

II

(Acts whose publication is not obligatory)

COMMISSION

COMMISSION DECISION

of 9 November 1994

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

(IV/M.469 — MSG Media Service)

(Only the German text is authentic)

(94/922/EC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Community,

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

Having regard to the EEA Agreement, and in particular Article 57 (1) thereof,

Having regard to the Commission Decision of 18 July 1994 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 ⁽²⁾,

Whereas:

(1) The procedure under consideration concerns the proposed setting up, by Bertelsmann AG

(Bertelsmann), Deutsche Bundespost Telekom (Telekom) and Taurus Beteiligungs GmbH (Taurus), of a joint venture under the name of MSG Media Service Gesellschaft für Abwicklung von Pay-TV und verbundenen Diensten mbH (MSG).

(2) By decision dated 28 June 1994, the Commission ordered the suspension of the concentration as a whole, pursuant to Article 7 (2) and Article 18 (2) of Regulation (EEC) No 4064/89 (hereinafter the 'Merger Regulation'), until it takes a final decision.

(3) By decision of 18 July 1994, the Commission found that the notified concentration raises serious doubts as to its compatibility with the common market. The Commission accordingly initiated proceedings in this case, pursuant to Article 6 (1) (c) of the Merger Regulation.

(4) By letter dated 29 June 1994, Germany informed the Commission, pursuant to Article 9 (2) of the Merger Regulation, that the concentration threatened to create or to strengthen a dominant position as a result of which effective competition would be significantly impeded on three markets within Germany, each of which was a separate geographic market within the meaning of Article 9

⁽¹⁾ OJ No L 395, 30. 12. 1989, p. 1. Corrigendum: OJ No L 257, 21. 9. 1990, p. 13.

(7). A referral of the case pursuant to Article 9 (3) of the Merger Regulation has not taken place.

I. THE PARTIES

- (5) Bertelsmann is the common parent company of the leading German media group. The Bertelsmann group has activities primarily in book and magazine publishing, book clubs, printing, music publishing and sound recording, and has holdings in commercial television. Although Germany is the most important market for Bertelsmann, the group also has widespread international activities (some 6 % of its turnover is earned outside Germany).
- (6) Taurus is a holding company belonging to the Kirch group (Kirch). Kirch is the leading German supplier of feature films and television programming and is also active in commercial television. The group operates mainly in Germany. Kirch also — and to an increasing extent — has holdings in pay-TV suppliers outside Germany.
- (7) Telekom is the public telecommunications operator in Germany. Telekom is active, either directly or through subsidiaries, in all areas of telecommunications services. It has a monopoly of the German telephone network and is the owner and operator of nearly all the German cable-television networks.

II. THE PROPOSED OPERATION

- (8) Bertelsmann, Kirch and Telekom propose to set up a joint venture, MSG, which will have a share capital of DM 60 million. Each of the parents will hold one-third of the share capital and voting rights in MSG. The object of MSG is the technical, business and administrative handling of mainly payment-financed television and other communication services, including conditional access and subscriber customer management, as well as the provision of the necessary technical infrastructure for the supply of such services and all related business.

III. THE CONCENTRATION

1. *Joint control*

- (9) MSG will be jointly controlled by its three parent companies. According to MSG's articles of association, each of the parents has the right to appoint two members of the six-member

supervisory board. A number of strategic decisions require the approval of the supervisory board by a 75 % majority vote. Such decisions include the appointment of the management, the annual budget, entering into new or giving up existing activities, basic questions as to the organization of legal and economic relations with the authorities, network operators and service suppliers and basic decisions on the technology and systems to be applied. The agreement of all three parents is, therefore, required in basic decisions concerning the management, commercial policy and the competitive strategy of the joint venture.

2. *Concentrative joint venture*

- (10) (a) MSG will perform on a permanent basis all the functions of an autonomous economic entity. There is at present only one pay-TV channel in Germany, Premiere, which is operated by a joint venture (Premiere Medien GmbH & Co. KG), owned by Bertelsmann, Kirch and Canal Plus. Premiere at present supplies the services required for the operation of pay-TV itself. There is therefore currently no market in Germany for the services which are the object of MSG. However, as outlined below, it is to be expected that, as a consequence of the introduction of digital television over the next few years, the joint venture's downstream market for pay-TV and other payment-financed television services will grow rapidly and new suppliers will enter the market. It may therefore be assumed that a market will develop for the services offered by MSG which will reach a substantial size in the foreseeable future. The MSG joint venture is intended to play an active role in this growth market and participate in the value chain. MSG will therefore be a full-function enterprise on the market and not merely take on auxiliary functions, whether in whole or in part, for its parent companies Bertelsmann and Kirch.

- (11) With regard to the investment required for its business activity, the parent companies are prepared to provide the joint venture with the necessary financial resources to enable it to undertake the investment itself. According to the MSG business plan submitted by Telekom,

MSG's total capital requirement will be DM [...] ⁽¹⁾ million up to the year 2004, provided that the decoders which are to be installed are rented. DM [...] million of this capital requirement is to be financed from the joint venture's own capital. Although, according to the business plan, the break-even point is to be expected only after [...] years (which means that the cumulative operating result will be positive in [...]), a positive operating result is expected in [...] if the cumulative initial losses are disregarded. Such results are not to be regarded as exceptional in the case of a long-term project in a future-oriented market with a high investment requirement. Neither the equity-capital base described nor the earnings pattern aimed at point to the conclusion that MSG would be inadequately endowed with financial resources and could not therefore be regarded as a full-function enterprise.

- (12) Nor is this assumption precluded by the fact that MSG will possibly take over services relating to Premiere's current analog pay-TV business. Premiere already has the technical infrastructure for analog pay-TV, on the basis of which the company itself administers its subscriber system. MSG's business plan indicates the company itself administers its subscriber system. MSG's business plan indicates for 1995 to 1997 a subscriber list for MSG which is far smaller than Premiere's current subscriber list (Premiere subscriber list: 800 000; MSG subscriber 1995: [...]; 1966: [...]; 1997: [...]). This suggests that MSG's services are not aimed at Premiere's current analog pay-TV, but at future digital pay-TV services. If over the next few years MSG develops a digital pay-TV infrastructure, it may be assumed that Premiere will use that infrastructure if it wishes to supply digital pay-TV. Digitalization will, however, open up the possibility of further pay-TV suppliers entering the market and making use of MSG's services.

- (13) MSG will, as outlined below, supply a package of services that constitute an autonomous market. One of MSG's essential tasks will be to create the necessary technical infrastructure for digital pay-TV, by establishing a decoder base and a system of conditional access. This is an essential prerequisite for pay-TV that calls for a

quite substantial level of investment. In so far as the use of the technical infrastructure by the services supplied by MSG requires cooperation on the part of MSG with the parent companies, who are themselves pay-TV suppliers, the same need arises for cooperation with other pay-TV suppliers who avail themselves of infrastructure and services.

- (14) (b) The setting-up of MSG has neither the object nor the effect of coordinating the competitive behaviour of undertakings, which remain independent of one another. A risk of coordination between Bertelsmann and Kirch is in particular not to be expected in the introduction of new pay-TV services or the conversion of present advertising-financed programmes into pay-TV programmes. The pay-TV activities of Bertelsmann and Kirch are currently combined in the joint venture Premiere. Premiere's three parent companies have undertaken 'as a specific measure embodying their company-law obligations in the joint venture' not to participate in any other German-language pay-TV service for the duration of the joint pay-TV service without the agreement of the other partners. If therefore in future Bertelsmann and Kirch were to supply pay-TV programmes independently of each other, any coordination of such independent activities would be the result of cooperation in Premiere. It is not apparent that any additional coordination through MSG is necessary in that connection and that such additional coordination might be relevant to the concentrative or cooperative nature of MSG.

- (15) Nor can a risk of coordination within the meaning of Article 3 of the Merger Regulation between the parent companies be assumed in the installation of a digital infrastructure and in the use of such systems. The installation of an appropriate digital infrastructure for pay-TV and its use is precisely the business object of the joint venture. Cooperation within a joint venture within the framework of the business object is a characteristic of every joint venture and cannot be used as evidence of its cooperative nature. The Commission finally has no evidence that Telekom or Kirch or Bertelsmann intend to supply the abovementioned services beyond MSG. After the establishment of MSG, Telekom, in particular, can no longer be regarded as a

⁽¹⁾ In the published version of the Decision, some information has hereinafter been omitted, pursuant to the provisions of Article 17 (2) of Regulation (EEC) No 4064/89 concerning non-disclosure of business secrets.

potential competitor of the joint venture, since the development of an additional alternative infrastructure by Telekom would be economically unjustifiable in view of its investment in MSG and would run completely counter to the strategy pursued by Telekom in helping to set up MSG.

- (16) Lastly, it appears improbable that there will be any coordination between Kirch and Bertelsmann via MSG on the market for advertising-financed television. Although Bertelsmann and Kirch each have holdings in advertising-financed television channels, it is not apparent why cooperation in the pay-TV area and in services for pay-TV should, for example, lead to a restriction of competition between RTL and SAT 1. The same applies to the relationship between Telekom and the joint venture as regards future non-media-related communications services provided by Telekom.
- (17) It must accordingly be assumed that the setting-up of MSG represents a concentration within the meaning of Article 3 of the Merger Regulation in the form of a concentrative joint venture.

IV. COMMUNITY DIMENSION

- (18) The aggregate worldwide turnover of Bertelsmann, Kirch and Telekom is more than ECU 5 billion. In the financial year 1992/93, Bertelsmann earned ECU 9 billion, the Kirch group ECU [...] million and Telekom ECU 29,3 billion. Each of the three undertakings achieves an aggregate Community-wide turnover of more than ECU 250 million. The undertakings concerned do not all realize more than two-thirds of their aggregate Community-wide turnover within one and the same Member State. The concentration therefore has a Community dimension within the meaning of Article 1 of the Merger Regulation.

V. ASSESSMENT UNDER ARTICLE 2 OF THE MERGER REGULATION

A. *Relevant product markets*

- (19) The proposed concentration affects the market for administrative and technical services for suppliers of pay-TV and other television services financed through subscription or payment by viewers, the market for pay-TV and other television services financed through subscription or payment by

viewers (pay-TV) and the market for cable-television networks.

1. **Administrative and technical services for pay-TV**
- (20) The operation of pay-TV requires a special technical infrastructure consisting essentially of an adaptor for decryption (decoder), conditional-access technology and a subscriber management system. A series of services required for the operation of pay-TV are provided on the basis of this infrastructure.
- (21) (a) Pay-TV programmes are generally broadcast by cable or satellite. Unlike free commercial television, they require a specific system to ensure that only authorized viewers, that is, subscribers to the particular pay-TV supplier, can receive the programmes. This requires the installation of a decoder in the home of every pay-TV viewer in order to unscramble the television picture, which is scrambled when the television signal is broadcast. Decoders may be either bought or rented from shops or leased out to viewers. Since, at least in the initial phase, the price of the digital decoders which will in future be installed will amount to between DM 1 000 and DM 1 500 and as a result the cost to the individual viewer is relatively high, it may be assumed that, at least in the first five years, digital pay-TV decoders will normally be rented. This means that the installation of a decoder base requires a major investment by the operator of a pay-TV infrastructure.
- (22) Since most households will, following the introduction of digital television, continue for a number of years to be equipped with an analog television set, there will also be a need for a digital-analog convertor that will allow the digital signals to be received in analog form. The convertor and decoder will in all probability be available in a single device ('set-top box') and in the longer term be incorporated in satellite receivers or directly into television sets.
- (23) (b) In addition to the decoder base, pay-TV requires a system of conditional access. This system comprises the transmission of encrypted data, which contain information on the programmes or packages of programmes subscribed to and on the entitlement of the pay-TV subscribers to receive the programmes, together with the television signal, and possibly

smart cards which are made available to the viewer and are able to decipher the encrypted authorization data and transfer them to the decoder. Control of conditional access takes place either within the decoder or by means of one or more smart cards inserted in the decoder.

(24) In Western Europe, there are at present — for analog pay-TV — at least five encryption systems which operate on a proprietary basis: Videocrypt (used by BSkyB and Adult Channel in the United Kingdom and by Filmnet in the Benelux countries), Syster /Nagravision (Canal Plus in France and Spain, Premiere in Germany and Austria and Teleclub in Switzerland), Eurocrypt (Filmnet and TV 1000 in Scandinavia), Irdeto (Telepiù in Italy) and Luxcrypt (RTL 4 and RTL 5 in the Netherlands). Harmonization throughout Europe has been achieved for scrambling/descrambling, for the digital signal broadcasting standard (MPEG II) and for the licensing of proprietary conditional access technologies within the framework of the European Project for Digital Video Broadcasting (DVB), which consists of approximately 150 companies with interests in the field of digital TV in Europe. As far as encryption technology is concerned, the intentions of the individual enterprises vary. In particular, pay-TV suppliers such as BSkyB, Canal Plus and Filmnet are convinced of the need for proprietary encryption technology and see the SimulCrypt concept as the appropriate approach to conditional access in digital television. On the other hand, potential pay-TV suppliers and network operators prefer a common-interface solution. With Simulcrypt, pay-TV broadcasters can have simultaneously access to bases of consumer decoders which use different conditional access systems, on the basis of agreements and of technical arrangements defined in the DVB. On the other hand, in a 'common interface' solution, the decoders can be already technically designed so that they can 'understand' very different access control systems thanks to modules and/or smart cards. In the framework of DVB, an agreement was recently reached on the provision of both concepts 'Simulcrypt' and 'Common Interface'. A code of conduct is added to Simulcrypt for governing commercial relations between parties in the market. Some of the DVB members have signed the code, others have not.

(25) (c) In addition to the decoder base and encrypted conditional access, there is also a subscriber datafile in which all the relevant information on pay-TV subscribers is stored, including invoicing and in payments (subscriber management system).

(26) The infrastructure described forms the basis for the services relating to the operation of pay-TV. These involve primarily the following administrative and technical services:

- the making available of decoders,
- the handling of conditional access,
- subscriber management in respect of pay-TV customers,
- settlement of accounts with programme suppliers.

(27) (d) The technical and administrative services for pay-TV can be provided by a pay-TV supplier itself. This is currently the case with Premiere. The pay-TV supplier can also make its infrastructure available to other pay-TV suppliers. This is, for example, the case with Canal Plus in France and — for satellite pay-TV — with BSkyB in the United Kingdom. Premiere, too, intends to offer its services to other enterprises. The infrastructure may, however, also be operated by undertakings which are not programme suppliers. This is the case in particular with cable network operators. The provision of the relevant services by cable network operators is commonplace in the United States.

(28) MSG will make the decoders available (at least in the short and medium-term), and will also carry out access control and subscriber management for pay-TV providers. In so doing, MSG will have direct contractual relations mainly with the programme suppliers. The pay-TV subscription agreement will be concluded between the programme supplier and the final consumer. In addition, MSG will lease the decoders to the end user - in any case for quite a few years. Finally, the programme supplier must conclude user agreements with Telekom and other network or satellite operators.

(29) Under the subscriber management system, MSG will also monitor in-payments and pass

on information on this to any pay-TV supplier cutting off the conditional access signal for subscribers who are late with payments. MSG will, according to the parties themselves, neither offer programmes or interactive services nor undertake packaging (the putting together of programme packages). The packaging and marketing of the programmes transmitted through MSG will be carried out by the programme organizers themselves. MSG intends to offer its services as from 1995 to programme suppliers irrespective of whether they broadcast their programmes using digital or analog technology. Since, as described below, the introduction of digital technology is imminent and since Kirch and Bertelsmann, as co-partners in the only analog pay-TV broadcaster so far in Germany, do not intend to put together any further pay-TV programmes on an analog basis (apart from a children's channel which Premiere intends to introduce), it is not to be expected that MSG will to any significant extent be further involved in analog programmes.

- (30) (e) Even if there is at present no market in Germany for the services provided by MSG, such a market is expected to develop, in particular following the introduction of digital television (see paragraph 2). Since it is unlikely that all suppliers of television communications services will have their own infrastructure, the relevant demand should develop quickly, leading to the supply-side development of the services offered by MSG.
- (31) (f) According to the conception underlying MSG, it must be assumed that there will be a single market for services relating to digital pay-TV and other digital interactive television communications services. MSG will offer decoder, conditional access and subscriber management from one and the same body. The same package of services is provided on an analog basis by Premiere and Selco. Selco also markets the pay-TV programmes which it handles. After the agreement within DVB on the parallel existence of several access control solutions, the services, in particular the subscriber management system, could also be supplied separately. A number of the undertakings surveyed by the Commission accordingly consider it possible that a separate market for subscriber management by specialized firms may develop. In connection with subscriber management or separately from it, a special market might possibly also develop for programme packaging, which means the putting-together of packages of programmes from different programme suppliers.

2. Pay-TV

- (32) Pay-TV constitutes a relevant product market that is separate from commercial advertising-financed television and from public television financed through fees and partly through advertising. While in the case of advertising-financed television, there is a trade relationship only between the programme supplier and the advertising industry, in the case of pay-TV there is a trade relationship only between the programme supplier and the viewer as subscriber. The conditions of competition are accordingly different for the two types of commercial television. Whereas in the case of advertising-financed television the audience share and the advertising rates are the key parameters, in the case of pay-TV the key factors are the shaping of programmes to meet the interests of the target groups and the level of subscriber prices (see also the Commission Decision of 5 August 1994-IV/M.410 Kirch/Richmont/Telepiù). There is, however, some relationship between pay-TV and free-access TV in that the growth of the pay-TV market is slower where the programmes provided by free-access TV broadcasters are relatively varied. Thus, the development of the figures of Premiere subscribers was different in Germany as compared to the development of subscribers in France or the United Kingdom (see point 48). But this does not change anything about the original character of the pay-TV market. The distinction between the two markets could, however, become blurred in the case of pay-TV programmes that are financed from a mixture of sources. Such programmes can be expected in various countries in future. On the German market, however, there is as yet no evidence of pay-TV having such mixed-financing sources, particularly since Premiere is financed solely from subscriptions and payments by viewers. According to various market participants, the absence of programme breaks for advertising will, on the contrary, be an important argument in winning customers over to digital pay-TV.
- (33) Pay-TV programmes and free-access, advertising-financed programmes also differ in terms of content. Digitalization allows the signals being transmitted to be highly compressed and will therefore lead to a considerable increase in transmission capacities. At present, some 14 million households on cable and some seven million households with satellite receivers can receive about 30 television programmes in analog form. In the digital age, 200 or more television programmes are considered possible. The new programmes would probably be mainly pay-TV

programmes, since there are limits to the further growth in the volume of television advertising and since the market for advertising-financed television therefore appears essentially to be a mature one. Against this background, a variety of new, payment-financed special-interest programmes may be expected, meeting the demand of specific target groups (e.g. sport, music, news, feature films or children's programmes). Although a similar trend towards special-interest channels may be observed in the case of advertising-financed television too, this is not comparable with the specialization to be expected in digital pay-TV. In addition, digitalization in conjunction with the use of the telephone or cable network as the return channel allows the introduction of inter-active television services such as pay-per-view, near-video-on-demand, video-on-demand, home banking, home shopping and teleteaching.

- (34) According to the information provided by the parties, digitalization of Telekom's cable network will take place in 1995. By early 1995, digital reception should be available to 80 % of households on cable (assuming, that they have a decoder). This is expected to rise to 96 % during the course of the year. Satellite transmission can already be carried out in either analog or digital form; only the terrestrial broadcasting and reception facilities require adjustment. In Telekom's broadband cable network, there will in future, in the hyperband range of 300 — 450 MHz, be 15 channels available for the transmission of digital programme signals. A total of four to 10 digital programmes is to be available on each channel. In a first stage, Telekom intends to provide three channels for digital pay-TV by the end of 1995.

- (35) Whereas in the United States a directly receivable digital satellite programme package comprising an initial range of 75 programmes (DirectTV) was started early in 1994, Europe is at present at the stage of pilot projects. In the United Kingdom BSkyB is offering pay-per-channel and pay-per-view via satellite while BT is going to try out video-on-demand using partly digital technology. In France, France Télécom has just issued an invitation to tender for an order for the supply of 300 000 decoders. Canal Plus similarly intends to introduce digital decoders in 1995. Bertelsmann has embarked on cooperation with Canal Plus in the pay-TV area, involving

investment of more than ECU [...] ⁽¹⁾ million over the next three years.

- (36) In Germany, several pilot projects for digital and in some cases interactive television are getting under way this year, for example in Nuremberg, Hamburg und Berlin. Projects involving interactive services, including near-video-on-demand and home-shopping, will start at the end of 1994 in 4 000 households in Baden-Württemberg (Multi Media Services Pilot) and in Hamburg (DITB Gesellschaft für digitales interaktives Fernsehen mbH). In the home-shopping area, the mail order firm Quelle Schickedanz AG is planning to introduce home-shopping as from 1995 and wants to develop this into its own satellite channel with an 'electronic catalogue' and a range of available services and entertainment. Most of the undertakings surveyed by the Commission in this proceeding accordingly expect there to be an increase in digital pay-TV and digital interactive services between 1995 and 1998. Premiere, the pay-TV channel operated by Bertelsmann, Kirch and Canal Plus has announced that it hopes to be able to offer near-video-on-demand and pay-per-view as from 1995/96.
- (37) According to a survey reported in the specialist press, at least 20 % of television viewers over 14 years of age in Germany would be prepared to spend money for pay-TV in addition to the television licence fees and the fees for the broadband cable network. This would give a market potential of over 10 million viewers for pay-TV. Telekom itself, as part of its planning for MSG, anticipates 3,4 million connected households by 2005.
- (38) It is doubtful whether all forms of payment-financed communications services for picture-receiving appliances are to be included in one and the same market. Interactive services such as home shopping or home banking in particular might have to be regarded as separate. However, according to what is known at present, pay-TV in the form of pay-per-channel, pay-per-view and near-video-on-demand constitutes a single market, since, in such forms of viewing, the broadcaster alone determines the programme sequence and timing and the viewer has only limited choice available (in the case of near-video-on-demand, for example, a specific number of feature films is available for selection, with each being repeated at specific times of the day). Things might be different

⁽¹⁾ Business secret; according to press articles approximately ECU 300 million.

in the case of video-on-demand proper, with the customer selecting a programme of his choice from an electronic video library. However, since this form of broadcasting will, according to the information provided by various potential market participants, probably not be achievable for technical reasons over the next few years, if need not be assigned specifically to any particular market.

3. Cable television networks

- (39) In the Commission's view, a separate market can be considered to exist for cable television networks.
- (40) The parties have submitted that, following the introduction of digitalization, there will no longer be a separate relevant market for cable television networks. They argue that there would then no longer be any shortage of transmission capacity. They also consider that cable, satellite and terrestrial frequencies are now regarded by the consumer as interchangeable and entail comparable financial charges for viewers and for programme suppliers.
- (41) This view cannot be accepted for a number of reasons. Regardless of whether the form of transmission is analog or digital, television can be broadcast via terrestrial frequencies, satellite or cable networks. There are considerable differences between the three means of transmission, as far as the technical conditions and financing are concerned. While terrestrial transmission and satellite television only require the viewer to install an aerial or a satellite dish at his own expense, cable television presupposes the maintenance of a cable network financed by the viewer through cable fees. It makes a difference to the final consumer whether he has to incur a large amount of expenditure on a one-off basis for one form of transmission (for example, for the satellite receiver) or whether he prefers to incur low-level, regular payments in the form of cable fees. Although in Germany market penetration through cable connections (some 14 million) is particularly high compared with other Member States, the choice between different means of transmission is not a straightforward matter for a large number of households, even in Germany. Of the total of around 33 million households with television, some 8 million are not yet on cable, and there are at present no plans at all to link a further 9 million households up to cable. The fact that some 8 million of households could still have a choice and that the differences in financing referred to
- above could be reduced by similar payment terms (instalments) may result in a certain degree of substitutability. This does not, however, have any particular importance in Germany because of the very advanced degree of cable link-up as compared to other Member States and because of various other circumstances set out below. Households with television are quite frequently faced with the difficulty that the acquisition of satellite dishes is prohibited on aesthetic grounds by the landlord or by the owners' association in the case of multiple dwellings. Lastly, a household already on cable or having a satellite receiver is normally not ready to make a further investment in the other form of transmission (lock-in effect). Multiple dwellings may increasingly be switching from cable to satellite in order to receive foreign broadcasters, as the parties report, but this does not mean that the two means of reception are interchangeable, since the programmes supplied differ.
- (42) From the programme suppliers' point of view as well, contrary to the view put forward by the parties, cable and satellite are not interchangeable in terms of costs. Taking the cost comparison put forward by the parties, it is true that a programme supplier broadcasting via satellite and also feeding the satellite programme into the cable network has comparable costs to a supplier broadcasting only via the cable network. However, if a programme supplier broadcasts solely via satellite (direct-to-home), this entails significantly higher costs per household and per year.
- (43) Lastly, it is not the case, as the parties argue, that there is no longer a separate relevant market for cable networks because digitalization has removed the shortage in the means of transmission of television signals. Whether an economic item is available to customers in limited or sufficient numbers does not determine the existence of a relevant market for such an item. The decisive factor is whether trade relationships based on payment exist in respect of a good or a service. This is at present and will in future be the case with the transmission capacity for television signals, whether in analog or digital form.
- (44) For the reasons, the Commission considers that there is a separate relevant market for cable television networks.

B. Relevant geographic market.

- (45) On the basis of the results of the Commission's investigations, the relevant geographic market for

all of the three product markets defined is restricted to Germany. However, as far as the market for services is concerned, it cannot be ruled out that MSG will over time — possibly with local partners — extend its service activities to other countries as well.

(46) 1. In the case of *pay-TV*, this is due in particular to the fact that the programmes offered in Germany are to a large extent not interchangeable with programmes offered in other countries. The conditions of competition for pay-TV suppliers are, at present and for the foreseeable future even after digitalization of the means of transmission, considerably different in the individual Member States for the following reasons:

— TV programmes are very largely nationally restricted and broadcast only in the relevant national language. Broadcasting rights are granted for one or more specified countries or language regions. Such granting of broadcasting rights and the timing of so-called 'windows' for feature films, video and pay-TV are subject to various statutory provisions and provisions agreed between the suppliers respectively. Furthermore, foreign language films or other programmes are almost never broadcast in the original language. Whereas, for example, English language films are frequently broadcast in the Benelux countries and in Scandinavia with subtitles in the relevant national language, dubbing is the usual practice in Germany, France, Italy and Spain. This entails differing costs for the broadcasters.

— It is true that, in certain niche markets, there are already programmes broadcast beyond linguistic borders, such as for example the Franco-German channel Arte or the music channel MTV. Generally, however, the range of programmes available and the programme mix are clearly determined by cultural differences and specific preferences on the part of the relevant audience.

(47) The language barriers and regulatory differences in particular will continue to exist even in the digital pay-TV age. It is to be assumed that pay-TV programmes in Germany will continue in future to be predominantly German language programmes. This factor alone means that the conditions of competition will be different from other non-German speaking countries.

(48) However, the market for pay-TV demonstrates further differences in the conditions of

competition between Member States. The supplier structure in analog pay-TV is characterized by the fact that, in virtually every Member State, one particular supplier has a dominant market position or indeed a monopoly. This is the case with BSkyB in the United Kingdom, Canal Plus in France and Spain, Filmnet in the Benelux countries, Telepiù in Italy and Premiere in Germany. Only in Scandinavia are several suppliers operating (Filmnet, TV 1000, Tele TV). Similarly, prices, the number of programmes and combination possibilities differ. Even the encryption systems described above can be differentiated, albeit more at regional level, as between the large suppliers. Premiere is at present the only supplier with only one programme. The German market accordingly has a conspicuously lower level of penetration by pay-TV. Only around 800 000 German households having television — 2 % of the total — subscribe to Premiere. In France and the United Kingdom, the corresponding rates are 16 % and 15 % respectively. A difference in market penetration may not as such indicate a market access barrier. However, according to a number of television market competitors of the enterprises involved in the concentration, the discrepancy for example between Germany and France is due to differences in how attractive is the range of feature films shown on free-access advertising-financed television. The broad range of feature films in German television will probably make market access more difficult for third parties in the future as well.

(49) From a technical point of view, finally, account must be taken of the fact that in the case of pay-TV the viewer can receive programmes only via a decoder. This in principle opens up the technical possibility of operating price differentiation for identical programmes as between different Member States.

(50) Although following the introduction of digitalization it is to be expected that there will be an increase in supply and the development of various interactive services, the structural imbalances on the supply side will not be evened out in the short-term. It is already foreseeable that today's leading pay-TV suppliers will also play a leading role in digital television. The Commission's investigations have shown that Germany is regarded as the

- largest potential market in Europe for pay-TV services.
- (51) This would also be true for German suppliers wishing to operate in Austria. Here, bearing in mind the lack of any language barrier, a market could be assumed to exist for German language pay-TV. Currently, the pay-TV channel Premiere, which is operated by Kirch, Bertelsmann and Canal Plus, has the great majority of its subscribers in Germany; it has less than [...] % of its subscribers in Austria. There are currently no other pay-TV suppliers in these two countries. For this reason and because of the conditions of competition at the beginning of the digital pay-TV era set out below, the competition assessment of the concentration would be the same even on the assumption of a geographic market encompassing both countries.
- (52) 2. Since the *services* being offered by MSG are closely connected with the supply of pay-TV, it must be assumed that the market for these services too will in the foreseeable future remain confined to Germany. Although MSG is, according to the parties, geared to Europe-wide activity and there are no obstacles to the supply of decoders and smart cards and the acquisition of subscribers abroad and the linguistic and regulatory differences, which are of some relevance in the pay-TV sector, have no direct effect on the service sector, the pay-TV suppliers handled by MSG would, as already noted, have to have transmission capacities with the respective national network owners. This may be of little relevance in countries where television programmes are received mainly by satellite, but it is of crucial importance to the German market where over 14 million households are on cable. MSG will accordingly initially operate only in Germany. Even Premiere, which provides the necessary services itself and, according to its own statement, could also provide them for other pay-TV suppliers, has, as stated above, the great majority of its subscribers in Germany. To the extent that German providers of pay-TV also acquire subscribers in other German-speaking regions, MSG's service market will probably also spread to such areas.
- (53) Even though it may be true that supply by foreign programme suppliers does not necessarily require them to have their own technical infrastructure in Germany, such an infrastructure appears to be an advantage. Hitherto the relevant services have always been provided by the national pay-TV supplier. The recent establishment of the German marketing and services undertaking Selco for BSkyB pay-TV programmes and other English language programmes further illustrates this. MSG's market chances also rest to a not insignificant extent on the existence of a well-developed cable network in Germany. This network will in itself and in conjunction with the telephone network also be of particular importance for future interactive services. This applies particularly in view of the imminent introduction of ISDN technology on the basis of the glass fibre broadband cable network, allowing the development of a two-way data transmission network with almost unlimited capacity. Against the background of the significantly smaller degree of connection to cable in most of the other Member States, particularly in France and the United Kingdom, there will for the foreseeable future not be any homogeneous conditions of competition between Germany and the other Member States. With regard to Austria and its cable networks, developments could, for the reasons set out above (point 52), result in the emergence of a German language market for services.
- (54) 3. As regards *the operation of cable television networks*, there is already a national German market resulting from Telekom's statutory monopoly on laying and operating cable networks in public roads. This means that the conditions of competition in Germany are substantially different from those in other countries in which the network monopoly has already been abolished and in some cases a large number of private network operators exist.

C. *Effects of the concentration*

1. *Technical and administrative services*

- (55) MSG will be the first supplier of technical and administrative services for pay-TV and other payment-financed communication services in Germany. Apart from Selco, an undertaking established in a special market segment, MSG will probably be the only supplier of such services on the German market in the near future and will thus have a monopoly. Although a monopoly in a future market that is only just beginning to develop should not necessarily be regarded as a dominant position within the meaning of Article 2 (3) of the Merger Regulation, the assumption that no market dominance exists presupposes in such a case that the future market in question remains

open to future competition and that the monopoly is consequently only temporary. However, this condition is not met in the present case. One can expect that the market for the services offered by MSG is being sealed off already in the development phase by the establishment of the joint venture and that MSG will acquire a long-term monopoly.

(a) *Elimination of potential competition*

(56) As already stated, experience in other countries shows that pay-TV suppliers or cable network operators are the most likely suppliers of technical and administrative services for pay-TV. In Germany, the only pay-TV supplier at present is Premiere, which is jointly controlled by its three shareholders, Bertelsmann, Kirch and Canal Plus. Premiere at present provides the necessary technical and administrative services for its pay-TV operation itself. On the other side there is Telekom, which holds a monopoly under public law on the broadband cable network, and which is virtually the sole cable network operator in Germany. Over 90 % of cable networks in Germany are operated by Telekom. With the setting up of MSG there is therefore a concentration of those enterprises which would each otherwise have had to install an infrastructure for digital pay-TV and provide the corresponding services. The most likely potential competition is thus excluded already in the development phase of the market.

(57) The parties argue in response to this that none of the undertakings setting up MSG would, in view of the substantial investment required, be prepared on its own to open up the market for the services being offered by MSG. According to the submission of the parties, none of the shareholders in MSG would accept the risk associated with the investment on its own and without the combined know-how required for the project. It must be granted to the parties that the investment required, which according to the documents available is estimated at DM [...] million over the next 10 years, is of a considerable order of magnitude. However, Bertelsmann/Kirch on the one hand and Telekom on the other have the resources to carry out a project such as MSG on their own as well. Each also has a strong interest in setting up a technical infrastructure for digital pay-TV. In the case of Bertelsmann/Kirch, this is because of the additional programme possibilities that digital television makes available precisely for pay-TV. In the case of Telekom, it is of considerable

importance that in introducing digital television the preconditions be created for digital pay-TV. Since the additional programmes made possible by digitalization would probably, as already described, mostly be payment-financed, the success of digital television and hence better use of Telekom's cable network depends on the necessary infrastructure for pay-TV being ensured.

(58) The argument put forward by the parties that they could assume the risk of investing in digital infrastructure only jointly also appears rather unconvincing if one bears in mind experience with the introduction of the mobile telephone system GSM in Germany. Here too, an infrastructure covering as much of the country as possible had to be set up for a new communications system. Yet it proved possible for two competing mobile telephony operators to undertake the task. It was thus ensured that mobile telephony users can choose between two competing systems, system D1 operated by Telekom and system D2 operated by a private consortium. Whereas MSG's investment is to amount to some DM (...) million over 10 years, each of the D1 and D2 operators invested DM 2,5 to 3 billion over a period of five years.

(59) It is apparent from Telekom's documentation on the MSG project that Telekom has a strategic interest, through the development of a service undertaking, in entering the pay-TV market and the future market for interactive higher-value services. With the promotion of the spread of pay-TV as an entry into interactive services, the possibility opens up for Telekom to pursue a more strongly use-oriented policy in the broadband cable service area rather than a purely connection-related payments and charges policy. Against this background, it appears likely that, if it were not involved in MSG, Telekom would independently enter the market for technical and administrative services and would hence operate a pay-TV infrastructure that would not be controlled by Bertelsmann/Kirch. If necessary, Telekom could also undertake this task together with other partners not active in the field of pay-TV.

(b) *Partitioning of the market*

(60) It appears scarcely conceivable that competing suppliers in Germany could enter the market for technical and administrative services for pay-TV once MSG had established itself on that market. The installation of an alternative infrastructure would require a large amount of investment that would be undertaken by other suppliers or groups of suppliers only if there was a chance of market penetration. However,

such a chance would scarcely exist if MSG had already occupied the market. An alternative supply of services would have to impose itself against the combined competitive advantages and specific strengths of Telekom on the one hand and Bertelsmann/Kirch on the other. This appears hardly possible.

(aa) Strengths of Telekom

(61) The following specific strengths of Telekom are particularly relevant to the joint venture MSG and the market for the services offered by MSG:

- Telekom has a broadband cable network with at present over 13 million connected households, which represents more than 90 % of all cabled households in Germany (a total of 14 million cable connections). Of the two basic means of transmitting pay-TV, the cable network plays a far greater role in Germany than satellite TV, which at present can be received by seven million households. In addition, regional or local markets can be reached most cheaply via direct, locally limited inputs into the cable network. Because of the importance of the cable network in Germany, it makes sense for services relating to pay-TV to be provided only if they relate to pay-TV programmes that are also transmitted by cable. Restricting services to satellite programmes is conceivable only in special market segments, such as the area of activity covered by Selco, described below. Apart from such segments, any pay-TV provider is therefore dependent on the use of the cable network of Telekom.

- As the owner of the cable network, Telekom will be in charge of digitalization in the hyperband area. It will determine the gradual expansion of the transmission channels for digital television and can thus control the development of the transmission capacity for digital television.

- With its recently acquired 16,6 % holding in SES, Telekom has become the second largest shareholder, after the Grand Duchy of Luxembourg, in the main European satellite operator, which reaches 6 million households in Germany via the Astra satellites. Telekom is represented on the board of directors of SES and collaborates with SES in order to ensure compatibility between the satellite network and the cable network in the digital television area. Even if Telekom does not control SES, it can, through its stake in SES, influence the allocation of satellite channels using the Astra

satellites, which play a dominant role in the Community.

- As the owner of the broadband cable network and at the same time the holder of the monopoly for the fixed telephone network, Telekom controls the two main means of transmission that can provide the return channel required for interactive digital television. The use of the mobile phone system as a return channel, though technically possible, does not appear to be an appropriate alternative in economic terms at least for private households. According to the Commission's information, the broadband cable network in Germany cannot for technical reasons be used at present as a return channel. This would require further investment. This makes Telekom's telephone network or its glass fibre network all the more important as the only channel currently available for interactive television.

- With the cable network, Telekom has a customer base that may be of considerable importance for the operation of pay-TV. Telekom has direct access to about four million individual customers. It is in addition indirectly involved in the cable service companies, which look after a further 900 000 cable users in the network level 4 area (house distribution equipment). Furthermore, with its Telekom shops represented throughout the country, Telekom also has a national distribution base.

- As a cable and telephone network operator, Telekom has experience in network management and the technological know-how for communications services.

The specific strengths of Telekom outlined above confer substantial competitive advantages on MSG as compared with potential competitors.

(bb) Strengths of Bertelsmann/Kirch

- (62) As the only supplier of pay-TV so far, Bertelsmann/Kirch already have, through Premiere, a subscriber base which they can also use in future digital pay-TV. The parties object in this respect that Premiere's subscriber base would not be sufficient to ensure a pay-back on the investment in MSG. This may be true. However, the risk of investment in a digital infrastructure is significantly reduced if the service provider can build on a subscriber base of analog pay-TV customers. Each competitor of MSG would have to build on a subscriber base which the pay-TV suppliers handled by them would have to first acquire.

Competitors of Bertelsmann/Kirch on the market for pay-TV would, in contrast to the parent companies of Premiere, have to start from scratch. The same applies to potential competitors of MSG in the area of technical and administrative services.

- (63) As explained in detail below, Bertelsmann and in particular Kirch have preferential access to programme software. Bertelsmann/Kirch have to a far greater extent than their potential competitors in the pay-TV market the possibility, after the introduction of digital television, of offering additional attractive pay-TV programmes. Any potential competitor of MSG would consequently have to create a customer base without having the programmes of the future leading pay-TV supplier available for its technical infrastructure. This increases substantially the economic risk for an alternative service supplier.
- (64) Lastly, Bertelsmann, which has experience in the customer management of 22 million book club members worldwide and is the leading book club operator in Germany, with six million book club members, has an important potential distribution channel for pay-TV. This too strengthens the chances of market success for future Bertelsmann/Kirch digital pay-TV programmes, which at the same time means for MSG that its customer base is secured. In this respect, Bertelsmann argues that a substantial part of the book club customer base is only leased to Bertelsmann by [...] independent selling agents, and that Bertelsmann is not interested in steering the buying power of book club clients from the current club products towards other products. However, on the one hand, it is unlikely that a selling method, which consists of recruiting clients through independent selling agents, would seriously prevent the extension of the club's product range. On the other hand, the argument of a transfer of club clients from books and discs to pay-TV products is not very convincing. Any successful pay-TV product presents a risk of transfer within the culture budget of consumers, whatever way is used for selling, and the successful introduction of digital pay-TV is precisely the declared objective of MSG and its parents.
- (cc) Other service suppliers
- (65) The only currently known company wishing to offer in Germany similar services to those to be provided by MSG is Selco Servicegesellschaft für elektronische Kommunikation mbH (Selco). Selco is a joint venture between the private television broadcaster PRO 7 (50,1 %) and News

Corporation Ltd (49,9 %), which belongs to the Murdoch group. According to the information available to the Commission, Selco's business object is confined to the marketing of foreign-language programmes in Germany. This probably involves primarily programmes from the pay-TV supplier BSKyB, which belongs to the Murdoch group. Selco will therefore operate in a niche market with a limited subscriber base. It should further be noted that 47,7 % of the shares in PRO 7 are held by Mr Thomas Kirch, the son of the owner of the Kirch group. It appears furthermore that PRO 7 to a large extent purchases Kirch-group programme software for use in its programmes. PRO 7 therefore should probably be included at least in the sphere of influence of the Kirch group. Against this background it is hardly to be expected that Selco will enter into active competition against MSG.

- (66) The Luxembourg company Europa Online SA, which is mentioned by the parties and which is in the process of being set up, is, according to press reports, confined to interactive information services that are computer-supported. The share capital reported in the press of an equivalent of DM 1,25 million suggests that it is improbable that Europa Online will establish an infrastructure for digital pay-TV.
- (67) Contrary to the submission of the parties, it cannot realistically be expected that other competitors will enter MSG's market in view of its competitive advantages as described above. In this connection, a contradiction in the parties' submission should be pointed out. On the one hand, MSG's investment risk is said to be so high that Bertelsmann/Kirch and Telekom would each be unable to take on the risk on their own. On the other, according to the parties, other competitors will enter the market once MSG has successfully established itself on it.
- (68) The assumption that in the long term MSG is to be expected to have a monopoly position is confirmed both by the results of the oral hearing, in which a number of third parties took part, and by a large number of responses from other firms surveyed by the Commission, firms which operate in the television area or other areas of relevance to MSG's activity. It is accordingly not to be expected that an alternative service provider could establish itself as a competitor of MSG.
- (69) A dominant position on the part of MSG is also to be expected even if MSG with its present shareholder structure were to decide to install a decoder base using a so-called 'common interface'. 'Common interface' means here an encryption technology design that allows any other

pay-TV or service provider to operate conditional access and subscriber management using an available decoder base without requiring a licence for the use of the conditional access system of the firm that installed the decoder base. This can be achieved because modules of different programme or service providers can be plugged into a decoder equipped with a common interface, and each module contains the proprietary encryption elements. It is true that, under such a system, potential competitors would no longer require investment in their own decoder base. However, it cannot be excluded that, where decoders are leased to viewers, MSG might impose on them in the lease contracts the requirement that they should not use the decoder with modules of other pay-TV or service providers without the consent of MSG. Such a contractual restriction would be possible at the present stage of understanding within the DVB project. As a consequence of the restriction, competitors of Bertelsmann/Kirch or of MSG would not have free and uncontrolled access to the installed decoder base in spite of the common interface, as long as decoders are mainly or at least to a substantial extent leased by MSG and not bought by pay-TV subscribers. According to the business plan of MSG, this will be the case during the first five years, during which the proportion of leasing of new equipment should fall progressively from approximately 70 % to approximately 20 %. This means that free access will not be possible during a fairly lengthy period in which digital television is being introduced. But this period is decisive in determining market conditions on MSG's market. Moreover, even after this period, free access will be possible only for decoders sold to subscribers and not for lease decoders already installed.

(70) Even if MSG does not limit the access of other service providers in the leasing contracts on decoders, it can be expected that MSG would have a dominant position on the separate conditional-access and subscriber-management market that could then in theory exist. Thanks to the business potential of Bertelsmann/Kirch in the pay-TV area, MSG will on its market probably benefit from economies of scale (subscriber base, number of programmes handled) that would make competition from other service providers much more difficult. On the other hand, Telekom's participation in the joint venture allows MSG to provide pay-TV suppliers with the necessary user contracts for Telekom's broad band cable network, even if these contracts are legally made between Telekom and the users. MSG can therefore, in contrast to other potential service suppliers, offer programme suppliers a comprehensive service

covering all the technical prerequisites for pay-TV.

(71) Furthermore, if MSG occupies the market with its present shareholder structure, any new pay-TV suppliers will probably be largely dependent on MSG's supply of services, even if, with a common interface and unlimited access to decoders, conditional access and subscriber management can be provided by other service suppliers using the decoder base installed by MSG. It is not to be expected that the average pay-TV subscriber would wish to have dealings with several subscriber management operators. It is in the viewer's interest to have as far as possible a single body dealing on his behalf with all questions relating to the taking of pay-TV (e.g. extension of the subscription to additional programmes, reduction of programmes subscribed to, settlement of the subscription). Whichever service supplier can provide the largest number of programmes and the most attractive programmes will thus occupy a favoured position against which the other service suppliers will have difficulty in asserting themselves. It is to be expected that MSG will acquire such a favoured position since, in view of their programme resources, Bertelsmann and Kirch will be able most rapidly and most extensively to provide the digital pay-TV market with attractive programmes. Any new pay-TV suppliers would therefore substantially reduce their sales prospects if they did not make use of MSG's services and offered the customer their own subscriber management or that of another service supplier.

(72) The 'suction effect' of a service undertaking controlled by Bertelsmann and Kirch could be countered most easily by a cable network operator that took over pay-TV subscriber management itself and possibly offered cable customers programme packages which it had itself put together. Because of the structural conditions in Germany, such a function could be performed only by Telekom, which dominates the market for cable networks. The cable islands of the private cable network operators are mostly too small to justify the expenditure involved in the investment that would be required for them to have their own conditional access and their own subscriber management for pay-TV. In contrast to Telekom's broad band cable network, the private operators' cable networks are moreover not such an essential means of transmission for pay-TV that Bertelsmann/Kirch's programmes would be obliged to use them. As a result of Telekom's involvement in MSG, therefore, a market structure is created

which suggests that MSG will have a dominant position even where a common interface is used.

(c) *Summary*

- (73) For the reasons set out above it is to be expected that the proposed concentration will give MSG a durable dominant position on the market for technical and administrative services in Germany.

2. Pay-TV

- (74) If MSG held a dominant position on the market for technical and administrative services, this would considerably strengthen the position of Bertelsmann/Kirch on the downstream market for pay-TV. It would have to be expected that the setting-up of MSG would give Bertelsmann and Kirch a durable dominant position on the market for pay-TV.

(a) *Present position of Bertelsmann/Kirch on the market for pay-TV*

- (75) At present, Premiere, which is jointly controlled by Bertelsmann, Kirch and Canal Plus, is the only pay-TV supplier in Germany. Even if, as a result of increased capacity following the digitalization of television, a large number of new pay-TV programmes are possible and hence competitors may be expected to enter the pay-TV market, there is significant evidence that Bertelsmann/Kirch, irrespective of the establishment of MSG, will retain a leading position on that market.
- (76) Bertelsmann and Kirch have preferential access to the software that is attractive for pay-TV. Kirch is the leading German supplier of feature films and entertainment programmes for television. Kirch has at its disposal a stock of about 15 000 movies of all types and 50 000 hours of television programmes and also has extensive production activities in the area of movies and television. Together with Axel-Springer-Verlag, Kirch also controls ISPR. ISPR has become the leading agency for sports broadcast rights and, for example, markets the Bundesliga football games centrally. Bertelsmann also has access to attractive sports rights and film production activities through Ufa.
- (77) Both undertakings have widespread activities in free-access commercial television. The commercial television broadcasters in which Bertelsmann and Kirch have holdings or which have to be included within the sphere of influence of the Kirch group achieve a share of some 80 % of television advertising revenue in Germany (RTL, SAT 1,

PRO 7, RTL 2, VOX, Deutsches Sportfernsehen and Kabelkanal). Kirch in particular, with its associated companies or the companies to be included in its sphere of influence (SAT 1, DSF, PRO 7 and Kabelkanal), has the possibility of making multiple use of film rights or sporting rights. This enables the Kirch group to pay higher prices than other competitors in acquiring such rights. Their preferential access to software means that Bertelsmann/Kirch can, following the digitalization of television, offer additional attractive pay-TV programmes and programme packages more easily than potential competitors.

- (78) In this connection, it is of particular importance that Bertelsmann/Kirch's programme resources allow different programme packages to be put together that are tailored to the requirements of specific target groups and can be offered at an attractive subscription price. Experience in countries where pay-TV is already at a more advanced stage of development shows that the bringing together of individual programmes to form programme packages is a key factor in achieving success on the pay-TV market. Pay-TV suppliers occupying a less important position on the market may moreover be forced to include their programmes in the leading pay-TV supplier's packages, thus giving it control over its competitors.
- (79) Account must also be taken of the fact that, as already noted, Bertelsmann is the leading book club operator in Germany and thus has at its disposal an important potential distribution channel for pay-TV programmes. In the case of Kirch, a further competitive advantage derives from its 35 % holding in Axel-Springer-Verlag, which for its part has a 20 % stake in SAT 1. Axel-Springer-Verlag is the largest newspaper publisher in Germany and at the same time also the leading publisher of television programme magazines. Obviously, the media association of Kirch and Axel-Springer-Verlag is likely to promote the acceptance of pay-TV programmes in which Kirch is involved.
- (80) With regard to the position which Bertelsmann and Kirch hold on the pay-TV market, another important point is the fact that the competition ban imposed on Premiere's shareholders, as described above, removes any chance of competition between both undertakings on the pay-TV market. This fact is perhaps less important in the case of analog television, since, given the shortage of available transmission channels, the possibility of new pay-TV programmes is in any

event limited. However, with the increase in transmission capacities following digitalization, both Bertelsmann and Kirch will have the possibility of supplying a much larger range of programmes on the market. Against this background, the competition ban acts as a restriction of competition to a much greater extent than previously.

- (81) Thus, Bertelsmann/Kirch already at present has an extraordinarily strong position on the pay-TV market.

(b) Strengthening of the position of Bertelsmann/Kirch through MSG

- (82) If, for the reasons set out above, MSG achieves on a lasting basis a monopoly position as an operator of a digital infrastructure for pay-TV, all pay-TV suppliers that may enter the pay-TV market following digitalization will be forced to take the services underlying pay-TV from an enterprise controlled by the pay-TV suppliers that are already in a leading position. Future pay-TV competitors of Bertelsmann/Kirch would have the choice of either accepting MSG's conditions or staying out of the market. This assessment is supported by the results of the hearing and by a large number of responses from enterprises surveyed.

- (83) The parties argue in response to this that each pay-TV programme supplier has the alternative of providing this service themselves, as is currently generally usual. This is incorrect. A look at the present situation shows that any new programme supplier entering the market is obliged to make use of the services of that pay-TV supplier which is already established on the market with technical infrastructure. This follows from the fact that the economic risk is normally too great for a programme supplier to install its own new infrastructure for a new programme. Experience has shown that, for example, a new programme supplier in the United Kingdom is dependent on BskyB's infrastructure and a new supplier in France on that of Canal Plus. With the setting up of MSG under its current shareholder structure, a comparable situation would also arise for digital pay-TV in Germany.

- (84) Via MSG, therefore, Bertelsmann/Kirch could significantly influence competition from future pay-TV suppliers and to a large extent shape it as they wished. Through their controlling influence in MSG, they can ensure that MSG's terms and conditions and in particular the price structure are

arranged in a way that is advantageous to their own programmes and disadvantageous to those of their competitors. Bertelsmann/Kirch could also derive benefit from artificially high prices, since unlike their competitors they have a share in MSG's earnings.

- (85) There would furthermore be the possibility, citing technical constraints that could be verified only with difficulty, of supplying MSG's services in such a way that the market access of programmes that ran counter to the interests of Bertelsmann/Kirch was at least delayed. The same also applies to Telekom's input of programmes into the cable network. It cannot be ruled out that, if it is concentrated with Bertelsmann/Kirch in MSG, Telekom will also take its partners' interests into account. The difficulties previously encountered in feeding programmes broadcast via Astra into Telekom's cable network suggest that, citing technical constraints, it can influence access to the cable network without in any provable way infringing the neutrality requirement.

- (86) As already stated, Telekom has it in its power to control the digital development of the hyperband in its broadband cable network. Telekom intends to make three channels available for digital television by the end of 1995, with each channel being able to broadcast digitally between four and 10 television programmes. This means that initially an additional transmission capacity will be available for only 30 new programmes at the most. A large proportion of this capacity can easily be taken up by Bertelsmann/Kirch, particularly since Premiere will be able to introduce near-video-on-demand, which would use up a considerable proportion of the transmission capacity. Telekom has stated that the digitalization of the other 12 channels available will take place in the light of general economic conditions in accordance with the principle of development that will achieve optimum coverage tailored to suit the needs of the market. Having set itself these relatively vague criteria, Telekom has it in its power to base the further development of the hyperband on the pay-TV interests of its partners in MSG. Account should also be taken of the fact that development can in any case take place only gradually, since digitalization of a new channel takes about six months and involves investment of around DM 50 million.

- (87) Bertelsmann/Kirch also have the possibility of influencing via MSG the location of their competitors' programmes. The large number of possible programmes in digital television makes it

necessary to establish a system of user guidance to help the viewer locate individual programmes in the 'programme jungle'. Since the necessary on-screen modulator is contained in the decoder box, such user guidance will probably be operated by whoever installs the decoder base. The control of user guidance enables the operator to place programmes of competing pay-TV suppliers on positions in the programme menu which make them less attractive. In this context, it is important, for example, how many operating steps are required to get access to a certain programme.

- (88) Bertelsmann/Kirch similarly have the possibility via MSG of influencing the marketing of competing programmes as regards the placing of such programmes on the smart cards issued by MSG. MSG, as the operator of conditional access, places on the smart cards the pay-TV programmes and programme packages offered, which are then released by the authorization signals transmitted with the television signal. It is to be expected that the average pay-TV subscriber will not wish to have to use a variety of different smart cards. MSG can therefore impede any competitors of Bertelsmann/Kirch by placing them not on the first smart card with the attractive programmes, but on additional new smart cards.
- (89) Lastly, Bertelsmann/Kirch could acquire substantial informational advantages through MSG. This applies in respect of planned new programmes, but in particular also in relation to the customer structure and viewer behaviour of the subscribers handled by its subscriber management system. Bertelsmann/Kirch do not even have to acquire access to individual customer data. It is sufficient for them to obtain access to non-personal data giving, for example, information on the age structure of the viewers of the relevant programmes. In the case of interactive pay-TV services such as pay-per-view, moreover, it can be ascertained from non-individualized data which specific group prefers what specific programme contents and to what extent. Such information confers substantial competitive advantages since it makes it much easier to develop target-group-oriented programmes or programme packages.
- (90) The parties counter this by arguing that it could not be in the interest of MSG's shareholders to act to the prejudice of other pay-TV suppliers as this would endanger the economic success of MSG. This argument appears questionable, since MSG is, as was stated above, expected to achieve a

monopoly position. Other pay-TV suppliers will be dependent on the services supplied by MSG even if the conditions are unfavourable and there are possibilities of prejudice. Furthermore, Bertelsmann and Kirch have a particular interest in controlling the pay-TV market and in influencing the chances of their competitors notwithstanding a possible negative impact of such behaviour on MSG's profits. Any counter-argument by the parties that the participation of Telekom ensures that MSG's activity will be non-discriminatory and supplier-neutral is not convincing. Bertelsmann and Kirch hold two-thirds of the shares in the joint venture. Even if Telekom exercises joint control with Bertelsmann and Kirch over the joint venture, it cannot be expected that MSG will behave in a neutral manner where the interests of both Bertelsmann and Kirch coincide. This is of particular relevance, since Kirch and Bertelsmann possess know-how for pay-TV technology, and in addition will be the most important customers of MSG's services, so that they will be able to restrict Telekom's scope for decision-making in MSG.

(c) Summary

- (91) In view of the considerable competitive advantages that are involved for Bertelsmann and Kirch in MSG and the possible adverse effect on future competitors, it is to be expected that the proposed concentration will create a durable dominant position for Bertelsmann and Kirch on the pay-TV market in Germany.

3. Cable networks

- (92) It can be expected that the proposed concentration will in the long-term also adversely affect to a considerable extent effective competition on the market for cable networks in Germany. In the immediate future, the Telekom monopoly under public law in the broadband cable network will continue. It is however to be expected that, following the liberalization of basic telephone services in 1998, the cable network market will also be deregulated and opened up to competition. There is a danger that, by jointly operating the pay-TV structure together with the leading pay-TV suppliers, Telekom will strengthen its position as a cable network operator in such a way that, following liberalization, competition in the cable network market will be substantially impeded and thus Telekom's dominant position safeguarded. In the same way as Bertelsmann/Kirch remove

Telekom as a potential competitor in the market for technical and administrative pay-TV services, Telekom, through the proposed joint venture, prevents Bertelsmann and Kirch from being available as potential partners for other future cable network operators.

- (93) For the time being, cable operators operating at network level 4, i.e. in the area of private home-distribution facilities, can only to a very limited extent install cable networks which are independent of Telekom's broadband cable network. Establishing the required satellite reception equipment (head ends) is subject to the Federal monopoly on radio plants and needs an authorization from the Ministry for Post and Telecommunications (BMPT). According to the administrative practice of the BMPT, a general authorization is given only for head ends of cable networks which do not go beyond the frontiers of a piece of land or which cover linked pieces of land with not more than 25 supplied households. Otherwise, a special authorization is required. As to cable networks between pieces of land which are not linked, the BMPT does not in principle give authorization for head ends. The only exception from this prohibition is made for private operators outside existing or projected areas of Telekom. This administrative practice largely protects Telekom from competition by private cable network operators. Should this practice be abandoned in liberalizing the market for cable networks, cable companies operating at network level 4 will have the opportunity to link their cable islands which at present are limited to single estates and thus to enter into competition with Telekom. This competition can, however, be rendered much more difficult for the private network operators if Telekom together with Bertelsmann and Kirch controls MSG as the dominant service company. There would in particular be the risk that private operators could not obtain the programmes of the leading pay-TV suppliers Bertelsmann and Kirch, which are required for attractive programme packages, or could obtain them only on unfavourable conditions. The creation of MSG with the current shareholding structure is therefore liable to strengthen the dominant position of Telekom as a cable network operator.

VI. UNDERTAKINGS WHICH THE PARTIES PROPOSE TO GIVE

- (94) By letter of 20 October 1994 the parties proposed giving various undertakings so as to remove the doubts against the proposed concentration. The

proposed undertakings comprise the following points:

- MSG will choose a decoder base that works on the basis of a common interface provided that a common interface is developed in accordance with the standards defined by DVB and minimizes the risk of piracy, so that this technology can be accepted by pay-TV providers.
- MSG will promote the free sale of decoders in the market and, in the case of renting, it will not impose any clause forbidding the use of the decoder for receiving programmes not handled by MSG.
- MSG undertakes not to disclose to its parent companies any information on programmes or subscriber data of other pay-TV suppliers (even in non-individualized form).
- MSG will choose a neutral and non-discriminatory style of presentation within the framework governing the technical features for the presentation of an Electronic Programming Guide (EPG) and will, as far as technically possible, provide information on programmes not handled by MSG.
- MSG will establish an advisory body that will control the non-discriminatory manner of display within EPG. On the board, the customers (service providers) of MSG will be represented, and proposals made by the advisory body will be taken into account by MSG in its decisions.
- MSG will charge reasonable market prices and will operate a transparent price policy, in particular with regard to equivalent prices for equivalent services.
- Telekom undertakes that, in addition to the currently installed 30 channels, it will open up its networks for further digital transmission of programmes in order to have sufficient reserves of technically usable transmission capacity and to avoid any shortage of channels.

- (95) These proposed undertakings must be deemed insufficient to avoid the abovementioned creation or strengthening of dominant positions. It is true that they relate to certain aspects which, generally, can be of particular importance for the competitive structure of future digital pay-TV. In particular, the introduction of a common interface appears from a competition point of view to be a solution to the problem of conditional access that would have a positive effect on the development of free and unfettered competition. This is true at least if

there are no contractual restraints on access to the decoder base for other pay-TV suppliers. Equally, a transparent price policy with respect to administrative and technical services is a positive factor for the competitive development of digital pay-TV. Given the current structure of shareholders of MSG, however, the proposed undertakings do not suffice to remove the competition problems in the present case. Moreover, they are partly subject to conditions and reservations which put their enforceability into question. Furthermore, apart from the undertakings concerning the introduction of a common interface and the creation of sufficient digital channel reserves by Telekom, they basically comprise only the commitment not to abuse in certain respects a dominant position held by MSG on the market for administrative and technical services to the detriment of competitors in the market for pay-TV.

- (96) The undertaking concerning the introduction of a common interface is subject to the condition that it minimize the risk of piracy and that the technology can be accepted by pay-TV providers. It is thus merely a declaration of intent which leaves scope for MSG to choose a decoder infrastructure on the basis of a proprietary system, claiming that the common interface is not sufficiently secure or that there is a lack of acceptance by potential customers. In this context, it should be borne in mind that the most important potential customer of MSG is Premiere, which is jointly controlled by Bertelsmann, Kirch and Canal Plus. It is well known that Canal Plus is resolutely opposed to a common interface and vigorously supports proprietary encryption systems in digital television as well as elsewhere. Besides, Bertelsmann recently entered a strategic alliance with Canal Plus. One practical project to come out of this strategic alliance is the agreement to set up a joint venture to develop a digital encryption system.

- (97) Even if the undertaking were given in a form which ensured the introduction of a common interface, the incompatibility of the concentration with the common market would not be removed. As set out above (points 70 to 72), MSG in its current structure of shareholders would achieve a dominant position in the market for technical and administrative services even on the basis of a common interface with unlimited access. Against

this background, a common interface is not capable to remove the serious harm to competition resulting from the combination of the leading cable network operator and the leading pay-TV suppliers in the MSG joint venture.

- (98) The proposed undertakings relating to the behaviour of MSG towards its customers and the further digitalization of the cable network by Telekom are not such as to avoid the creation or strengthening of a pre-existing dominant position held by Bertelsmann and Kirch in the market for pay-TV. As to MSG's assurance of non-discriminatory treatment of customers, this merely complies with the legal obligations incumbent on undertakings in a position of market dominance. In view of the various possibilities of hidden discrimination that exist in practice, it would furthermore be difficult to prove that MSG was not behaving neutrally *vis-à-vis* programme providers. The proposed advisory board would not alter this assessment since it would have only advisory functions and its proposals would not be binding on MSG. In addition, the undertaking not to pass programme information or subscriber data to the parent companies of MSG could not prevent the parent companies from obtaining informational advantages in non-verifiable ways because of the particular relationship and information links between them and MSG. Nor does the undertaking by Telekom that it will provide sufficient digital channel reserves afford any guarantee that further digitalization will not, citing technical and economic needs, be tailored to suit the interests of Bertelsmann and Kirch. In any case, it is rather a general declaration of intent and not a firmly defined undertaking.

- (99) All in all, it can be said that only the undertaking on the introduction of a common interface contains a structural aspect. The undertaking, however, is not sufficient to prevent market dominance by MSG, and it is moreover subject to reservations which make it amount to a non-binding declaration of intent. The other proposed undertakings have to be described as mere pledges of conduct which have no structural dimension and whose fulfilment cannot in any case be checked. They are as a matter of principle inappropriate to solving the structural problem, namely that the creation of MSG creates or strengthens dominant positions on the markets for administrative and technical services, pay-TV and cable networks.

VII. DEVELOPMENT OF TECHNICAL AND ECONOMIC PROGRESS

- (100) The parties point out that the rapid acceptance of digital television will be promoted by the services

offered by MSG. It is true that the successful spread of digital television presupposes a digital infrastructure and hence that an enterprise with the business object of MSG can contribute to technical and economic progress. However, the reference to this criterion in Article 2 (1) (b) of the Merger Regulation is subject to the reservation that no obstacle is formed to competition. As outlined above, however, the foreseeable effects of the proposed concentration suggest that it will lead to a sealing-off of and early creation of a dominant position on the future market for technical and administrative services and to a substantial hindering of effective competition on the future market for pay-TV.

- (101) This hindering of effective competition does in fact make even the achievement of technical and economic progress questionable. It is extremely doubtful whether, under the conditions given, the establishment of a digital infrastructure for pay-TV by MSG will actually contribute in a positive manner to the development of technical and economic progress. It is to be feared that, in view of the effects of the concentration described above, potential suppliers of digital pay-TV will not decide to enter the market to the same extent as would be the case with a service supplier whose shareholder structure would ensure strict neutrality. The successful spread of digital television would, in such a situation, be hindered rather than promoted. This assumption is underpinned by a series of opinions from the enterprises surveyed, which have stated that, in the event of the concentration being carried out, they would have to review and possibly abandon existing plans or thoughts on future pay-TV supply in the digital television area.

VIII. SUMMARY

- (102) For the reasons outlined above, it is to be expected that the proposed concentration would lead to the

development or strengthening of dominant positions and that effective competition in a substantial part of the Community would as a result be significantly hindered. The concentration must therefore be declared incompatible with the common market, in accordance with Article 2 (3) of the Merger Regulation, and with the functioning of the EEA Agreement, in accordance with Article 57 of that Agreement.

HAS ADOPTED THIS DECISION:

Article 2

The concentration by way of the creation of a joint venture as notified by Bertelsmann AG, Deutsche Bundespost Telekom and Taurus Beteiligungs GmbH & Co. KG is hereby declared incompatible with the common market and the functioning of the EEA Agreement.

Article 2

This Decision is addressed to:

1. Bertelsmann AG,
Carl-Bertelsmann-Straße 270,
D-33311 Gütersloh.
2. Deutsche Bundespost Telekom,
Godesberger Allee 87-93,
D-40474 Düsseldorf.
3. Taurus Beteiligungs GmbH & Co. KG,
Robert-Bürkle-Straße 2,
D-85737 Ismaning.

Done at Brussels, 9 November 1994.

For the Commission

Karel VAN MIERT

Member of the Commission