movie listing guide and ticketing service,
 - MapQuest.com, a travel service delivering maps and driving instructions, and
 - the on-line music distribution services Shoutcast, Spinner and Winamp. These services are 'publicly' accessible to Internet users via AOL's worldwide websites.
- (8) AOL operates a number of joint ventures in Europe. AOL Europe, SA (AOL Europe) is presently a 50/50 joint venture with the German media group Bertelsmann AG (Bertelsmann) and provides ISP services in nine European countries. In France, AOL Europe operates via a joint venture between AOL, Bertelsmann, and the French group Vivendi (through its telecommunications subsidiary Cegetel and Canal Plus, the pay-TV operator in which Vivendi owns a controlling interest). Netscape Online is a subscription free Internet service in the United Kingdom.
- (9) AOL also offers software, including the Netscape navigator browser, technical support, consulting and training to business customers through the Netscape Enterprise Group. This is marketed jointly with Sun Microsystems, Inc., through the (Sun-Netscape Alliance) ^{*}.

⁽⁴⁾ AOL's press release announcing its fourth-quarter of 2 000 financial results.

^(*) Parts of this text have been edited to ensure that confidential information is not disclosed; those parts are enclosed in brackets and marked with an asterisk.

⁽⁵⁾ These services allow users to keep track of their friends and colleagues on-line, send instant messages and conduct real time chats with other users. Instant messaging is much quicker than e-mail, and unlike e-mail enables the user to know if the other user is on-line and allows instant conversation.

- (10) On 16 March 2000 AOL and Bertelsmann entered into a four-year agreement to govern the terms of their relationship for content and advertising in light of Bertelsmann's planned exit from AOL Europe. The terms of the agreement will be described in the assessment. However, it should be noted that Bertelsmann has a number of content businesses including CLT-UFA, the film and television programme producer, Pearson, the television programme producer and publisher of the Financial Times, and BMG, its music arm. It also has a joint venture with Lycos, known as Lycos Europe/Comondo, offering mainly Internet access services.

Time Warner

- (11) Time Warner is a media and entertainment company, incorporated in Delaware, United States of America, and headquartered in New York ⁽⁶⁾.
- (12) Time Warner, which describes itself as the leading media company in the world, operates business interests in the following principal areas:
- (a) *Cable television programming*, consisting principally of interests in cable television programming networks, including in Europe the classic movie channel TNT, Cartoon Network and CNN News Group. According to Time Warner's web page, CNN is the world's foremost news brand with more than one billion people worldwide having access to a CNN service. Time Warner participates in a number of European joint ventures. Time Warner has a (40 % to 50 %)* interest in n-tv, a 24-hour German-language television news service, with Holtzbrinck. It also has a (minority)* share in Music Choice Europe, which operates a cable and satellite-delivered digital pay radio service, together with Sony Software Corp., and BSkyB. Together with Universal, EMI and Sony, Warner established a German-language music video channel VIVA, in which it has a (minority)* stake.
 - (b) *Publishing*, consisting principally of interests in magazine and book publishing, including Time, People, Sports Illustrated, Warner Books and Time Life Inc. Time Warner's magazines are United States oriented, although some are also distributed in Europe. In total Time Warner publishes 36 magazines with 130 million readers.
 - (c) *Music*, consisting principally of interests in recorded music and music publishing, including Warner Music Group and its labels Atlantic, Elektra, Rhino, Sire, Warner Brothers Records and Warner Music International, and Warner/Chappell in the music publishing business. Time Warner also has a (less than 10 %)* shareholding in CDnow, a music e-commerce site controlled by Sony.
 - (d) *Filmed Entertainment*, consisting principally of interests in filmed entertainment, television production and television broadcasting, including Warner Brothers Studios, New Line Cinema and the WB Network. In Europe, Warner Brothers operates film production and distribution, distribution of television programming and home video products, and cinemas through a number of joint ventures. Warner Brothers has co-production and distribution agreements with Polygram Holdings Inc. (now part of Universal), Canal Plus and UFA/CLT.
 - (e) *Cable networks*, consisting principally of interests in cable television systems located in the United States of America and not in Europe. Time Warner is one of the leading cable operators in the United States of America with 12,6 million subscribers and 21,3 million homes passed. Time Warner owns part of Road Runner, an on-line service joint venture that provides Internet access and also offers content for cable systems providing broad-band services. Road Runner does not have any operations in Europe.

II. THE OPERATION

- (13) The transaction will be structured as follows: AOL and Time Warner each will merge with newly created subsidiaries of a newly formed holding company, AOL Time Warner. As a result of the mergers, both AOL and Time Warner will become wholly owned subsidiaries of AOL Time Warner.

⁽⁶⁾ Time Warner owns 74,49 % of Time Warner Entertainment Company, LP (Time WarnerE). The remaining 25,51 % of Time WarnerE is owned by MediaOne Limited Partner, whose parent company has agreed to merge with AT&T Corp.

- (14) Following consummation of the merger, AOL shareholders will receive 55 % of AOL Time Warner shares and Time Warner shareholder will receive the remaining 45 %. The initial board of directors of AOL Time Warner will consist of 16 members, of whom eight will be appointed by AOL and eight by Time Warner. The notified operation will thus lead to a concentration within the meaning of Article 3(1)(a) of the Merger Regulation.

III. COMMUNITY DIMENSION

- (15) The combined worldwide turnover of the undertakings concerned is more than EUR 5 billion (AOL: EUR 4 780 million, Time Warner: EUR 25 600 million).
- (16) Each of them has an aggregate EEA-wide turnover in excess of EUR 250 million (AOL: EUR (...)*, Time Warner: EUR (...)*, but they do not achieve more than two-thirds of their aggregate EEA-wide turnover within one and the same Member State. The notified operation therefore has a Community dimension within the meaning of Article 1(2) of the Merger Regulation.

IV. COMPETITIVE ASSESSMENT

A. The relevant markets

On-line music (narrow-band content)

- (17) The on-line music business involves the following activities.

Downloading

- (18) Music downloading is a new form of distribution of music to consumers over the Internet. It is a technology permitting the electronic transfer of an entire music file to a device before playback is allowed. As a result of music downloading, such file remains on that person's device as a permanent copy as opposed to a transient one (see the section on streaming). Music downloading is based on the distribution of digital music files and should not be confused with e-tailing, which involves a physical sale (the sale of physical goods, such as a CD) through the Internet.
- (19) Music is a product well-suited for on-line distribution because it is a digital product with low bandwidth requirements.
- (20) The parties do not consider that downloadable music constitutes a separate market, but are of the opinion that it forms part of the larger market for recorded music. They claim that downloadable music is substitutable for music distributed on physical carriers.
- (21) In contrast, it can be maintained that there are a number of significant differences, which make downloadable music an entirely different business model, and a separate market. For example, from the demand side, consumers can access or buy and receive music immediately (instead of e-commerce, where they have to wait for the CD that they have ordered) from any computer with Internet access, without having to visit a store, no matter the time and the location. They can download individual tracks, instead of buying the entire album or a single, and create customised compilations. They also need, beside the hardware, special software to play the music that they have downloaded. From the supply side, the structure of on-line distribution of downloadable music is completely different from the physical distribution of music (both in bricks and mortar shops and in e-commerce). Music downloading does not involve manufacturing, warehousing, physical sales and distribution. These differences make downloads and physical CDs two completely separate product markets. In addition, downloads and CDs have different pricing structures ⁽⁷⁾ and the price and volume of CDs have not decreased as a result of the offering of music downloads. In the present case, the parties have provided no empirical evidence showing that the pricing of music distributed on physical carriers is restrained by the pricing of downloading or that the pricing of physical CDs has gone down as a result of the offering of music downloads. It is, therefore, concluded that there is an emergent, but separate, market for downloadable music.

⁽⁷⁾ Examples of companies selling downloads over the Internet are CDnow and Musicmaker.

Streaming

- (22) Streaming audio is a method of transmitting audio over the Internet. A streaming audio system transforms a computer into a virtual jukebox. The user 'clicks' on the link to the audio file, which begins to play after a few seconds. The main difference between downloading and streaming is that with the former a music file is transmitted from one computer to another, is stored locally and is accessible directly on the recipient's computer; with the latter the audio file is only temporarily transferred to the user's playing device. Consumers may have access to streamed files that are stored in central 'lockers', accessible via a unique password. Consumers may then access their locker from any Internet enabled device. AOL offers, in one of its sites called Shoutcast.com, a streaming audio system using the Winamp player where users can create on-line music programming or listen to programmes created by other users.
- (23) Streaming is at present generally given free of charge and is financed out of Internet advertising revenues. However, it can reasonably be expected that users will be charged for streaming in the near future. It can be mentioned in this context that following its licensing agreement with Time Warner and Bertelsmann, the Internet music company MP3 has announced plans to launch a subscription music service over the Internet (that is a system based on subscription fees to be paid by users for lockers).
- (24) A company offering music downloads and streaming over the Internet must obtain a license and secure any copyrights required in connection with the use of the music compositions. The copyright holder's consent is thus essential for the on-line exploitation of music compositions. In most cases authors and composers will have assigned their rights to publishers, as there are very few self-publishing authors⁽⁸⁾. The publisher will have the power to decide which rights to assign, to whom and under what conditions. When licensing a certain piece of music to a record company, the publisher will be able to decide whether the record company may distribute the licensed piece of work via the Internet. In particular, the publisher may refuse to grant the 'on-line' distribution right or make it subject to payment of additional licensing fees.
- (25) Therefore, securing the copyright is the first logical and legal step and the pre-condition for the on-line exploitation of music over the Internet. A company holding a dominant position in the market for the licensing of music publishing rights required for on-line delivery would be in a position to play the gatekeeper's role dictating the conditions for the delivery of music via the Internet by refusing to license or threatening to withhold the rights.

Conclusion

- (26) It may be concluded that there is an emerging market for on-line music delivery. For the purpose of the present assessment it is unnecessary to decide whether music downloads and streaming constitute one or two separate product markets as the transaction would in any event lead to the creation of a dominant position.
- (27) As to the geographical dimension of the market for on-line music delivery, the possibilities offered by digital technology imply a geographic market definition which certainly extends beyond national borders and which could be at least the EEA. In any event the investigation carried out by the Commission shows that the transaction would give rise to dominance even if the market were considered to be global in scope. Therefore, the question of determining the exact geographical scope of the market may be left open.

⁽⁸⁾ Music publishing consists, *inter alia*, of the acquisition of rights to musical works and their subsequent exploitation upon remuneration, mostly in the form of a commission charged by the publisher to the author on the revenues generated by the commercial exploitation of musical works. 'Self-publishing' takes place when an author promotes, licenses and administers his own works without the help of a professional publisher.

Music player

- (28) Music downloading and streaming generally rely on the following three technologies:
- (a) *Compression/decompression*, which is used to compress the music for fast delivery over the Internet and decompresses it for playback. Compression reduces the size of a digital music file and thus the amount of information (bits) to be transmitted electronically without a meaningful loss of sound quality. Compression makes music delivery faster and increases storage capacity. At present, compressed files produce sound quality which is virtually the same as a CD. There are a number of companies, which have developed compression and decompression algorithms (codec) used for music files. The most popular compression format is by far MP3 (developed by the Fraunhofer Institut). Other popular formats are Windows Media Audio (developed by Microsoft), G2 (developed by Real Networks), AAC (developed by the Fraunhofer Institut, Sony, AT&T and Dolby Laboratories and licensed by Dolby) and ATRAC (developed by Sony).
 - (b) *Encryption/decryption*, which provides security for digital downloads by 'scrambling' a digital file, so that it can be read only with the proper decrypting software. Some of the companies operating in this area are Audiosoft, IBM, Intel, Mjuice, and Microsoft. In general, these companies provide their technologies to digital rights management companies.
 - (c) *Digital rights management (DRM)*, which helps manage the process of transferring audio files from their source to their recipients. DRM software manages the transfer of a particular song for downloading, verifies its receipt, and creates a record for the transaction. The DRM technology must be interoperable with the encryption technology as encryption is used by most DRM systems to prevent unauthorised access to the content. The most popular DRM systems are Liquid Audio (developed by Liquid Audio), Mjuice (developed by ARTIST Direct), Windows Media Audio (developed by Microsoft), Intertrust (developed by Intertrust) and IBM/EMMS (developed by IBM).
- (29) Record companies format their songs by using a mixture of compression, encryption and DRM technologies. Once a formatted audio file has been downloaded or streamed, users can play it on their PC using a music player, which is the software device incorporated in a PC that finally plays the audio file and provides a user interface (a graphical screen with which the user interacts to operate the basic controls for playing music, such as play, volume, stop, and so forth). A digital file is played back by going through three steps. First a software module called input plug-in decodes the audio file (technically, the file is converted into 'raw' digital audio data); second, the sound quality is adjusted; third, another software module, the output plug-in, plays the music. The player software must be interoperable with the actual compression technology of the file, and, if used, the DRM technology and the encryption technology. The more technologies the player software supports, the more music it will be able to play. Therefore, player software developers have an interest in being licensed as many technologies as possible. Some of the most popular players are Realplayer (developed by Real Networks), Microsoft Media Player (developed by Microsoft), Winamp ⁽⁹⁾ (developed by Nullsoft, a company acquired by AOL in 1999), QuickTime (developed by Apple), and MusicMatch Jukebox (developed by MusicMatch). Most of these software products are normally given free over the Internet; for some others there is a price to pay (for example, the price for Music Match Jukebox is USD 29,99).
- (30) Downloaded music may also be transferred (burnt) on to a physical carrier, such as a recordable CD, a sound card or a minidisk.
- (31) Therefore, there is a market for the supply of player software.

⁽⁹⁾ According to an article entitled 'MP3', by Glyn Moody, in New Scientist of 19 June 1999, Winamp, with 160 000 downloads per day, dominates the music player field.

- (32) As to the geographical scope of the player software market, it is global. The language of the file menu text on music players can be easily changed to suit a multitude of languages. For example, Winamp provides free language packs on its website. The companies consulted expressed the view that the impact of language is minimal: Localisation of player software (that is adapting the software to the needs of a local market) is common and simple to accomplish.

Internet dial-up access (narrow-band access)

- (33) In Telia/Telenor ⁽¹⁰⁾ the Commission identified a demand for the supply of Internet access services and distinguished between dial-up and dedicated access. By dedicated access the user is connected to the ISP through a dedicated fixed line cable link, while by dial-up access the user is connected over a normal PSTN line. From the demand point of view these types of access are two separate product markets. Dial-up access is targeted at residential and business (i.e. small and medium enterprises) customers, while dedicated access is requested mainly by large corporate customers. In BT/ESAT ⁽¹¹⁾ it emerged in the course of the market investigation that within dial-up access it could be possible to distinguish between residential and business (large companies) dial-up access, the latter being provided on the basis of more sophisticated dial-up mechanisms. At this stage it is unnecessary to establish whether residential and business dial-up access constitute two separate relevant product markets since the transaction would in any event lead to the creation of a dominant position in the ISP market.
- (34) It is a common view that the geographic market for ISP dial-up services is essentially national based on the need for a local loop service. In Telia/Telenor, the Commission concluded that this characteristic limits the extent to which existing access markets could be wider than national. This conclusion is also valid in the present case where the relevant geographical market will be held to be each of the nine Member States in which AOL operates (Belgium, Germany, Spain, France, Italy, Netherlands, Austria, Sweden and the United Kingdom).

Paid-for content other than music (broad-band content)

- (35) The Commission has defined a market for paid-for content in Telia/Telenor/Schibsted ⁽¹²⁾. In the course of its investigation the Commission found evidence of the existence of an emerging demand for the one-stop integrated supply of broad-band content via the Internet. This demand is for bundled audio/video content (such as film plus sporting contests plus pop music concerts) via the Internet and as such appears to be separate from the demand for films and TV programmes supplied through more traditional distribution channels (such as pay-per-view, video on demand or DVD/video rental). The different broad-band contents would not be substitutes, but complementary goods. An ISP able to offer such a range of content could be compared to a supermarket offering a wide range of complementary products in a single place. This market would encompass the following content categories.
- (36) As to the geographical scope of this market, on the one hand, due to linguistic requirements of different national audiences for film and TV programming this market is, like those for pay-TV equivalents, likely to be national ⁽¹³⁾. On the other hand, the offer of films over the Internet is mainly focused on US films and programmes (cartoons) which have international appeal and are popular in all the EEA countries.
- (37) For the purpose of the present assessment, there is no need to decide on whether there exists a separate product market for the integrated supply of broad-band content, since it may be concluded that the transaction does not give rise to the creation of a dominant position in this area.

⁽¹⁰⁾ Commission Decision: Case IV/M.1439, Telia/Telenor.

⁽¹¹⁾ Commission Decision: Case COMP/M. 1838, BT/Esat.

⁽¹²⁾ Commission Decision in Case JV 1.

⁽¹³⁾ See Commission Decision 1999/242/EC in Case IV/36.237 — TPS (OJ L 90, 2.4.1999, p. 6) point 43.

Broad-band Internet access

- (38) In the course of its inquiry the Commission found evidence of the existence of a developing demand for the provision of residential broad-band Internet access. Broad-band access provides high-speed Internet access and delivers greater audio and visual functionality than dial-up (narrow-band) access. This includes streaming video and audio, video e-mail, interactive advertising and video conferencing, none of which can be delivered effectively over traditional narrow-band lines.
- (39) Broad-band access is not yet widely available in Europe and is generally more expensive than dial-up access.
- (40) The latest generations of broad-band alternatives are digital subscriber line (DSL) and cable modems. DSL is a new technology using existing telephone network wiring to deliver an all-digital connection. DSL can share a wire path with a conventional telephone line so that the user can receive high-speed service and conventional telephone service on the same wire. DSL provides a single data channel and a dedicated point-to-point circuit, usually used to connect a home to an ISP. Cable modems deliver multi-megabit speeds by using the local cable TV network.
- (41) The market for broad-band Internet services appears to be essentially national, based on the need for the installation of a physical connection (telephone line for DSL and cable for cable modem) between the customers and the ISP. For the purpose of this assessment, it is not necessary to conclude whether there exists a separate broad-band Internet access market, whether DSL, cable and other forms of fast Internet access belong to the same relevant product market, and whether this market is national, since, after consideration, the conclusion has been reached that the transaction does not give rise to the creation of a dominant position in this area.

B. Assessment**1. Introduction***The relationships between AOL and Bertelsmann*

- (42) AOL and Bertelsmann, the German media company, have been partners since the beginning of the commercialisation of the Internet. In 1995 they established the 50/50 joint venture AOL Europe, which has permitted AOL's expansion in Europe. In addition, AOL and Bertelsmann, together with Vivendi, have a joint venture in France.
- (43) In March 2000 AOL and Bertelsmann entered into a joint promotion, distribution and sales agreement. The parties' main obligations under the agreement may be summarised as follows:
- (a) *Bertelsmann's obligations.* Bertelsmann will spend (...) for advertising on AOL over four years and will receive preferred terms for this advertising, (...)*. Bertelsmann will (promote and generate)* new subscribers for AOL Europe. If Bertelsmann's promotion is less successful than foreseen, Bertelsmann is prevented from marketing any other ISP until the shortfall is remedied. Bertelsmann will supply AOL with content (on preferred)* terms.
- (b) *AOL's obligations.* AOL will enter into negotiations with Bertelsmann's affiliated e-commerce retailers *barnes&noble.com* and Bertelsmann Online (BOL) to structure e-commerce relationships as its (...) e-commerce partners. This means that these companies, together with another on-line retailer, will receive preferential placement (such as anchor tenancy, which means having a permanent presence by means of a logo or advertisement through which a visitor can go directly to the advertiser's website) on the appropriate AOL pages. AOL will enter into negotiations with a number of other Bertelsmann web properties and businesses to offer (...) promotions to them. Finally, AOL will negotiate in good faith if Bertelsmann approaches AOL regarding an agreement to carry promotion for on-line retailing of books and music on a specific AOL property (such as anchor tenancy or banner advertisement for a shorter period of time) (...)*.

(c) *Mutual obligations.* AOL and Bertelsmann agree to exchange (...) promotional barter over four years (this means that AOL will provide a package of on-line promotions for Bertelsmann in exchange for a package of on-line and off-line — such as TV, radio and print promotions to be provided by Bertelsmann). Moreover, if AOL merges with Time Warner, then AOL and Bertelsmann are committed to (engage in additional cross promotion)*. Finally, AOL and Bertelsmann agree to work to ensure that Bertelsmann's music is formatted to be playable by AOL's Winamp player software. In particular, the agreement provides that Bertelsmann will use commercially reasonable efforts to ensure that any DRM system it uses will be compatible and ready to use with any AOL media player. Alternatively, according to the agreement, AOL may decide to reformat such system or Bertelsmann's content to be compatible with its player (...) and Bertelsmann, whether or not it is commercially reasonable for Bertelsmann, will permit AOL to do so and reasonably cooperate with AOL in such efforts.

- (44) In conclusion, the Commission is of the opinion that these structural links, in particular, and, to a lesser extent, the contractual links between AOL and Bertelsmann give Bertelsmann a strong incentive to appoint AOL as its preferred content carrier that is to make its content available preferentially through AOL). This needs to be taken into account when assessing the position of AOL/Time Warner in the market for on-line delivery of music. Therefore, the market shares of Bertelsmann have been added to those of Time Warner in the markets for performance and mechanical rights to measure the market power enjoyed by the new entity.

The Time Warner/EMI transaction

- (45) A further factor is that on 23 January 2000 Time Warner and EMI concluded an agreement involving the combination of their recorded music and music publishing businesses. However, that deal has been abandoned.

On-line music

- (46) AOL/Time Warner will control Time Warner publishing rights and, mainly, because of the joint ventures and, to a lesser extent, the agreement with Bertelsmann, AOL will have access to Bertelsmann's music library and corresponding rights. As a result of these arrangements AOL will secure access to the leading source of music publishing rights. Time Warner and Bertelsmann account for approximately (30 % to 40 %)* of the music publishing rights for both mechanical and performance rights⁽¹⁴⁾ in the EEA (10 % to 20 %)* Time Warner and (10 % to 20 %)* Bertelsmann). The next largest publisher is EMI with (10 % to 20 %)* in performance rights and (15 % to 25 %)* in mechanical rights, followed by Universal with over 10 % in mechanical rights and nearly 10 % in performance rights, and Sony with substantially less than 10 % in both rights categories. In Spain, Germany, the Netherlands and Italy their combined market shares are between (25 % to 35 %)* and (30 % to 40 %)*. In the Nordic area, Greece and Portugal, their combined market shares range from (40 % to 50 %)* to (50 % to 60 %)*⁽¹⁵⁾.
- (47) One entity controlling such a sizeable music catalogue could exercise substantial market power, by refusing to license its rights, or threatening not to license them, or imposing high or discriminatory prices and other unfair commercial conditions on its customers wishing to acquire such rights (such as Internet retailers offering music downloads and streaming).
- (48) The parties contest this reasoning, which, in their opinion, would rest on a fundamental misunderstanding of the AOL/Bertelsmann relationship. The parties maintain that the agreement with Bertelsmann is on a non-exclusive basis and thus precludes control by AOL of Bertelsmann music.
- (49) The Commission does not share the parties' point of view. The Commission is of the opinion that, because of its financial interests in AOL Europe and the joint venture in France, Bertelsmann has an economic incentive to cooperate with AOL.

⁽¹⁴⁾ Mechanical rights are those necessary for the licensing of the reproduction of protected musical works by mechanical means, such as CDs and MDs to a record company. Performance rights are those necessary for the licensing of the public performance of protected musical works to commercial users such as television, radio, cable and satellite stations, concert organisers, discos, hotels, restaurants, etc. Both rights must be licensed for the on-line exploitation of musical works over the Internet.

⁽¹⁵⁾ A publisher controlling the publishing rights in one particular EEA country would be able to control the exploitation on-line of the corresponding musical works, at least, in that country.

- (50) The parties consider that the Commission fails to take into account the role of collecting societies. According to the parties, in most circumstances the collecting societies and not publishers control the rights necessary to authorise Internet exploitation of their music, because those rights have been granted to and controlled by the collecting societies. Music publishers could not thus withdraw the on-line publishing rights from the collecting societies because in order to do so they should withdraw all the rights for a work as well as obtaining consent from any author who in turn must withdraw all their rights from the collecting societies, none of which is practical nor profitable.
- (51) The Commission has found that it is currently unclear, in the music business, whether the collecting societies and not the publishers control the exploitation of on-line music rights. Even assuming that the collecting societies control those rights, there are no legal barriers for publishers to withdraw certain categories of rights from the collecting societies. This can be done for any of the 'categories' or 'forms of utilisation' defined in the GEMA I ⁽¹⁶⁾ and GEMA II ⁽¹⁷⁾ decisions. This means that withdrawal for certain mechanical and/or performing rights can take place. The applicable rules show that for most Member States, with the exception of the United Kingdom and Ireland, the authorisation of the writer or composer may be needed for the publisher to withdraw its rights from the collecting society. The writer or composer can of course be convinced that the withdrawal of certain rights will be economically beneficial to him.
- (52) In the digital Internet environment, the Commission has found that the exercise by rights-holders of an exclusive right to authorise or prohibit any communication to the public of copyrighted works, by wire or wireless means raises possibilities for a dominant publisher to exercise even greater market power on the licensing of such works by digital means when compared to the traditional music publishing environment.
- (53) AOL could set up its own business distributing music over the Internet or take over an existing business (...)*. The market investigation carried out by the Commission indicates that, given the critical mass of music content controlled by the new entity and AOL's Internet distribution strength in the USA, competing music labels will feel compelled to join AOL. AOL is the largest ISP in the world and is by far the largest ISP in the USA. AOL can rely on its two own Instant messaging communities (ICQ and Instant Messenger) which account together for over 130 million registered potential users and more than 34 million regular users. In addition AOL is the most visited portal website in the United States of America with 59 million unique visitors ⁽¹⁸⁾ in May 2000 ⁽¹⁹⁾. So ISP can display such a formidable on-line distribution network. Moreover, because of the attractiveness of its content, AOL is much better than the other ISPs in retaining the attention of the users for longer periods (this is generally referred to as stickiness).
- (54) Record companies selling international pop music, which by definition has worldwide appeal, in order to achieve maximum distribution of their products will have to secure distribution through AOL's 'on-line outlet'. AOL could use its position either to charge supra-competitive prices for the carriage of content or to restrict access to the on-line music market by favouring Time Warner and Bertelsmann and degrading the quality of access for competing content providers.
- (55) In addition to that, the Commission's market investigation has shown that the combined entity would be in a position to dictate the technical standards (for a description of the relevant technologies and music player device) for delivering music over the Internet. It is to be stressed that, according to the AOL pre-merger document referred to in recital 53, one of the missions of the Time Warner/AOL deal is (to ensure mass adoption of digital download delivery standards)*. According to the same document, this music strategy might be complemented by (a policy of strategic acquisitions)*.

⁽¹⁶⁾ Commission Decision 71/224/EC, Case IV/26.760 — GEMA (OJ L 134, 20.6.1971, p. 15).

⁽¹⁷⁾ Commission Decision 72/268/EC, Case IV/26.760 — GEMA (OJ L 166, 24.7.1972, p. 22).

⁽¹⁸⁾ Unique visitors means estimated number of different individuals who access a specific site among the total number of projected individuals.

⁽¹⁹⁾ According to Media Matrix.

- (56) This result could, according to the Commission's market investigation, be achieved by developing or acquiring a non-open proprietary formatting technology for all the downloads and streaming of Time Warner tracks. By releasing all its music on proprietary codes or formats, the new entity would prevent its huge music content from being downloaded or streamed through competing technologies. Because of the breadth of Time Warner and Bertelsmann publishing rights, the popularity of their catalogue, AOL's know-how in the Internet field and its huge Internet community, the new entity would be in a position to impose its technology or formatting language as the industry standard. For example, the new entity, by threatening not to license its technology, could force developers of music players not to support competing technologies. Competing record companies wishing to distribute their music on-line would then be required to format their music using the new entity's technology. Because of its control over the relevant technology the new entity would be in a position to control downloadable music and streaming over the Internet and raise competitors' costs through excessive license fees.
- (57) The new entity could also lever AOL's Internet distribution strength in the United States of America in order to impose its proprietary technology. The new entity could accept to distribute the products of competing labels (such as International pop records which are sold worldwide) on condition that those labels adopt its technology. Record companies would be ready to pay a high price for having access to AOL.
- (58) The parties maintain that the new entity would have neither the power nor the incentive to pursue an exclusive formatting strategy. In addition they say that the field is dominated by established, well founded competitors, including Microsoft, Intel, IBM Sony Fraunhofer Institut and AT&T. Any of those entities alone could put up formidable resistance to any attempt by the new entity to develop and impose a non-open proprietary format. The Commission considers that this argument may be dismissed since none of those competitors, with the exception of Sony, is vertically integrated and thus controls any music publishing rights. As regards Sony, the size of its music library (on average (1 % to 10 %)* of all the music publishing rights) is not comparable to those of the new entity. Therefore, the Commission considers that Sony's music library is not sufficiently large to permit Sony to impose a formatting strategy. It can be noted that Sony has already developed a proprietary compression format (ATRAC), which has not become the industry standard, but competes with a number of other formats.
- (59) In conclusion, the Commission considers that the new entity would become dominant in the market for on-line music.

Music player

- (60) The Commission's market investigation has shown that the combined entity, instead of developing a proprietary technology, could alternatively decide to format Time Warner music to make it compatible only with Winamp, which would become the only music player which could be used to play its music.
- (61) AOL has also the right to reformat Bertelsmann's music to make it compatible with Winamp. It has been mentioned earlier that Bertelsmann is contractually obliged to ensure that its music is formatted to be playable by Winamp. Alternatively, according to the agreement, AOL may decide to reformat Bertelsmann's content to make it compatible with its player at its own expense and Bertelsmann's, whether or not this is commercially reasonable for Bertelsmann. Bertelsmann has to cooperate with AOL in such efforts.

- (62) Winamp could support the other formats and technologies (e.g. MP3 or WMA), with which competing record companies release their music (or most of such music). As a result, Winamp would become the only music player in the world able to play virtually all the music available on the Internet. The other record companies would have no incentive to format their music using proprietary standards because they do not have a music-player software (such as AOL's Winamp), do not have an on-line music distribution network comparable to AOL's, and do not have the same critical mass in terms of back-catalogue. By refusing to license its technology, the new entity would impose Winamp as the dominant music player as no other player would be able to decode the proprietary format of Time Warner and Bertelsmann music. Given their technical limitations, competing music players, will exert no competitive constraint on the pricing of Winamp. Therefore, as a result of the transaction the new entity will control the dominant player software and could charge supra-competitive prices for it.
- (63) The parties maintain that a strategy based on reformatting their music to make it compatible only with Winamp would be a commercial disaster. They maintain that, according to the latest statistics, Winamp reaches only (10 % to 20 %)* of music listeners on-line (the most popular players would be Real with (70 % to 80 %)*, Microsoft Media Player with (40 % to 50 %)* and QuickTime with (20 % to 30 %)*). Therefore, it would be against the commercial interest of Time Warner and Bertelsmann to release their music in a format playable only with Winamp since they would reach only (10 % to 20 %)* of all the on-line music audience. The Commission is of the opinion that the fact that Winamp (which, according to AOL's website, is 'leader in Internet music') would currently reach a more limited number of listeners than competing players is irrelevant once it is assumed that AOL can reformat Time Warner and Bertelsmann music. Music players can be freely and easily downloaded on a PC, which may support more than one player. The key to the success of a player is of course its ability to play the widest range of music. In the present case the music catalogue reformatted by AOL would drive on-line listeners to Winamp and not the reverse. Internet users wanting to download, for example, a song of a Time Warner's artist would at the same time be asked to download Winamp, which would shortly become the most popular player in the world.
- (64) The parties also note that Winamp currently contains no significant proprietary technology, but all the core technological components come from unaffiliated third parties. It can be replied to this argument that nothing will prevent the new entity from developing or licensing such a proprietary format. For example, AOL has already entered into an agreement with Intertrust, under which it will use Intertrust DRM system. This agreement, which gives Intertrust the status of preferred technology provider for AOL, could be used as a basis for the development of the proprietary technology.
- (65) It may, therefore, be concluded that the new entity would become dominant in the market for music software.

Internet dial-up access

AOL's position in the United States of America and its business model

- (66) AOL is by far the main ISP in the United States of America with, according to the parties, (40 % to 50 %)* of the market. (...)*
- (67) AOL's growth model in the United States of America has been (at least partly) based on the unique features of AOL. AOL offers a large amount of easy-to-use content, rather than just providing a portal for accessing content lodged anywhere on the Internet.
- (68) Part of the content and related services (such as forums, magazines, chat boards, reference databases and news services) offered by AOL is proprietary and can be accessed only by subscribers and not by the general Internet public ⁽²⁰⁾.

⁽²⁰⁾ See 'The Internet — the rough guide 2000', by Angus J. Kennedy, p. 41.

- (69) AOL's size in the United States of America has also allowed it to acquire content on a preferential basis, as is evidenced by the deal with Bertelsmann. AOL's content and related services, combined with a huge subscriber base creates network effects, which deprive a subscriber of any incentive to abandon AOL. Newcomers are also willing to join AOL to be able to communicate and interact with its large Internet community. As will be described below, the network effect works both ways: more subscribers bring more content and vice versa.
- (70) AOL's service has also been described as a 'walled garden' or a 'one-stop shop', where the generality of Internet users would have the impression they can find whatever they want. This would appear to mean that a large number of services and content are offered on the AOL homepage. Many of these are exclusive to AOL. Once the user clicks on these hyperlinks he enters a cul de sac from which he can only access other affiliated services and certain key external content. However, AOL's customers can be guided away from content which competes too aggressively with AOL. The breadth of AOL services and content could give rise to considerable switching inertia as users may tend to identify AOL with the Internet and not look for competing sites. Therefore, the more content AOL acquires and the bigger its community of users, the less reason for a subscriber to abandon AOL's walled garden, and the more reason for potential Internet users to join AOL. In this context, a distinction has to be drawn between passive and active Internet users. The former are inexperienced users who tend to stay with AOL, clicking on the hyperlinks as displayed by AOL. In contrast, active Internet users are experienced users, who look for specific pieces of information and are able to find their own way through the Internet. According to a presentation by Bob Pitman, AOL's chief executive officer, evidence shows that AOL's subscribers spend (a considerable amount)* of their surfing time within AOL (stickiness). This shows that passive users represent the majority of AOL's customers.
- (71) According to AOL, the Commission misunderstands AOL's business model. AOL would not be a walled garden since it would give its online subscribers unrestricted ability to access the Internet content of their choice, including competing web sites and products and content having no affiliation or promotional connection to AOL. AOL claims that a strategy restricting subscribers' access to non-AOL content would be self-destructive since AOL would lose customers and the corresponding advertising and promotional revenues. Moreover, some surveys attached to AOL's reply to the Commission's Statement of objections show that when it comes to relevant content viewing (that is on-line usage excluding chat and e-mail), AOL users spend (a significant part)* of their time off AOL.
- (72) The Commission considers that these surveys are misleading since they consider the time spent by users on non-AOL sites, within the network, as time off AOL. This is flatly contradicted by an AOL internal document (the presentation by Bob Pitmann referred to in recital 70), according to which 'the content that people go to within the four walls of AOL is (a significant part)* of that usage. Only (a smaller part)* goes to the Internet at large, which many of you know, is the great differentiator between us and a straight ISP service which just sort of hooks into the Internet and has almost 100 % usage of just Internet-at-large content'.
- (73) As regards the walled garden, the Commission found that the generality of AOL users tend to surf the Internet through the navigational tools displayed on AOL pages (such as links to third parties' web sites), rather than using search engines or typing the address of the sites they are looking for. In this context, it can be useful to reiterate that beside basic Internet connectivity, AOL aggregates and packages content from the Internet for the benefit of its customers (these services are similar to those provided by an editor, who compiles and arranges materials written by others). In accomplishing this editorial task, AOL sells promotions and leases shopping areas within its network to content providers. The contracts concluded by AOL contain restrictive clauses prohibiting promotions or links to websites outside the AOL network or the sale of products competing with those of AOL. As a result of these restrictions AOL users are kept within AOL network, even though they have the impression they are surfing the Internet without restrictions.

- (74) As regards AOL's lack of economic incentive to engage in exclusionary conduct, the Commission notes that the parties' arguments are focused on a scenario in which AOL would absolutely refuse to carry competing third party content. AOL, however, disregards a more realistic scenario in which AOL accepts to carry unaffiliated content, but on discriminatory terms. The Commission considers that the vertical integration of Time Warner content with AOL Internet services will change AOL's incentive in setting access prices to unaffiliated content providers. After the merger AOL will take into account, in its dealing with third party content providers, the impact of competition on Time Warner's profitability. Therefore, AOL will have an incentive to toughen the terms of trade and increase the price of access in order to protect Time Warner's profitability and compensate for Time Warner's reduced revenues because of competition.

AOL's position in Europe

- (75) In the European Internet dial-up market, which is still largely dominated by the incumbent telephone companies because of their control over the local loop, AOL is the only ISP, which has a presence in the majority of the Member States. It is the second largest ISP in France, Germany and the United Kingdom.
- (76) According to the parties the market position of AOL and its affiliates, on the basis of numbers of customers, in its four main markets is as follows:
- (a) In France, with (10 to 20 %)* (AOL (10 to 20 %)* and CompuServe (less than 10 %)*, AOL is the second largest ISP behind Wanadoo, owned by France Telecom, which has a market share of (30 to 40 %)*.
 - (b) In Germany, with (10 to 20 %)* (AOL (10 to 20 %)* and CompuServe (less than 10 %)*, AOL is the second largest ISP behind T-Online, owned by Deutsche Telecom, with (50 to 60 %)*. It is to be stressed that AOL's market position is enhanced by the fact that its partner Bertelsmann, which owns 50 % of AOL Europe, has joint control of Lycos Europe. Comundo, the dial-up access ISP of Lycos Europe has (less than 10 %)* share of the German market.
 - (c) In the Netherlands, AOL (CompuServe) has (less than 10 %)*, making it the eighth largest ISP.
 - (d) For the United Kingdom, see recital 78 and following.
- (77) In Europe Internet penetration is on average far below the United States of America. This is mainly due to the fact that in the United States of America Internet access and usage is much cheaper than in Europe, where local calls are generally metered. In the United States of America local call charges are unmetered and most ISPs finance their operations earning flat-rate subscriptions from subscribers, Internet advertising revenues (that is income from selling advertising space on their websites) and e-commerce commissions (that is a share of the price of an item sold on a webpage accessed through a hyperlink on the ISP's site). The Internet in Europe is poised to take off with falling costs of access, facilitated by the unbundling of the local loop in telecommunications, and the promotion of unmetered access. Local loop unbundling allows more competitors to operate without building competing local loop infrastructure and to compete with the incumbent telecom operator. With falling costs of access, content should become the crucial factor determining an ISP's competitiveness.

AOL's position in the United Kingdom

- (78) Unlike France and Germany, where the dominant ISPs are paying ISPs controlled by the incumbent telecom operators, the United Kingdom Internet market is characterised by the presence of a number of subscription-free ISPs. In terms of customer number, the leading ISP is Freeserve. According to the latest market figures (in terms of active subscribers) of June 2000, the main market players are:
- Freeserve: (15 to 25 %)*,
 - AOL: (15 to 25 %)* (AOL UK (less than 10 %)*, Netscape On Line (less than 10 %)* and CompuServe (less than 10 %)*),
 - Line One: (less than 10 %)*,

- Virgin Net: (less than 10 %)*,
- Breath Online: (less than 10 %)*,
- BT Internet: (less than 10 %)*.

(79) Assessing ISPs' market position only by reference to numbers of subscribers may, however, be misleading. Many occasional Internet users may subscribe to subscription-free ISPs and use them only rarely, thus generating very little interconnection revenues. An alternative method to measure the market position of an ISP may be on the basis of revenues. The parties have not been able to provide market shares on a revenue basis since most ISPs are not public companies and consequently do not publish their results. However, if market shares were calculated on this basis, AOL's market share would be much larger than Freeserve's and would be by far the largest in the United Kingdom. Freeserve's Internet dial-up revenues (i.e. interconnection revenues) were GBP 9,6 million for the year 1999/2000, while AOL's gross Internet dial-up revenues were GBP (...) (that is interconnection revenues plus subscription fees), its net revenues (that is to say with subscription fees netted of network costs, namely what AOL pays to the local telephone operator) were GBP (...)*. Therefore, AOL's revenues are (several times)* higher than Freeserve's. AOL revenues are (higher than)* the sum of the Internet revenues of its four main competitors (Freeserve, Line One and Virgin Net, which together have (35 to 45 %)* of the subscribers in the United Kingdom). If market shares were calculated on the basis of Internet revenues AOL could certainly be considered by far as the largest Internet dial-up access provider. It is to be borne in mind that, contrary to what is maintained by the parties, a market share analysis based on revenues is not unprecedented. In Telia/Telenor, the Commission calculated the market shares in the Internet dial up market both in terms of revenues and number of subscribers.

(80) On the basis of subscribers, AOL used to be the sole leader with a market share of (35 to 45 %)* (AOL UK (15 to 25 %)* and CompuServe (15 to 25 %)* before Freeserve entered the market in September 1998. Freeserve's success is due to the fact that, unlike AOL, it offers subscription-free Internet access (where subscribers pay only for telephone calls) and contribute to drive down the cost of usage of the Internet. However, Freeserve has a short operating history and a fragile financial situation. As of 29 April 2000 Freeserve had incurred a net loss of approximately GBP 18,4 million and an operating loss of GBP 26,4 million. According to recent analysts' forecasts, Freeserve would incur pre-tax losses of GBP 61 million in 2001, compared with previous estimates of GBP 27,4 million. Freeserve's precarious financial situation and its bad results cast doubts on its future viability and credibility as a competitor of much larger, financially stronger multimarket companies, such as AOL. In general, financial analysts are calling into question the soundness of the 'free' Internet access business model. It is to be borne in mind in this connection that the other two United Kingdom free Internet access providers, LineOne and VirginNet, have recently cancelled and delayed their access offerings⁽²¹⁾. In the face of this it cannot be excluded that, at least in the United Kingdom, the United States subscription-based Internet access model will prevail in the future.

(81) In an environment of subscription-based Internet access, ISPs which are able to justify their subscription fee by offering attractive content will succeed. This is confirmed by a recent report from Jupiter Communications which states that 'AOL continues to be the king of content among portals and ISPs. The average 30 minutes consumers use per day is well deserved for AOL's high-quality content and e-commerce offers'⁽²²⁾. Unlike its competitors which do not own proprietary content, AOL would be able to bundle Time Warner's and Bertelsmann's huge music content portfolio with Internet access and proprietary services and give its subscribers exclusive or preferential access to that content (AOL's subscribers could, for example, be given the possibility of accessing Time Warner music several months before non-AOL subscribers).

⁽²¹⁾ See 'Setbacks cast doubts on "free" Net access', by Chris Ayres, in The Times of 20 July 2000.

⁽²²⁾ Report by Jupiter Communication, 'Competitive landscapes, UK market — Fourth Quarter 2000'.

- (82) The critical mass of this content coupled with AOL's Internet distribution strength in the USA will act as a magnet attracting further content to AOL's 'on-line store/essential facility'. Music is a substantial attraction and has a racheting effect which will draw new subscribers to AOL. In the course of its investigation, the Commission has found that music is one of the most popular and sought after elements of Internet content.
- (83) There are a number of possibilities for promoting AOL Internet dial-up services through Time Warner's content. AOL could, for example, offer attractive Internet/music packages using music as a promotional tool or a loss-leader (such as subscribe to AOL and get Time Warner and Bertelsmann music free for a month, or subscribe and listen to a popular artist's new album which has not yet been released to the public). Music can easily be distributed on-line via narrow-band connections as it is already a digital product, has low bandwidth requirements, and its core target audience is similar to the core group of Internet users. AOL may use on-line music as a platform to attract sufficient new subscribers to attain a dominant position on the Internet dial-up access market. AOL could also adapt Time Warner and Bertelsmann CDs to carry AOL software thereby encouraging consumers to register with AOL or get AOL for free. It can be noted in this context that, according to the AOL/Bertelsmann agreement, one of the promotion tools which may be used by Bertelsmann to achieve the subscriber targets (set out in recital 43) is providing AOL with the opportunity to burn its software into Bertelsmann CDs, DVDs and CD-ROMs and include stickers and flier materials promoting such integration of the AOL software.
- (84) The parties maintain that AOL's business model will not be altered by the merger with Time Warner. AOL and Time Warner have stated that they do not intend to pursue a strategy of exclusively promoting or distributing Time Warner music via AOL. The parties claim that the promotional revenue generated from broad promotion and distribution far outstrips any gains achieved from exclusive fulfillment opportunities. The lost sales that are not realised when only a portion of music is offered for sale and the promotional value of those sales cannot be recouped by even substantial increases in sales of the promoted content. When the lost 'viewership' of subscribers caused by not promoting the most popular music are factored in, the profit for a combined AOL/Time Warner plunges even further below the non-exclusive model. (...) * The result is that AOL current promotional model (that is broad promotion and distribution) generates greater profits than any competing exclusive distribution model.
- (85) The Commission is of the opinion that AOL's analysis is based on a static view of the music distribution market, which does not factor in the synergies and changes which will be brought about by the merger. For example, the parties' reasoning does not take into account the fact that the critical mass of music content on AOL's website, Time Warner and Bertelsmann, will attract music from other record companies. Because of its library of content and its distribution network, competing record companies would feel obliged to join AOL, which would end up by having access to all the music. The parties also fail to take into account that AOL by promoting Time Warner and Bertelsmann music exclusively or preferentially through AOL (that is by denying access to its content or charging supra-competitive prices to other ISPs) will attract more Internet subscribers and thereby increase AOL's importance as a carrier for competing content providers. Finally, it is to be borne in mind that the development of new proprietary technologies or formats for music delivery via the Internet would by itself suffice to change AOL's business model.
- (86) It is not necessary to conclude on whether the transaction could lead to the creation of a dominant position in the dial-up Internet market in the United Kingdom since this possibility is negated as a result of the impact of the remedies given by the parties on music.

Broad-band content

Films and TV programming

- (87) The notified transaction involves, *inter alia*, the vertical integration of Time Warner's film and television library with AOL's Internet network and on-line distribution services.
- (88) The new entity will be the first vertically integrated broad-band content provider. The Commission is of the opinion that a company able to bundle broad-band Internet access with a vast array of attractive broad-band content (and music) will have a considerable competitive advantage over non-integrated content providers or firms able to supply a more limited range of content.
- (89) In the course of the procedure a number of concerns were expressed about the possibility for AOL to lever its dominant position in the United States of America into the EEA. AOL is the largest ISP with the largest Internet community in the world. It is the undisputed leader in the United States of America and is the only ISP having a presence in most European countries. AOL's two instant messaging services constitute a formidable distribution tool and a network of potentially approximately 130 million users. IM and ICQ could be used to permit simultaneous audio file sharing among users. IM and ICQ users could watch a Time Warner film and chat simultaneously about the film. They could then form chat rooms and fan clubs and promote such content through discussion. The messaging communities could also be used to implement loyalty programmes, such as send a Time Warner film to 10 users and receive a discount on streaming your next film. Moreover, as a result of the transaction AOL will have access to the broad-band cable infrastructure of Time Warner, one of the leading cable operators in the United States of America.
- (90) Given its reach, its formidable customer base, and its Instant messaging communities, the Commission's market investigation has shown that third parties, and in particular international media and entertainment companies marketing their products worldwide, must have access to AOL in the United States of America in order to secure maximum distribution of their content. In order to dispel any doubts in this respect, the parties have committed themselves that for three years following the completion of the AOL Time Warner merger, AOL agrees that it will not, as a condition of entering into a content carriage deal for its US online service, require that the content provider enters into a content carriage arrangement with any AOL-affiliated ISP in the EEA. The Commission has taken note of this commitment.
- (91) As regards Time Warner content, Warner Brothers has a significant position as a supplier of content for this market as a major Hollywood studio. Market shares of film producers depend on the number of hits in any given year. Warner Brothers, in terms of value of films at the box office in Europe, will have a market share between 10 % and 20 % in any given year. For example in 1997 Warner Brothers was the second most successful studio with (10 to 20 %)*, but in 1995 Warner Brothers led with (10 to 20 %)* ⁽²³⁾. Time Warner has an extensive English language TV programme library and a number of worldwide hits (such as ER and Friends). However, in the EEA Time Warner is not a unique or dominant supplier of broad-band content. Time Warner's market share for TV programme production for broadcast is below (less than 10 %)* in every EEA country.
- (92) Against this background, it may be concluded that the combination of Time Warner and AOL will not lead to the creation of a dominant position in the market for broad-band content in the EEA.

⁽²³⁾ European Audiovisual Observatory Statistical Yearbook 1998, p. 92.

Internet broad-band access

- (93) Time Warner's vast array of video and film properties (such as CNN and Warner Brothers Film library) are ideally suited for distribution via high-speed Internet connections. The new entity could lever Time Warner's broad-band content into the emerging high-speed Internet access market in Europe. To this end AOL could use content as a loss leader and/or bundle its content with AOL subscriptions. However, neither AOL nor Time Warner own any transmission infrastructure in Europe, which is characterised by the presence of well established incumbent cable and telephone companies. Time Warner owns a large cable infrastructure in the United States with approximately 12,6 million subscribers served by the group as of the end of 1999, but has no interest in any European cable system.
- (94) Given this starting point, the Commission, after examination, considers that there is no credible basis for concluding that, in the foreseeable future, the new entity will dominate the emerging broad-band market in the EEA. Therefore, the transaction will not give rise to a dominant position in this area.

V. UNDERTAKINGS PROPOSED BY THE PARTIES

- (95) In order to resolve the competitive concerns identified by the Commission, the parties submitted undertakings on 20 September 2000. The proposed undertakings may be summarised as follows:
- (a) The Parties have put in place a mechanism pursuant to which Bertelsmann will progressively exit from AOL Europe SA (AOL Europe) and AOL CompuServe France SAS (AOL France).
 - (b) The Parties have put in place measures until such exit is complete to ensure that Bertelsmann neither exercises control of AOL Europe or AOL France, nor affords non-arms-length treatment to AOL:
 - (i) in AOL Europe, Bertelsmann has renounced all of its contractual veto, consent, and approval rights; as to AOL France, it has agreed to exercise such rights on AOL's behalf and at its direction,
 - (ii) AOL has also caused AOL Europe to issue shares equal to 1 % of all of AOL Europe stock to an investor who is not controlled by or affiliated with Bertelsmann AG. Such issuance reduced Bertelsmann AG's shareholding and voting rights below 50 %,
 - (iii) AOL is undertaking that the CEOs of AOL Europe, AOL France and other affiliates of AOL Europe will remain unaffiliated with Bertelsmann,
 - (iv) AOL Time Warner will not take any action that will result in Bertelsmann music being available on-line exclusively through AOL or being formatted in a proprietary format that is playable exclusively on an AOL music player,
 - (v) AOL Time Warner will not require Bertelsmann to exclusively promote AOL's ISP services,
 - (vi) AOL will take all reasonably necessary action to ensure that Bertelsmann does not exercise operational control or negative control of either AOL Europe or AOL France within the meaning of the EC Merger Regulation.
 - (c) AOL has undertaken to forego certain rights under its Marketing Agreement with Bertelsmann:
 - (i) AOL will not exercise its rights under the Marketing Agreement to reformat Bertelsmann music content to make it compatible with AOL's media player in a manner that would promote or favour a format that is not available by license to third parties on reasonable commercial terms,
 - (ii) AOL will not enforce any provision in the Marketing Agreement which prohibits Bertelsmann from promoting third-party ISPs.
 - (d) An independent compliance monitor will be appointed to ensure compliance by AOL Time Warner with the undertakings concerning Bertelsmann until Bertelsmann exits from AOL Europe and AOL CompuServe France.

VI. ASSESSMENT OF THE PROPOSED UNDERTAKINGS

- (96) The Commission has examined the proposed mechanism under recital 95 point (a) and considers that it will permit to sever the structural links between AOL and Bertelsmann in a timely way. This will prevent the new entity from having access to the leading source of publishing rights ⁽²⁴⁾, necessary for the on-line exploitation of music over the Internet, and consequently will prevent the emergence of a dominant position in the on-line music, music player and Internet dial up market. The interim measures under points (b) and (c), and the monitoring exercise, provide sufficient guarantee that, before Bertelsmann's exit from AOL Europe and AOL France, the relationships between Bertelsmann and AOL will be at arm's length.
- (97) In conclusion, the Commission considers that the parties' final proposal for remedies removes all the identified competition concerns raised by the transaction in the EEA,

HAS ADOPTED THIS DECISION

Article 1

The concentration by which America Online Inc., will merge with Time Warner Inc., within the meaning of Article 3(1)(a) of Regulation (EEC) No 4064/89 is, subject to full compliance with the final proposal for undertakings submitted by the parties and set out in the Annex, compatible with the common market and the functioning of the EEA Agreement.

Article 2

This Decision is addressed to:

America Online, Inc.
22000 AOL Way
Dulles VA 20166-9323
United States of America
Fax :001-703 265 3992

Time Warner Inc.
75 Rockefeller Plaza
New York NY 10019
United States of America
Fax: 001-212 586 9812

Done at Brussels, 11 October 2000.

For the Commission

Mario MONTI

Member of the Commission

⁽²⁴⁾ It is to be borne in mind that Time Warner's market share, both for mechanical and performing rights, is in no Member State higher than (15 % to 30 %).

ANNEX

COMMITMENT UNDER ARTICLE 8(2) OF REGULATION (EEC) No 4064/89

In connection with the merger of America Online, Inc., (AOL) and Time Warner Inc., (Time Warner), AOL and Time Warner make the following undertakings pursuant to Article 8(2) of the Merger Regulation and subject to the Commission finding that the merger of AOL and Time Warner is compatible with the common market pursuant to Article 8(2) of the Merger Regulation:

1. **AOL Europe share issuance to dilute Bertelsmann.** Pursuant to AOL's rights under the Put/Call Agreement with Bertelsmann AG (Bertelsmann) dated 16 March 2000, within three months of the adoption of the Commission decision and unless Bertelsmann first sells its stake in AOL Europe, SA (AOL Europe), AOL will cause AOL Europe to issue shares equal to 1 % of all of AOL Europe stock issued and outstanding following such issuance, to an investor who is not controlled by or affiliated with Bertelsmann AG.
2. **Interim Measures until Bertelsmann exits from AOL Europe and AOL CompuServe France.** Subject to the completion of its merger with Time Warner, AOL and Time Warner agree that until such time as Bertelsmann AG exits from AOL Europe and AOL CompuServe France SAS, (i) AOL Time Warner will not take any action that will result in Bertelsmann music being available on-line exclusively through AOL or being formatted in a proprietary format that is playable exclusively on an AOL music player, (ii) in the event that AOL should seek to appoint a new CEO to AOL Europe or one of its affiliates, such CEO will not be affiliated with Bertelsmann, (iii) AOL Time Warner will not require Bertelsmann to exclusively promote AOL's ISP services, and (iv) AOL will take all necessary action to ensure that Bertelsmann does not exercise decisive influence or negative control of either AOL Europe or AOL CompuServe France SAS within the meaning of the EC Merger Regulation.
3. **(AOL and Bertelsmann have put in place a mechanism by which Bertelsmann will progressively exit from AOL Europe and the French joint venture AOL CompuServe.)***
4. **Changes to Bertelsmann Marketing Agreement.** Pursuant to the Interactive Services and Marketing Agreement among AOL, AOL Europe and Bertelsmann dated 16 March 2000 (Marketing Agreement) and upon completion of the AOL Time Warner merger, AOL undertakes that:
 - (a) in order to permit Bertelsmann to promote any third party ISP, upon completion of the AOL Time Warner merger, AOL will inform Bertelsmann that it will not enforce section B.2.3 of Exhibit B of the Marketing Agreement which currently prevents Bertelsmann from promoting a third party ISP if the subscriber targets discussed in that section of the Agreement are not met;
 - (b) AOL will inform Bertelsmann that it will not exercise the right under section C.1 of Exhibit B of the Marketing Agreement to reformat Bertelsmann content to make it compatible with AOL's media player in a manner that would promote or favor a format that is not available by license to third parties on fair and non-discriminatory terms.
5. **Independent compliance monitor provision.** Not later than two weeks after the Commission has adopted the decision authorising the AOL Time Warner merger, AOL Time Warner shall propose the names of three independent and experienced individuals to serve as an independent compliance monitor and the Commission shall select one of the proposed names to serve as independent compliance monitor. The proposal will fully document and justify the independence and experience of the nominees. The Commission will reject all three names only if none of them has the requisite independence and experience, and in the event that the Commission rejects all three names, the Commission will select an independent and experienced individual as an independent compliance monitor. AOL Time Warner will appoint the independent compliance monitor within five working days after the Commission's approval and submit a copy of the signed agreement with the independent compliance monitor which shall include a written mandate of his duties and responsibilities.
 - (a) The mandate will describe the tasks of the independent compliance monitor, the conditions for the replacement of the independent compliance monitor, the discharge of the independent compliance monitor, the reporting obligations and the remuneration. The mandate will have to be approved by the Commission. The parties shall amend the draft if the Commission so requests and will change the mandate upon a reasoned request from the Commission or the independent compliance monitor if the terms of the mandate do not allow the independent compliance monitor to properly exert his functions to monitor compliance with paragraphs 1, 2, 3 and 4 of the undertakings above (the Bertelsmann undertakings).
 - (b) The independent compliance monitor shall serve until such time as Bertelsmann exits from AOL Europe and AOL CompuServe France SAS and shall ensure compliance by AOL Time Warner with the Bertelsmann Undertakings.
 - (c) The independent compliance monitor will take all measures reasonably necessary to ensure that the Bertelsmann Undertakings are respected by AOL Time Warner, and AOL Time Warner will take all reasonable measures ordered by the independent compliance monitor necessary to comply with the Bertelsmann undertakings, within the time period set by him. AOL Time Warner shall also provide the independent compliance monitor with all such assistance and information as the independent compliance monitor may reasonably require.

- (d) The independent compliance monitor will provide, every six months, written reports in English to the Commission on the progress of the discharge of its mandate, identifying any respect in which he has been unable to discharge its mandate. AOL Time Warner will receive simultaneously a non-confidential copy of such reports. The independent compliance monitor will at any time provide to the Commission, at its request, a written or oral report on matters falling within the independent compliance monitor's mandate. AOL Time Warner will receive simultaneously a non-confidential copy of such reports.
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