EUROPEAN COMMISSION

Brussels, 29/12/2003
C(2003) 5192 final

COMMISSION DECISION

of 29/12/2003

relating to a proceeding under to Article 81 of the Treaty and Article 53 of the EEA Agreement

(COMP/C.2-38.287 – Telenor / Canal+ / Canal Digital)

(Only the English text is authentic)

(Text with EEA relevance)

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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,

Having regard to Council Regulation No 17 of 6 February 1962, First Regulation implementing Articles 85 and 86 of the Treaty[1], as last amended by Regulation (EC) No 1216/1999[2], and in particular Articles 2, 6 and 8(1) thereof,

Having regard to the application for negative clearance pursuant to Article 2 of Regulation No 17 and the notification with a view to obtain an exemption pursuant to Article 4 of Regulation No 17 submitted by Telenor Broadband Services AS on 16 November 2001,

Having regard to the Commission decision of 19 June 2003 to initiate proceedings in this case,

Having regard to the summary of the application/notification and the commitments given by the notifying party published pursuant to Article 19(3) of Regulation No 17[3],

After consulting the Advisory Committee on Restrictive Practices and Dominant Positions,

WHEREAS:

1. INTRODUCTION

1. This decision refers to various contractual arrangements entered into by Telenor ASA (hereinafter "Telenor") and a number of its subsidiaries including Telenor Broadband Services AS (hereinafter "TBS") and Canal Digital AS (hereinafter "Canal Digital) as well as Groupe Canal+ SA (hereinafter "Canal+") and Canal+ Television AB (hereinafter "Canal+ Nordic") in 2001. The arrangements provide for Canal+' divestiture of its 50% shareholding in Canal Digital, previously jointly run with TBS, and its acquisition by TBS. They further stipulate the conditions under which the parties intend to conduct their pay-TV operations in the Nordic region subsequent to the transaction, in particular the distribution of pay-TV premium content channels to end-consumers via the direct-to-home (hereinafter "DTH") satellite platform of Canal Digital. These conditions include a range of exclusivity and non-compete arrangements between Canal+/Canal+ Nordic as an upstream supplier of pay-TV content and TBS/Canal Digital as a downstream TV broadcaster and DTH satellite distributor of such content that are restrictive of competition. Moreover, the notified agreements lay down certain mechanisms for co-operation between the parties regarding the acquisition of content for the purpose of pay-TV exploitation which equally restrict competition. However, the

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[1] OJ 13, 21.2.1962, p. 204/62.

[2] OJ L 148, 15.6.1999, p. 5.

[3] OJ C 149, 26.6.2003, p. 16.

Commission takes the view that these arrangements, subject to modification in accordance with a number of commitments given by the parties, either no longer have as their object or effect to restrict competition within the meaning of Article 81(1) of the Treaty and Article 53(1) of the EEA Agreement or fulfill the conditions for exemption under Article 81(3) of the Treaty and Article 53(3) of the EEA Agreement.

2. PARTIES

2. The notifying party TBS used to be a wholly owned subsidiary of Telenor, the incumbent telecommunications operator in Norway under the sole control of the Norwegian State. After internal reorganisation within the Telenor group in 2002 all contractual rights and obligations under the notified agreements were ultimately transferred from TBS to the newly created subsidiary Telenor Broadcast Holding AS (hereinafter “Telenor Broadcast”). Telenor Broadcast is a provider of TV and broadband based services to end-consumers across the Nordic region through DTH satellite transmission, satellite master antenna television system networks (hereinafter “SMATV”)[4] and cable networks. Following acquisition of its full ownership of Canal Digital, Telenor Broadcast is active as an independent DTH satellite TV distributor in all Nordic countries. Telenor Broadcast also operates the Norwegian analogue terrestrial broadcasting network through its affiliate company Norkring AS. Moreover, Telenor Broadcast owns large cable networks (hereinafter “CATV”)[5] in Norway (Telenor Avidi) and Sweden (Sweden On Line). In addition, through its subsidiary Telenor Vision, Telenor Broadcast operates as a commission agent wholesaler and retailer of (pay-)TV channels including so-called “mini-pay” and advertising financed channels for the purpose of their distribution to households connected to cable networks and SMATV. Finally, through its subsidiary Telenor Satellite Broadcasting, Telenor operates the Nordic satellites Thor II and III and offers leased capacity on satellite Intelsat 707, all positioned at 1°West and having a “Nordic footprint”, with transponder capacity for analogue and digital TV retransmission across the Nordic region.

3. Canal+ is the film and TV division of the Vivendi Universal group. Canal+ produces, acquires and distributes feature films, audio-visual works and acquires and exploits film licences and sports broadcasting rights for the purpose of pay-TV distribution. It also produces pay-TV channels and markets bouquets of such channels via cable and satellite. Following the divestiture of its shareholding in Canal Digital, Canal+ is no longer active as a DTH satellite distributor for pay-TV in the Nordic region. However, through its subsidiary Canal+ Nordic, it continues to operate as a wholesaler of Canal+’ pay-TV channels to multichannel TV distribution platforms, such as Canal Digital and large cable networks (hereinafter

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[4] SMATV are satellite networks distributing TV signals received through a joint satellite dish to households located in one or more adjacent buildings, primarily serving urban and suburban multiple dwelling units. For the purpose of this decision and in accordance with the parties’ definition, SMATV networks are considered to fall in the category of DTH retransmission.

[5] For the purpose of this decision, CATV networks are meant to be TV broadcast platforms operating a cable network with at least 20.000 connected households having direct contractual relations with their TV subscribers and controlling that relationship by means of their own technical devices and services.

"CATV") in the Nordic region. Canal+ Nordic also produces and wholesales pay-per-view (hereinafter "PPV") and near-video-on-demand (hereinafter "NVOD") services that are redistributed by Canal Digital and some Nordic CATV operators. Vivendi Universal has recently agreed with capital investment firms Baker Capital and Nordic Capital on the sale of Canal+ Nordic. The share deal, while aimed at changing the ownership and the control of Canal+ Nordic, has no material impact on the competition assessment of the notified agreements in the present decision.

4. Canal Digital was created in 1997 through a merger of Telenor CTV, a distributor of satellite TV channels, and NetHold, a company that was subsequently taken over by Canal+. Canal Digital's activities include in particular the packaging, marketing and selling of (pay-)TV channels including PPV and NVOD services. Canal Digital is active in both TV channel wholesale and retail distribution through a number of subsidiaries[6] to DTH customers (private households fitted with parabolic aerial), SMATV (hotels, institutions and small independent cable companies), small cable networks and CATV operators in all Nordic countries.

5. It is to be noted that Canal+/Canal+ Nordic are not notifying parties within the meaning of Article 4 of Regulation No 17 but have a contractually agreed right and obligation *vis-à-vis* Telenor/Telenor Broadcast fully to participate in the proceedings before the Commission. In the following it will be nonetheless referred to "the parties" as meaning both Telenor/Telenor Broadcast and Canal+/Canal+ Nordic.

3. THE NOTIFIED AGREEMENTS

3.1. Summary of the notified agreements

6. Telenor/TBS and Canal+ have been operating Canal Digital as a jointly controlled venture with equal shares since 1997. On 10 July 2001, the parties agreed on the acquisition of Canal+' 50% shareholding in Canal Digital by TBS (now Telenor Broadcast). In parallel the parties concluded two agreements on the distribution by Canal Digital of Canal+ Nordic's pay-TV premium content channels and PPV/NVOD channels via DTH, SMATV and small cable networks in the Nordic region. Hence, besides full acquisition of Canal Digital by Telenor/TBS the agreements aim at guaranteeing continuity of the pay-TV content supply and distribution previously secured within a vertically integrated company structure. The new contractual framework thus creates a vertical relationship between an independent upstream supplier of pay-TV premium content, i.e. Canal+ Nordic, and an independent downstream DTH platform for the distribution of pay-TV services to end-consumers, i.e. Canal Digital, that is principally caught by Article 81(1) of the Treaty.

7. The three notified agreements are:

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6 Canal Digital owns Canal Digital Norge AS, Canal Digital Sverige AB, Canal Digital Danmark AS and Canal Digital Finland OY.

– A sale and purchase agreement between Canal+ and TBS relating to the sale by Canal+ of its 50% shareholding in Canal Digital to TBS (hereinafter "Sale agreement");

– A distribution agreement between Canal+/Canal+ Nordic and Canal Digital/TBS regarding the distribution of Canal+ Nordic's pay-TV premium content channels via DTH through Canal Digital (hereinafter "Distribution agreement");

– An agreement for the supply of PPV/NVOD channels by Canal+ Nordic to Canal Digital (hereinafter "PPV/NVOD agreement").

8. The share deal between Canal+ and Telenor addressed by the Sale agreement had also been notified to the Finnish, the Norwegian and the Swedish competition authorities for clearance under the respective national merger laws. The national authorities cleared the transaction without conditions and without addressing potential restrictions of competition within the meaning of Article 81(1) of the Treaty.[7] Therefore, TBS also requested the Commission to grant negative clearance or, alternatively, an exemption for the notified agreements in so far as they are susceptible of being caught by Article 81 of the Treaty. The present decision accordingly addresses the notified agreements including the Sale agreement to the extent that they cover the distribution side and the co-operation in the relevant pay-TV markets between Telenor/TBS/Canal Digital on the one hand and Canal+/Canal+ Nordic on the other.

9. The parties on 21 June 2002 respectively notified to the Commission a settlement agreement reached between Canal+ and Telenor on 13 June 2002 regarding the interpretation of certain terms and conditions of the notified agreements. Moreover, they informed the Commission that closing of the notified agreements had taken place on 17 June 2002 subject to any potential amendments subsequently required by the Commission in the present proceedings.

3.2. Relevant clauses in the agreements as initially notified

10. The agreements as initially notified contained the following provisions susceptible of affecting competition:

3.2.1. Pay-TV channel exclusivity

11. Under the Distribution agreement, Canal Digital was granted the exclusive right to distribute, market and sell DTH and SMATV subscriptions to Canal+ Nordic's pay-TV premium content channels in the Nordic region for a period of <u>at least ten years</u>. This included the right to grant retransmission rights to small cable networks and SMATV covered by the term DTH as defined in the Distribution agreement.[8]

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[7] Cf. Decision of the Finnish Competition Authority of 17.8.2001; Administrative letter of the Swedish Competition Authority of 3.9.2001; Decision of the Norwegian Competition Authority of 14.12.2001.

[8] The agreed threshold separating small cable from CATV networks was [**confidential**] households connected. [**confidential**].

Accordingly, the exclusivity covered both wholesale and retail distribution of Canal+ Nordic's pay-TV premium content channels with respect to DTH/SMATV.

12. The Sale and Distribution agreements further protected Canal Digital's exclusive status by obliging Canal+ and its affiliate companies not to own or operate a DTH/SMATV platform or cable TV network with less than [**confidential**] connected households in the Nordic region during the term of the pay-TV channel exclusivity.

3.2.2. Pay-TV channel non-compete obligations

13. The Sale and Distribution agreements prohibited Telenor/TBS to own, operate or retail in the Nordic region via DTH/SMATV during at least ten years any other pay-TV premium content channels than those of Canal+ Nordic. The prohibition however did not cover distribution by Telenor/TBS or Canal Digital of third parties' pay-TV premium content channels via CATV networks owned or controlled by Telenor. On the other hand, Telenor/TBS were also precluded during three years from retailing via such CATV networks a pay-TV premium content channel which it owns, operates, controls or has an equity interest in.

14. In parallel, the Sale agreement prohibited Telenor to acquire in competition with Canal+ premium movie rights – except for Nordic premium movies – for the compounding of a pay-TV premium content channel that is designed for distribution through either DTH/SMATV or CATV during the term of the relevant non-compete obligations, i.e. ten and three years, respectively.

3.2.3. Information, co-operation and joint acquisition of content

15. The Sale agreement stipulated that Telenor and Canal+ keep each other informed of each others' proposed acquisition of sports and movie licences for the purpose of DTH/SMATV, CATV and DTT[9] distribution in the Nordic region. It further established a mechanism for joint acquisition of audio-visual content of ten years duration in the case of DTH/SMATV distribution and three years duration in the case of CATV and DTT distribution. Moreover, the Sale agreement included a number of bilateral rights of first refusal unlimited in time relating to the acquisition and marketing of sports rights and new services or channels designed for (pay-)TV distribution as well as distribution via new media technologies and platforms, such as xDSL[10] and broadband Internet.

3.2.4. PPV/NVOD channel exclusivity

16. Under the PPV/NVOD agreement Canal Digital had the exclusive right and obligation to distribute all of the PPV/NVOD movie channels broadcast by Canal+ Nordic as part of a multichannel service through DTH/SMATV, small cable networks and Telenor's CATV networks in the Nordic region for a minimum period of five years. Canal Digital also had exclusivity – i.e. a sub-licensing right

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[9] DTT is the acronym for digital terrestrial transmission or television.

[10] DSL stands for Digital Subscriber Line being a digital broadband technology and infrastructure on the basis of a telephony copper wire.

and duty – to distribute Canal+ Nordic's PPV/NVOD movie channels to other CATV operators than Telenor for at least two years. Accordingly, the exclusive status covers both wholesale and retail of Canal+ Nordic's PPV/NVOD movie channels depending on whether or not Canal Digital directly concludes subscription agreements with end-consumers.

3.2.5. PPV/NVOD channel non-compete obligations

17. The PPV/NVOD agreement principally prohibited Canal Digital to distribute PPV/NVOD (premium) film channels other than those provided by Canal+ Nordic for a minimum period of five years. However, Canal Digital – after having observed a negotiation procedure with Canal+ Nordic – could be exceptionally allowed to supply additional PPV/NVOD movie channels or PPV/NVOD services provided by third parties subject to a minimum satellite transponder capacity reserved for Canal+ Nordic.

3.2.6. Satellite transponder non-compete obligation

18. The Sale agreement obliged Canal+ to transmit its pay-TV channels and related services only via satellites owned or operated by Telenor and/or situated in 1°West for DTH reception in the Nordic region for a duration in line with that of the pay-TV channel non-compete obligation, i.e. at least ten years.

3.3. The parties' commitments to modify the agreements as initially notified

19. The Commission had raised preliminary competition concerns with the parties particularly in respect of the long duration of the relevant exclusivity and non-compete clauses including the various arrangements on horizontal co-ordination and joint acquisition. In that regard it had informed the parties that as a result of these arrangements long-term foreclosure of potential entrants in the relevant downstream and upstream markets (pay-TV retail and wholesale supply) would occur and that the creation of an own pay-TV brand by Telenor/Canal Digital would be precluded for a very long period of time. In order to accommodate these preliminary concerns the parties have proposed to reduce substantially both the duration and the scope of the relevant clauses in the notified agreements and to eliminate some of the clauses altogether.

20. More specifically, in order to mitigate foreclosure of potential entrants in the downstream DTH pay-TV segment resulting from the exclusivity arrangements, the parties proposed to

- reduce the duration of Canal Digital's pay-TV channel exclusivity and the prohibition on Canal+ to own/operate a competing DTH/SMATV platform to a maximum of four years;

- reduce the scope of the pay-TV channel exclusivity by narrowing down the definition of DTH/SMATV distribution to cable networks with less than [**confidential**] households connected.

21. In order to alleviate foreclosure of potential entrants on the supply-side in the upstream market for the wholesale supply of pay-TV and the restrictive effects resulting from horizontal co-operation, the parties proposed to

– reduce the duration of the pay-TV channel non-compete obligations on Telenor/Canal Digital and the joint acquisition arrangements including the bilateral rights of first refusal regarding sports rights to a maximum of three years;

– reduce the scope of the joint acquisition arrangement to premium audio-visual content for the purpose of pay-TV exploitation;

– reduce the duration of the PPV/NVOD film channel non-compete obligation on Canal Digital to a maximum of three years.

22. To mitigate foreclosure of potential entrants on the supply-side in the upstream market for the provision of transponder capacity for TV broadcasting, the parties proposed to

– reduce the duration of the satellite transponder non-compete obligation on Canal+ to a maximum of five years.

23. Finally, in order to avoid foreclosure in a number of related market segments, such as DTT and new media, resulting from clauses which allowed the parties to leverage their respective market strength into these segments and to extend their (vertical and horizontal) co-operation to any type of broadband based content exploitation and distribution, the parties proposed to

– eliminate all bilateral rights of first refusal regarding the acquisition and marketing of content and new services and channels via DTT and new media platforms.

24. On the basis of the foregoing proposal the Commission informed the parties that it intended to take a positive stance on the notified agreements subject to their amendment and giving third parties the opportunity to comment on the proposal following the publication of a notice pursuant to Article 19(3) of Regulation No 17. That notice was published in the Official Journal of the European Union on 26 June 2003 and prompted reactions from a number of interested third parties. The third party comments, which are summarised below in section 6, have not resulted in the Commission to change its preliminary favourable position regarding the proposed changes to the notified agreements. Following receipt of the parties' confirmation by letters of 30 September 2003, respectively, to amend and implement the notified agreements in accordance with the above commitments, the Commission accordingly took the present decision.

4. THE RELEVANT MARKET

4.1. Product markets

4.1.1. Overview on the affected markets

25. The Commission considers that the following markets are relevant to an assessment of the effects of the notified agreements:

(a) The markets for DTH satellite, cable and terrestrial retail distribution of pay-TV and PPV/NVOD services to households equipped with DTH satellite or terrestrial antenna and those connected to SMATV, small cable and CATV networks, in which Canal Digital is active as the most important Nordic DTH satellite TV distributor;

(b) The markets for the wholesale supply of pay-TV premium content channels and PPV/NVOD film channels to multichannel TV distribution platforms, such as DTH satellite TV distributors, Digital Terrestrial Television (hereinafter "DTT") networks and CATV networks, in which Canal+ Nordic is active as the most important Nordic pay-TV channel supplier;

(c) The markets for the supply of premium film and sports rights and other audio-visual content rights for pay-TV programming, in which Canal+ Nordic is active as one of the most important buyers in the Nordic region;

(d) The emerging wholesale and retail markets for the distribution of content via new media platforms;

(e) The market for the supply of satellite transponder capacity for TV broadcasting, in which Telenor is active as the most important Nordic supplier.

4.1.2. The markets for DTH satellite, terrestrial and cable retail distribution of pay-TV services

4.1.2.1. Preliminary remarks

Notion of pay-TV services

26. In the following, the term pay-TV services will be used to denote the wholesale and retail distribution of premium pay-TV and PPV/NVOD services and channels on which the notified agreements are focussed. Pay-TV channels of that nature are compounded of key quality content that creates a particular appeal to viewers – hence its designation as "premium" –, in particular recently released movies, such as "first window" Hollywood films, and top sports events, such as European and national football competitions, most importantly live coverage of such events.[11] According to the prevailing business model in Europe including that in the Nordic region, such attractive content is used as the main driver to the sale of highly valued pay subscriptions for premium channels like those of Nordic pay-TV suppliers Canal+ Nordic and Modern Times Group's (hereinafter "MTG") subsidiary Viasat (e.g. TV1000). While other TV channels are generally composed of content of "secondary" appeal to viewers and distributed by multichannel TV platforms through lower priced basic bundles – usually referred to as "basic-tier" packages –, premium pay-TV channels are marketed separately or on top of the basic bundles and generate a relatively high subscription price. Thus, from the viewpoint of the end-consumer willing to subscribe to premium pay-TV services, basic TV services are normally not considered a substitute but rather a

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[11] See Commission Decision of 13.10.2000 in Case No COMP/M.2050 – Vivendi/Canal+/Seagram, paras. 18-21; Commission Decision of 2.4.2003 in Case No COMP/M.2876 – Newscorp/Telepiù, paras. 55 et seq.; Commission Decision of 23.7.2003 in Case COMP/C.2-37.398 – Joint selling of the commercial rights of the UEFA Champions League, paras. 71 et seq.

complementary offer that may or may not be included in the premium subscription package.[12] From the perspective of the pay-TV broadcasters, highly attractive premium content needed for the compounding and successful commercialisation of such pay-TV channels is a scarce resource with only limited substitution possibilities, thus creating a strong incentive for acquiring exclusivity combined with a particularly high acquisition price charged by rights holders.[13]

27. In the light of these distinctive features and for the purpose of the present decision, the provision of commercial advertising financed TV channels and so-called “mini-pay” TV channels, such as thematic and general interest channels, by multichannel TV platforms are not to be considered as being pay-TV in the above narrow sense.[14] Furthermore, in this case it can ultimately be left open whether or not the marketing of “mini-pay” channels constitutes pay-TV in a broader sense or should be attributed to a market separate from those for premium pay-TV services on the one hand and free-TV on the other.[15]

Distinction between pay-TV and free-TV

28. In that context it should also be recalled that, according to the Commission’s consistent approach, pay-TV is considered as a product market separate from that for free-TV. While in the case of free-TV, 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 between the programme supplier and the viewer as subscriber. The conditions of competition are accordingly different for the two types of TV broadcasting. Whereas in the case of fee-and advertising-financed free-TV the audience share and the advertising rates are the key parameters, in the case of pay-TV the key factors are the shaping of programmes to meet the interests of the target groups and the level of subscriptions. Also in the present case, and in accordance with the findings in its recent decision in *Newscorp/Telepiù*,[16] the Commission does not see any grounds to depart from its views stated in previous decisions in that regard.

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12 The exact composition of TV channel “packages” offered by Nordic multichannel TV platforms varies considerably. However, the great majority of Nordic CATV operators deliver the pay-TV premium content channels of Canal+ Nordic and/or MTG/Viasat in separate premium “packages” that may be picked by consumers individually. In addition, DTH operator Canal Digital offers the premium Canal+ Nordic channels also in combination with a broader bundle of channels in each of the Nordic countries whereas its competitor Viasat delivers the TV1000 premium channels only in a large bundle (“gold package” with at least 30 channels).

13 See, e.g., Commission Decision of 23.7.2003 in Case COMP/C.2-37.398 – Joint selling of the commercial rights of the UEFA Champions League, in particular, para. 70 regarding the acquisition of sports broadcasting rights.

14 See also Commission Decision 2001/98/EC in Case IV/M.1439 – Telia/Telenor, OJ L 40 of 9.2.2001, p. 1, para. 277; Commission Decision of 2.4.2003 in Case No COMP/M.2876 – Newscorp/Telepiù, para. 74.

15 See also Commission Decision 1999/242/EC in Case No IV/36.237 – TPS, OJ L 90, 2.4.1999, p. 6, paras. 37-39; Commission Decision 1999/781/EC in Case IV/36.539 – British Interactive Broadcasting/Open, OJ L 312, 6.12.1999, p. 1, para. 28.

16 Cf. Commission Decision of 2.4.2003 in Case No COMP/M.2876 – Newscorp/Telepiù, paras. 34-39.

Distinction between analogue and digital pay-TV

29. For the purpose of market delineation, the Commission has furthermore made no distinction between analogue and digital TV broadcasting as the latter is likely to supersede the former in the foreseeable future.[17] In the present case, this view is confirmed by the evolution of the Nordic TV broadcasting sector where the migration from analogue to digital TV is advancing rather quickly, in particular, for DTH satellite retransmission.[18]

Distinction between different transmission modes for pay-TV

30. Premium pay-TV services can be delivered in a more or less uniform manner via satellite, cable networks or terrestrial retransmission, in particular, in the case of digital broadcasting. In the Nordic region, pay-TV premium content channels are distributed mainly via satellite to DTH households equipped with parabolic antenna (home satellite dish), to SMATV households and to households connected to small or large cable networks (CATV). During the administrative proceedings the question was raised whether the provision of premium pay-TV services via these different transmission infrastructures constitutes a single relevant product market or is to be considered as forming at least two distinct product markets, i.e. one for DTH and one for cable pay-TV distribution in the Nordic countries.

31. This aspect will be considered in more detail in the following:

4.1.2.2. The parties' view on market delineation regarding different transmission modes for pay-TV

32. The parties claim that the different transmission modes for the retail distribution of pay-TV services correspond to separate and narrowly defined product markets in the Nordic region. The market for DTH satellite retail distribution of pay-TV, including the distribution via small cable and SMATV networks, would constitute a market distinct from retail markets using other transmission modes for pay-TV, such as in particular CATV networks and terrestrial transmission. In support of their argument the parties *inter alia* refer to the early Commission decisions in *MSG Media Service* and *Nordic Satellite Distribution*.[19]

33. In the latter case the Commission considered that in the Nordic region DTH satellite distribution of pay-TV constitutes a market distinct from the operation of pay-TV via cable networks because of mainly technical and financial reasons, namely:

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17 See e.g. Commission Decision 1999/242/EC in Case No IV/36.237 – TPS, OJ L 90, 2.4.1999, p. 6, para. 26; Commission Decision 1999/781/EC in Case IV/36.539 – British Interactive Broadcasting/Open, OJ L 312, 6.12.1999, p. 1, paras. 24-25; Commission Decision of 2.4.2003 in Case No COMP/M.2876 – Newscorp/Telepiù, paras. 18 et seq., in particular, 40-42.

18 Cf. IDATE, The World Television Market, Vol.1: Markets, 2003, p. 124-125, 140-141, 205-206.

19 Commission Decision 94/922/EC in Case IV/M.469 – MSG Media Service, OJ L 364 of 31.12.1994, p. 1; Commission Decision 96/177/EC in Case IV/M.490 – Nordic Satellite Distribution, OJ L 53, 2.3.1996, p. 20.

- A different expenditure scheme of cable and DTH satellite TV for both consumers and programme suppliers;

- A limit on the build-up of cable networks in the Nordic region caused by geographic or regional conditions – i.e. terrain difficulties and dispersion of the population in a wide geographical area – which renders it economically impossible for cable TV to be a substitute for DTH satellite or terrestrial TV;

- Factual and legal obstacles to the DTH expansion due to local prohibitions on the installation of satellite dishes, e.g. on aesthetic grounds, and the restrictive attitude of landlords and housing associations in the case of multiple dwellings;

- A "lock-in effect" meaning that households already cable-connected or having a satellite receiver are normally not ready to make a further investment in another form of transmission of TV services.

34. By reference to these findings, Telenor essentially argues that from either a TV channel's or a customer's perspective cable networks and DTH platforms cannot be considered as substitutes for the retail distribution of pay-TV services. TV channel broadcasters, who aim to reach the highest possible customer penetration and to maximise income from both advertising and subscription, would consider cable networks and DTH platforms as complementary rather than substitutable means of distribution. From a customer's viewpoint, cable networks would not offer substitute products as the vast majority of DTH households, particularly outside the urban areas, are not connected to cable networks. Moreover, cable connected households, in particular those in multiple occupancy dwellings, receive cable TV services via the landlord and pay for them as part of the housing rent. They would be prevented from switching to substitute pay-TV retail services offered by DTH satellite operators due to local prohibitions, in particular by landlords, on the installation of satellite dishes and technical difficulties for flat owners to receive DTH services from satellites positioned 1°West or 5°East. Additionally, DTH services could not compete with cable operators' services, particularly in the digital environment, amongst which two-way internet services, more channels and channels offered at a lower price. The availability of such cable pay-TV services to households would create a "lock-in effect", meaning that customers would be unlikely to incur additional expenditure and effort to receive DTH pay-TV services. Finally, Telenor argues that the primary target segment for DTH operators is individual households not connected to cable where a considerable potential for growth is perceived by TV channel providers. On the other hand, for cable operators, who experience a certain degree of maturity of growth of their networks due to the terrain difficulties and the wide dispersion of the Nordic population, these households do not constitute a primary target.

4.1.2.3. The Commission's previous decisions

35. Subsequent to the early decisions in *MSG* and *Nordic Satellite Distribution* referred to above, the Commission has taken the following position on the issue of delivery of pay-TV services via different transmission modes in various countries of the European Union:

36. In *BIB/Open*, the Commission held that there is a single pay-TV market in the United Kingdom with no distinction between the different modes of transmission – digital terrestrial, satellite (analogue/digital) and cable.[20] These pay-TV services were considered as substitutes from the consumer's point of view as their composition and price were broadly similar. Moreover, the fact that satellite customers may have purchased satellite equipment was not regarded as creating such a significant lock-in effect that switching between satellite and cable services would be unlikely. The existence of a competitive relationship between cable and satellite pay-TV was evidenced by the fact that BSkyB's penetration rate for satellite pay-TV was significantly lower in areas where it faced competition from cable operators than in areas where no cable network existed. Moreover, BSkyB's "churn rate" – i.e. the average number of customers cancelling their subscription – was significantly higher in cabled as compared with non-cabled areas, which showed that BSkyB lost customers to cable pay-TV.[21]

37. The Commission took the same line in respect of the French pay-TV market in *TPS*.[22] First, it held that in France cable operators, satellite and terrestrial platforms offer roughly the same mix of TV channels to consumers. Moreover, the satellite platforms would apply a uniform pricing policy throughout France and would not charge different rates according to whether or not they are operating in a cabled area.[23] Secondly, in cabled areas where consumers have a choice between satellite and cable, the fact that satellite TV is generally subject to a number of constraints (e.g. administrative rules governing apartment buildings) relating to the installation of satellite dishes, would not provide sufficient justification for treating cable and satellite pay-TV as separate markets. On the contrary, low or very low penetration of satellite in cabled areas would tend to prove that cable-pay TV, where it actually exists, constitutes a substitute for satellite pay-TV, with consumers preferring the convenience of cable connection to the formalities usually involved in the installation of a satellite dish. The Commission therefore concluded that the French pay-TV market comprised the three methods of transmission: terrestrial, satellite and cable.[24]

38. In the more recent merger case *Telia/Telenor* the Commission carried out an extensive investigation and analysis specifically concerning the substitutability between DTH and cable pay-TV retail distribution in the Nordic region.[25] It found that whereas some technical and commercial differences between these distribution

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20 Commission Decision 1999/781/EC in Case IV/36.539 – British Interactive Broadcasting/Open, OJ L 312, 6.12.1999, p. 1.

21 Ibid., para. 26.

22 Commission Decision 1999/242/EC in Case No IV/36.237 – TPS, OJ L 90, 2.4.1999, p. 6.

23 Ibid., para. 29. It should also be noted that the overall level of cable penetration (number of cable subscribers versus number of TV households) in France at the time was 10%, ibid., para. 30.

24 Ibid., para. 30.

25 See Commission Decision 2001/98/EC in Case IV/M.1439 – Telia/Telenor, OJ L 40 of 9.2.2001, p. 1, paras. 267 et seq., in particular, 270-276.

methods exist, they are not necessarily more significant than between, for example, two competing cable operators. Moreover, the alleged distinction between cable and DTH would be likely, in due course, to become less relevant in the new digital environment and the context of convergence of various kinds of digital services, such as pay-TV and interactive services, offered via different transmission infrastructures. This trend would require a higher number of individual contractual relations of the service providers directly with the households rather than the landlords or housing associations as their representatives. Likewise, all retail pay-TV distributors, whether offering their channels via cable or DTH, would increasingly engage into individual subscription agreements with individual households, thus bypassing the landlords as intermediaries who would consequently play a less important role in the distribution chain. Finally, consumers would assess the new digital offerings by their ability to supply an attractive and broad range of services. Most customers would be unlikely to have any strong preference for any particular technical means of delivering new digital services, whether by DTH, broadband cable or cable/satellite in combination with their traditional copper telecommunications network as a return path for interactive services.[26] However, the exact market delineation was eventually left open in this case.

39. In *YLE/TDF/Digita/JV* the Commission took the view that "terrestrial transmission of high/low power frequency radio programmes and TV programmes, in Finland constitute distinct product markets which are separate from cable and satellite transmission".[27] However, this finding essentially referred to radio and free-TV broadcasting in Finland in which case the granting of the broadcasting licences requires universal coverage by the broadcasters of the – widely dispersed – population. Thus, in particular the Finnish cable networks with a coverage rate of only 45% of national TV households would not have provided a viable alternative to terrestrial transmission.[28]

40. Finally, it is to be noted that the new regulatory framework for electronic communication networks and services including the related Recommendation on relevant product and service markets is not relevant for the market delineation at issue.[29] The Explanatory Memorandum to the Recommendation explicitly excludes

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26 Ibid., paras. 269-276.

27 Commission Decision of 26.6.2001 in Case COMP/M.2300 – YLE/TDF/Digita/JV, para. 16.

28 Ibid., para. 17.

29 Cf. Commission guidelines on market analysis and the assessment of significant market power under the Community regulatory framework for electronic communications networks and services (2002/ C 165/03), OJ C 165, 11.7.2002, p. 6, paras. 38 et seq., in particular 45-50; Commission Recommendation of 11.2.2003 on relevant product and services markets within the electronic communications sector susceptible to *ex ante* regulation in accordance with Directive 2002/21/EC of the European Parliament and of the Council on a common regulatory framework for electronic communications networks and services (2003/311/EC), OJ 114, 8.5.2003, p. 45, and the related Explanatory Memorandum published under: http://europa.eu.int/information_society/topics/telecoms/regulatory/maindocs/documents/explanmemoen.pdf.

from its scope the definition of retail markets in connection with broadcasting.[30] Accordingly, and in line with Article 15(1) of the Framework Directive,[31] the Recommendation and the Explanatory Memorandum do not prejudice the market delineation regarding both the retail delivery of pay-TV content services over different transmission infrastructures in the present case.

4.1.2.4. Assessment

41. In accordance with the findings in *Telia/Telenor* the Commission has found indications that the issue of market delineation in respect of in particular cable and satellite retransmission of premium pay-TV services in the Nordic region, for a number of reasons, is more complex than suggested by the parties. It is true that cable pay-TV services are hardly available in remote and sparsely populated areas of the Nordic region, a feature which the Nordic countries however share with some other Member States of the European Union, such as France. Moreover, it seems that Nordic CATV networks have reached a certain degree of maturity and that most cable operators, mainly for the alleged topographic and demographic reasons, actually consider further network extension hardly feasible both technically and economically. Thus, satellite and/or terrestrial broadcasting will continue to be the major, if not exclusive, infrastructure available for the transmission of pay-TV signals in the rural and sparsely populated areas of the Nordic countries where at best SMATV or small cable networks equipped with satellite antenna may develop in the future. These barriers to substitution for a number of Nordic TV households however do not necessarily lead cable and DTH pay-TV services to belong to separate relevant product markets in the Nordic region.

42. First, account is to be taken of the fact that on average over 50% of the TV households in the Nordic region are actually connected to cable networks.[32] Even more Nordic homes are passed by cable.[33] This means that at least half of the Nordic viewers principally have the possibility of accessing premium pay-TV services via either cable or DTH.[34]

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30 Ibid., Explanatory Memorandum, p. 36 under point 4.4., 2nd para.

31 Directive 2002/21/EC of the European Parliament and of the Council of 7.3.2002 on a common regulatory framework for electronic communications networks and services, OJ L 108, 24.4.2002, p. 33.

32 Cf. Screen Digest, Europe's Cable Power Players, June 2001, p. 183; Screen Digest, European Cable Yearbook, 2002, p. 55, 67, 121, 157; IDATE, The World Television Market, Vol.1: Markets, 2003, p. 123, 139, 203 setting out the ratio of cable households amongst TV households in 2002 for: Denmark – 60,7%; Finland – 40%; Sweden – 62,5%.

33 See Screen Digest, European Cable Yearbook, 2002, p. 16 indicating a range from 63% to 68%, the highest rate being in Sweden and the lowest in Finland.

34 In 2001, the Nordic CATV operators totalled approximately 5.310.000 subscribers including basic-tier, extended-tier and premium pay-TV subscriptions in the Nordic region, whereas the DTH operators' combined number of smart card holders accounted for roughly 1.850.000 (with approximately 50% premium pay-TV subscriptions); cf. also Screen Digest, Europe's Cable Power Players, June 2001, p. 183.

43. Secondly, MTG/Viasat and Canal+ Nordic, the only premium pay-TV channel providers currently active in the Nordic region, respectively offer their channels through both DTH/SMATV platforms – i.e. Canal+ Nordic exclusively through Canal Digital and MTG exclusively through Viasat – and the majority of CATV networks across the Nordic region. This is done in more or less the same packages and at identical prices over all platforms per country,[35] the technical reception equipment made available by both DTH and CATV operators being generally pay-TV compatible.[36] Thus, customers in cabled areas have in principle the choice to access similar, if not identical pay-TV premium content via either of the transmission modes at the same subscription price. In addition, in conformity with the Commission's findings in *Telia/Telenor*, ongoing digitalisation will bring about even further convergence of pay-TV services to be provided via both cable and DTH, including the number and quality of the channels, and thus increasingly blur the distinction between various TV offerings available through the different transmission modes from the perspective of both service suppliers and end-consumers.[37]

44. Thirdly, it seems that with ongoing digitalisation, enhanced multifunctionality and reduction in costs for the provision of the necessary technical equipment, in particular satellite dishes and decoders, the alleged "lock-in effect" is becoming less relevant from the Nordic end-consumers' point of view. It is true that decoders used by Nordic CATV and DTH operators do not currently include both a cable and DTH satellite tuner.[38] However, including multiple tuners in one reception device is becoming commercially feasible now that costs of digital receivers have fallen thanks to economies of scale. Moreover, Nordic free-to-air and pay-TV broadcasters have all agreed to use the open middleware or Application Programme Interface (hereinafter "API") Multimedia-Home-Platform (hereinafter "MHP"). Multiple tuners and the phased introduction of MHP middleware would

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35 Thus, Telenor Avidi and UPC for Norway, Telia Stofa and TDC Kabel TV for Denmark, Tampereen Tietoverkko Oy and Helsinki Televisio Oy for Finland as well as ComHem, UPC and Kabelvision for Sweden distribute the premium pay-TV channels supplied by both Canal+ Nordic and Viasat. Country-wide identical subscription prices are due to Canal+ Nordic's and Viasat's single pricing policy per Nordic country; cf. e.g. http://www.viasat.se/htmlpages/tv1000//index.html; http://www.canalplus.no/.

36 Traditionally, a large number of the Nordic households accessing pay-TV services via DTH have been equipped with so-called dual-headed satellite dishes ("Nordenparabol") capable of receiving TV signals from 1°West and 5°East and set-top boxes with two slots enabling them to use smart cards from both Canal Digital and Viasat. Also CATV operators offer their subscribers the necessary (analogue or digital) decoders to receive both Canal+' and MTG/Viasat's pay-TV premium channels.

37 Cf. Commission Decision 2001/98/EC in Case IV/M.1439 – Telia/Telenor, OJ L 40 of 9.2.2001, p. 1, paras. 274-276. The current state of introduction of digital TV services in the Nordic region via all transmission modes is reported in IDATE, The World Television Market, Vol.1: Markets, 2003, p. 123, 139, 203; for the ongoing digitalisation of TV offerings on CATV networks in the Nordic region see specifically Screen Digest, European Cable Yearbook, 2002, p. 55, 67, 121, 157.

38 Currently decoders used by Nordic TV platforms have different front ends for the purpose of receiving the TV signal via either DTH or cable. While DTH compatible decoders receive the signal directly from the satellite (so-called QPSK), cable decoders' front ends are designed to receive a cable specific signal (so-called QAM) which is the result of a transformation process ensured by transmodulators (transforming the satellite signal received by cable head-ends into a cable signal).

thus enable end-consumers to access various TV content and services via different transmission infrastructures and from several TV operators.[39] In addition, analogue and digital decoders are needed for the reception and decoding of encrypted pay-TV signals irrespective of their transmission mode and both DTH and CATV operators in the Nordic region have started providing them to subscribers at low cost in combination with a premium subscription (e.g. subsidised low-price lease or free-of-charge).[40] Particularly Nordic DTH satellite distributors offer individual households technical equipment, including parabolic antenna, at almost zero cost in combination with a subscription to their premium content channels for periods between 12 and 24 months.[41] This indicates that the costs which, for instance, a cable pay-TV consumer has to incur for switching to DTH premium pay-TV services are not necessarily prohibitive.

45. The above parameters of demand-side substitutability appear to suggest that, in accordance with the concept of cross-price elasticity of demand,[42] in the Nordic countries end-consumers would be increasingly willing to switch from one pay-TV transmission mode to the other and/or pay-TV operator to the other in the case of a small but significant and non-transitory increase in relative prices for retail pay-TV services offered by CATV/DTH operators and/or premium channel suppliers. However, whereas competition between premium pay-TV channel suppliers Canal+ Nordic and MTG/Viasat through the various platforms, particularly in the DTH segment, is currently very pronounced, the Commission's investigation has shown that migration from one pay-TV transmission mode to the other has to date not been appreciable in the Nordic region.[43] This may be explained by the duplication of the relevant pay-TV services on all infrastructures and the hitherto prevailing commercial strategy of each of the pay-TV channel providers to distribute their respective services at identical prices regardless of the transmission mode.[44] Moreover, [**confidential**]. Already today, country-wide price comparisons

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[39] The majority of market participants in the Nordic TV business have agreed, in the framework of the "NorDig" co-operation, to introduce the open interface standard MHP in order to ease migration and consumer access to digital TV services in the Nordic region via all transmission infrastructures, cf. http://www.nordig.org/.

[40] Thus, MTG/Viasat converted its 350.000 analogue pay-TV subscribers in April 2001 to digital pay-TV by giving away decoders free-of-charge, cf. http://www.mtg.se. A similar strategy had been adopted by Canal Digital in 2000, cf. IDATE, The World Television Market, Vol.1: Markets, 2003, p. 143. For the decoder subsidising and rental policy by UPC Norge in combination with an analogue/digital subscription to premium pay-TV services from either Canal+ Nordic or Viasat cf. http://www.upc.no/.

[41] Cf. e.g. Viasat Broadcasting, Annual Report, 2000, p. 21; http://www.canaldigital.se/.

[42] See Commission Notice 97/C 372/03 on the definition of the relevant market for the purposes of Community competition law, OJ C 372, 9.12.1997, p. 5, in particular, para. 17.

[43] Thus, the number of subscriptions to Canal+ Nordic's channels have been increasing as from 1997 to 2002 via both Telenor Avidi and Canal Digital in Norway with no appreciable migration rate detectable.

[44] Thus, while price competition between Canal+ Nordic and MTG/Viasat has been tight increases in the respective prices for Canal+ Nordic's and MTG/Viasat's pay-TV services during recent years have been carried out more or less in parallel for DTH and cable retransmission.

reveal that DTH operators do not charge higher prices for their pay-TV services in non-cabled areas although there not being faced with actual or potential competition emanating from CATV operators. This could be explained by the fact that cable pay-TV actually constitutes a competitive constraint on DTH pay-TV in cabled areas with an at least indirect impact on the DTH operators' general pricing policy at national level.

46. Fourthly, the parties to the notified agreements themselves, from their perspective as pay-TV service suppliers, appear to acknowledge that in the Nordic region a competitive relationship between DTH and cable pay-TV retail distribution exists. Thus, the non-compete obligations imposed on Telenor/Canal Digital partly also cover pay-TV channel distribution via CATV. Moreover, by including small cable networks and SMATV in the notion of DTH for the purpose of the notified agreements, the parties do not neatly distinguish between "pure" DTH satellite pay-TV distribution on the one hand and pay-TV distribution via cable on the other. In particular, the agreed indicative threshold of [**confidential**] connected households, ultimately narrowed down to [**confidential**] connected households, shows that the alleged distinction is rather artificial and not necessarily warranted either technically or economically.

47. In addition, from the viewpoint of the pay-TV suppliers there do not seem to be relevant technical or economic barriers in the Nordic region which would hinder DTH satellite distribution of pay-TV channels to households and/or housing associations connected to CATV networks. In fact, the agreements as initially notified explicitly covered DTH satellite distribution to medium-sized cable networks' cable-head-end antennas reaching up to [**confidential**] connected households. This suggests that Canal Digital actually has the technical and commercial means to retail Canal+ Nordic's pay-TV services also via cable networks with a broader reach. The only relevant difference appears to be that small cable and SMATV networks do not normally provide the necessary technical services for pay-TV reception, such as conditional access systems (hereinafter "CAS") and subscriber management systems (hereinafter "SMS") whereas CATV operators do.[45] Moreover, the Commission's investigation indicates that Canal Digital, Telenor Vision and Telenor Avidi on the one hand and third CATV operators, such as UPC, on the other actually compete in the retail distribution of (pay-)TV services to Nordic SMATV and small cable networks, in particular those owned by housing associations. Hence, from the perspective of these customers, CATV and DTH pay-TV services appear to be substitutable.

48. Fifthly, it is to be expected that national and/or regional rules governing local prohibitions on the installation of satellite equipment, e.g. on aesthetic grounds, will sooner or later lose relevance or become subject to adaptation in as much as they constitute inadmissible barriers to the provision of cross-border services

[45] Canal Digital/Canal+ Nordic and their main competitor in the provision of DTH pay-TV services in the Nordic region, MTG/Viasat, usually contract directly with individual households connected to small networks and SMATV for the supply of pay-TV channels including the provision of the technical services, such as CAS and SMS, and the technical equipment required, i.e. satellite antennas, (digital) set-top boxes and smart cards. CATV operators supplying pay-TV services to individual households in the Nordic region, such as Telenor Avidi, UPC, ComHem or Kabelvision, in general operate differently by using their own CAS and SMS as well as technical equipment.

within the meaning of Article 49 of the Treaty, which the Community institutions are committed to abolish.[46] However, it remains true that landlords, building owners and private housing associations in the Nordic region, having entered into (pay-)TV delivery agreements with CATV operators, continue to maintain such prohibitions and that currently applicable rental contracts seldom allow individual households to switch from e.g. cable pay-TV to DTH pay-TV services. Hence, a large part of cable connected TV households in the Nordic region may at present not be able to react in the event of small and permanent price increases for premium pay-TV services delivered via CATV, whereas in the reverse situation a DTH household located in a cabled area could in principle switch to cable.

49. Finally, it is to be noted that the retail distribution of pay-TV services via digital terrestrial television is still very much in its embryonic stage in the Nordic region. Only in Finland and Sweden DTT services have been launched, yet without having reached the required service breadth, quality and potential to be capable of seriously challenging other TV retransmission modes, in particular DTH, in the short and mid-term.[47] This is particularly true for digital pay-TV broadcasting. In fact, while MTG/Viasat withdrew their pay-TV channels from Swedish DTT distribution in 2001, Canal+ relinquished their digital terrestrial broadcasting licences for Finland in 2002. Canal+ Nordic however continues to market its premium pay-TV channels over the Swedish Boxer DTT network. Nonetheless, in line with the above reasoning in respect of cable and DTH pay-TV, there are indications that DTT pay-TV will develop in the long-term in a way that it becomes increasingly substitutable with similar, if not identical, digital pay-TV services delivered through other infrastructures, in particular DTH satellite retransmission, from both the demand and supply side perspectives. This however does not apply to analogue terrestrial transmission, which in the Nordic region has never played a noticeable role in the distribution of premium pay-TV services.

50. It follows from the foregoing that various elements tend to show that in the Nordic countries a single market for the retailing of pay-TV services irrespective of the transmission mode may be emerging, in particular because of the possibility of customers located in cabled areas to receive such services in particular from either CATV or DTH satellite operators. In the present case it is however not necessary definitely to conclude whether this is actually the case. Even on the narrowest markets, DTH, CATV and DTT pay-TV distribution respectively, the outcome of the competition assessment would ultimately be the same.

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[46] Cf. judgment of the Court of Justice of the European Communities in Case C-17/00 *De Coster vs. Collège des bourgmestre et échevins de Watermael-Boitsfort* [2001] ECR I-9445 as well as Commission Communication on the application of the general principles of free movement of goods and services – Articles 28 and 49 EC – concerning the use of satellite dishes of 27.6.2001 (COM(2001)351 final), in particular, p. 15 et seq. regarding "architectural and urban planning rules".

[47] Cf. IDATE, The World Television Market, Vol.1: Markets, 2003, p. 140 and 204.

4.1.3. *Market for retail distribution of PPV/NVOD film services*

51. In accordance with the findings in *Universal Studio Networks / De Facto 829 (NTL) / Studio Channel Limited*[48] there are some indications that the provision of PPV services at both the wholesale and retail levels is developing into markets separate from the parallel markets for the provision of pay-TV channel services.

52. The following differences from the perspective of both supply and demand side were mentioned in the above decision:

   - PPV films are made available much earlier after theatrical release than films shown on premium pay-TV channels and are licensed on per film basis rather than as part of a bundled selection of films.

   - This particular feature of PPV services generates a price premium so that the per-subscriber wholesale price attached to PPV films is usually higher than that attached to basic tier or premium channel films.

   The Commission however also stated that PPV services are not yet well developed and that it is difficult to assess the extent to which competitive restraints on the marketing of PPV might emanate from video rentals or NVOD services.[49]

53. In line with the predominant business model in Europe so far, PPV/NVOD film services have generally constituted a service linked and complementary to the provision of premium pay-TV channels.[50] In the Nordic region, Canal+ Nordic and Canal Digital offer the PPV movie channel "Kiosk" only to consumers who have already subscribed to an extended TV channel package or the Canal+ Nordic pay-TV premium channels. During the administrative proceedings it was argued that in the face of low demand for PPV/NVOD services, their to date limited commercial success[51] and the relatively high cost involved in supplying the technical services needed for their reception, the only economically sound strategy would be to provide PPV/NVOD as a value-added service in conjunction with a subscription to a broader package including pay-TV premium content channels.

54. However, in contrast to Canal+ Nordic/Canal Digital, MTG/Viasat offer their competing PPV film and sports channel "Ticket" also to subscribers of the "basic-tier" package. This indicates that both the technical and economic reasons usually given for maintaining bundled offers of pay-TV and PPV subscriptions may no

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48 Commission Decision of 20.12.2000 in Case COMP/M.2211 – Universal Studio Networks/De Facto 829 (NTL)/Studio Channel Limited, para. 17. See also Commission Decision of 14.8.2002 in Case COMP/M.2845 – Sogecable/Canalsatellite Digital/Via Digital, para. 25.

49 Commission Decision of 20.12.2000 in Case COMP/M.2211 – Universal Studio Networks/De Facto 829 (NTL)/Studio Channel Limited, para. 17.

50 For the Italian pay-TV sector cf. Commission Decision of 2.4.2003 in Case COMP/M.2876 – Newscorp/Telepiù, para. 43. For the UK see Commission Decision of 20.12.2000 in Case COMP/M.2211 – Universal Studio Networks/De Facto 829 (NTL)/Studio Channel Limited, para. 16.

51 Thus, Canal+ Nordic's PPV revenues in 2001 made up for only [**confidential**]% of its overall pay-TV revenues.

longer be valid. In fact, from the technical viewpoint, PPV/NVOD film services can be accessed by end-consumers who hold the necessary equipment, in particular, the set-top box and the smart card for the decoding of the pay-TV signals. While it is true that in the analogue environment end-consumers were unlikely to make considerable investment in technical equipment for the purpose of receiving PPV/NVOD film services only, this is likely to have lost relevance in the digital world. Indeed, digital DTH subscribers, such as MTG/Viasat customers, automatically are in the possession of the required technical equipment whatever TV service package they subscribe to so that such switching barriers no longer exist. Also from an economic perspective, the to date limited commercial success of PPV/NVOD services does not seem to warrant the bundling of PPV and pay-TV services. In fact, the decision by MTG/Viasat to offer unbundled PPV services appears to be based on the opposite commercial strategy, namely, to entice and accustom basic-tier subscribers to make increasingly use of specific pay-TV services rather than compelling them outright to subscribe to the premium pay-TV package as a whole.

55. In addition, subscriptions to pay-TV channels on the one hand and PPV film services on the other display a range of distinctive features in terms of content offered, consumption mode and pricing that tend to limit their substitutability from the perspective of the end-consumer. Whereas PPV channels offer recently released films immediately after the expiry of the physical video distribution "window" (usually a period up to six months), pay-TV premium channels generally show these films only following the completion of the PPV "window" (usually a three months period).[52] Hence, already by reason of the time-span during which these services are on offer, subscribers may not choose between PPV and pay-TV to watch a recently released movie they are specifically interested in. In addition, PPV/NVOD services using digital multiplexing technology afford subscribers a relatively broad freedom to pick between various movies of the film library and to choose the appropriate timing for watching them without being submitted, at least not to a comparable extent, to the programming constraints and schedule imposed by the pay-TV channel provider. This brings the consumption mode of PPV/NVOD services much closer to that of video rental services than to pay-TV channel watching.[53] This will be the more so in the event of introducing a fully-fledged digital and multiplexed video-on-demand service via TV that leaves it at the complete discretion of the end-consumer to watch a given film at a given point in time. Finally, the inherently different pricing modalities for subscribing to pay-TV channels – on the basis of a monthly lump sum – as opposed to those for using PPV services, being charged on a per-film or per-view basis, render it rather unlikely that end-consumers switch from one service to the other in the case of hypothetical small but significant and permanent increase of relative prices.

56. In the light of the foregoing, the Commission concludes that the provision of retail PPV/NVOD film services in the Nordic region is emerging as a market separate

[52] Cf. Commission Decision of 13.10.2000 in Case COMP/M.2050 – Vivendi/Canal+/Seagram, para. 18; Commission Decision of 2.4.2003 in Case COMP/M.2876 – Newscorp/Telepiù, paras. 56-59.

[53] However, also premium pay-TV channels, by means of digital and multiplexing technology, increasingly offer more choice and flexibility to pay-TV subscribers.

from that of the retailing of pay-TV channel services. However, for the purpose of the present decision the exact delineation of the relevant market in that respect may be left open as this would not change the outcome of the competition assessment. Moreover, as in the case of pay-TV premium content channel distribution there is no need to determine whether the retail provision of PPV/NVOD services through different transmission modes forms a single relevant product market or whether DTH and cable PPV/NVOD services constitute separate markets.[54]

4.1.4. Market for the wholesale supply of pay-TV premium content channels and PPV/NVOD film channels

57. The notified agreements primarily affect the upstream market for the wholesale supply of pay-TV premium content channels and PPV/NVOD film channels.

4.1.4.1. Previous Commission decisions and new regulatory framework

58. In past decisions, the Commission has taken the view that the wholesale supply of (films and sports) pay-TV channels constitutes a market separate from that of the wholesale supply of other TV programming.

59. In *BIB/Open* the Commission considered that the market for the wholesale supply of films and sports channels forms a product market separate from that for the wholesale supply of other TV programmes including thematic or general interest pay-TV channels. For a pay-TV operator to be successful it is of decisive importance to offer channels composed of recently released films and live exclusive coverage of attractive sports as part of the service. In that regard the pay-TV operators' demand for these particular offerings reflects the demand of their subscribers. Premium content of that kind attracts the highest viewing figures and, accordingly, constitutes the most important driving force in selling premium subscriptions successfully. In parallel, these subscriptions are the most expensive and the relevant channels are charged on an individual basis. To the extent that the viewers are willing to pay more for sports and film channels and that these programmes achieve very high viewing rates, also their wholesale price is far higher than that of other TV channels and programmes.[55]

60. In *Telia/Telenor*, the Commission held in respect of the Nordic region that it may be appropriate to distinguish the buying of rights to transmit TV channels from the buying of individual content, such as individual films, sport and other events. Moreover, another potential distinction would be between content in the form of advertising-financed TV channels and TV channels financed by low subscription fees (so-called "mini-pay" channels), where the cable or DTH distributor acts as a

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[54] To date, in the Nordic region PPV/NVOD services are primarily distributed by DTH operators. Thus, apart from ComHem and TDC Kabel TV, the great majority of CATV operators do not offer the Canal+ Nordic PPV channel "Kiosk" to their subscribers. This may however be subject to change in the near future as the notified agreements provide an obligation on Canal Digital to wholesale the "Kiosk" channel also to Nordic CATV operators.

[55] Commission Decision 1999/781/EC in Case IV/36.539 – British Interactive Broadcasting/Open, OJ L 312, 6.12.1999, p.1, paras. 28-29.

wholesaler and normally bundles several channels into a bouquet on the one hand, and premium pay-TV channels on the other. While most broadcasters of advertising-financed and mini-pay channels seek to be included in the "basic tier" offering of any DTH, cable or SMATV operator, broadcasters of premium pay-TV channels (mainly films and sports) generate their revenue from relatively high subscription fees paid by the viewer to access that specific channel, and are never included in the "basic tier". The cable or DTH distributor will often act as an agent for the premium channel provider, and the latter will normally set the prices. Moreover, during the proceedings in *Telia/Telenor* several broadcasters had indicated that they regard cable, DTH and SMATV as competing distribution channels, although they also wished to ensure that their channels be as widely distributed as possible. The Commission accordingly concluded that there are a number of aspects which indicates that a certain degree of substitutability may exist between cable, DTH and SMATV activities of Telia, Telenor and Canal Digital, both as far as the downstream retail TV-distribution and the upstream content buying is concerned. However, the exact delineation of the market was eventually left open in the decision.[56]

61. In *Newscorp/Telepiù*, the Commission ultimately did not determine whether different wholesale markets exist according to a single type of channel. It however confirmed that the provision of TV channels is to be distinguished from other TV contents acquisition markets, such as those for buying single events or contents for the purpose of assembling TV packages.[57]

62. The Explanatory Memorandum to the Recommendation on relevant product and service markets within the electronic communication sector[58] identifies, in the absence of limitations on the feasibility of switching between different platforms (in particular terrestrial, cable and satellite), a potential <u>wholesale</u> market for "broadcasting transmission services and distribution networks in so far as they provide the means to deliver broadcast content to end users". However, ultimately the Recommendation/Memorandum leaves the exact market delineation to the national regulators' appraisal on the basis of the facts that may vary from one Member State to the other, in particular, with a view to the actual switching barriers involved.[59] Already for that reason and in line with Article 15(1) of the Framework Directive,[60] these documents do not prejudice the market delineation regarding the wholesale supply of pay-TV channels to TV distribution platforms in the present case. Moreover, contrary to the wholesaling of <u>transmission</u> or <u>access</u>

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56 Commission Decision 2001/98/EC in Case IV/M.1439 – Telia/Telenor, OJ L 40 of 9.2.2001, p. 1, paras. 277-279.

57 Commission Decision of 2.4.2003 in Case No COMP/M.2876 – Newscorp/Telepiù, paras. 74-76.

58 Cf. http://europa.eu.int/information_society/topics/telecoms/regulatory/maindocs/documents/explanmemoen.pdf.

59 Ibid., Explanatory Memorandum, p. 37

60 Directive 2002/21/EC of the European Parliament and of the Council of 7.3.2002 on a common regulatory framework for electronic communications networks and services, OJ L 108, 24.4.2002, p. 33.

services as specified in the Recommendation under point 18, the relevant wholesale market at issue here consists of the wholesale supply of specific content input for the purpose of its redistribution to end-consumers (cf. below).

4.1.4.2. Assessment

63. For the purpose of the present decision it can ultimately be left open whether separate markets for the supply of different categories of pay-TV premium film or sports channels exist. The pay-TV packages offered by both Canal+ Nordic and MTG/Viasat constitute a bundle of channels with a mix of premium film and top sports events that are comparable in terms of both quality and price and the competition assessment would not change in the case of further sub-segmentation of the market.

64. In the Nordic region the wholesale supply of pay-TV premium content channels is carried out on the basis of varying trading relationships. As already indicated in *Telia/Telenor*, Nordic multichannel TV platforms formally often act as commission agents for the redistribution of the pay-TV broadcasters' channels to the end-consumer. Thus, the great majority of contractual relations between Canal+ Nordic or MTG/Viasat on the one hand and Nordic CATV operators on the other are based on so-called commission agency agreements. According to those agreements the CATV operators, while directly controlling the commercial relationship with the end-consumer and providing their own technical services (in particular SMS, CAS and decoder technology) to subscribers, legally act on behalf of the pay-TV supplier and receive a flat commission – being normally a given rate of the subscription fees – in return for their service. Other agreements with multichannel TV platforms, such as the notified Distribution agreement between Canal+ Nordic and Canal Digital and that between Canal+ Nordic and some of the CATV operators, follow a different commercial and contractual model. On the basis of such agreement, the TV distributor acquires a distribution licence, being mostly exclusive, against payment of a licence fee. Moreover, under this contractual set-up the TV distributor legally acts in its own name *vis-à-vis* the subscribers and shares both the revenues generated from the subscriptions and a larger portion of the economic risk with the pay-TV supplier, in particular by accepting minimum subscriber guarantees.

65. The Commission takes the view that the above differences in the existing business models do not have a bearing for the purpose of delineating the relevant product market in the present case. Nordic multichannel TV distributors, be they DTH or CATV operators, in general consider themselves as broadcasters rather than mere carriers of TV services as they usually undertake considerable market-specific (sunk) investment into their TV platform including the creation of an own platform brand. This includes heavy investment into the provision of a technical infrastructure and the related services, such as SMS and CAS systems, enabling CATV operators to control the end-consumer relationship in respect of pay-TV subscriptions. Moreover, CATV operators also share part of the economic risk with the pay-TV supplier as their commission fee is determined as a rate of the subscription fees actually paid by subscribers. This suggests that CATV operators, at least in the case of pay-TV, do not merely act as providers of TV carriage services but as broadcasters in their own right who seek to recoup market-specific investment via an attractive pay-TV offering designed to entice subscribers to access their platform.

66. From the perspective of the DTH and CATV distributors and for the reasons already indicated – in particular because of the highly valued and attractive content delivered – pay-TV premium channel bouquets are not substitutable with other TV channels, let alone with specific content rights for the purpose of (costly and resource demanding) TV channel production,[61] such as single films or sports events. In the Nordic region, pay-TV providers, such as Canal+ Nordic and MTG, supply pay-TV premium content channels in a given assembled and branded format as well as in bundles. Whatever the underlying business model, it appears that Nordic multichannel TV distributors consider such pay-TV premium content channels as a "must-have" content input that they need to offer to their subscribers. Also from their perspective, these channels have the highest ratings and constitute essential drivers for attracting customers and enhancing subscriber loyalty to their platform. In that regard, the distinct demand of the distribution platforms for pay-TV premium content channels ultimately reflects the preferences of their subscribers.[62]

67. The Commission therefore takes the view that the market for the wholesale supply for pay-TV premium content channels follows the traditional distinction of supply and demand in the distribution chain, with the pay-TV channel supplier as the selling-side on the one hand, and the multichannel TV distributor as the buying-side on the other. Moreover, the Commission considers that there is no need, at the wholesale level, to distinguish between the different transmission modes for channel redistribution, e.g. by either DTH, SMATV or CATV platforms/networks. However, for the purpose of the present decision it can ultimately be left open whether there is an overall wholesale market for the supply of pay-TV channels or whether distinct wholesale markets for either DTH or cable redistribution of these channels exist because this would not change the results of the competition assessment.

68. Accordingly, the relevant product market for the purpose of the present case is that for the wholesale supply of pay-TV premium content channels and PPV/NVOD channels.

4.1.5. Markets for the supply of premium film and sports rights and other audio-visual content rights for TV programming

69. The supply of premium film and sports rights and other content rights for TV programming constitute markets upstream to the wholesale supply of pay-TV premium content channels and PPV/NVOD channels. In previous Commission decisions, the following distinctions were made in respect of premium content rights for the purpose of pay-TV exploitation:

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61 See also Commission Decision 96/346/EC in Case IV/M.553 – RTL/Veronica/Endemol, OJ L 134, 5.6.1996, p. 32, para. 89.

62 Cf. Commission Decision 1999/781/EC in Case IV/36.539 – British Interactive Broadcasting/Open, OJ L 312, 6.12.1999, p.1, para. 28. Generally, both the pay-TV supplier and the TV distribution platform attempt to achieve the highest possible subscription rates in their common commercial interest. To that extent they are economically dependent on each other. It ultimately depends on their respective commercial strength on whether they are capable to impose on each other certain terms and conditions for the redistribution of the pay-TV service; cf. also Commission Decision 2001/98/EC in Case IV/M.1439 – Telia/Telenor, OJ L 40 of 9.2.2001, p. 1, paras. 277 et seq.

Premium film rights

70. The Commission stated in *Vivendi/Canal+/Seagram* that from the demand side, i.e. the pay-TV operator's point of view, the broadcasting rights for feature films and those for made-for-TV programmes are not interchangeable. The reason is that feature films and made-for-TV programmes do not have the same value in terms of consumers' attractiveness. From the supply side, these rights are traded under different pricing structures and do not have the same economic value. In *Sogecable/Canalsatellite Digital/Via Digital* and *Newscorp/Telepiù*, the Commission furthermore indicated that the relevant market for films was mainly composed of "premium films" or "highly successful films" in terms of box-office tickets sold during theatrical exhibition, which in general correspond to films produced by the U.S. major studios (so-called Hollywood Majors).[63]

Sports broadcasting rights

71. In its decisions *UEFA's broadcasting regulations*,[64] *Canal+/RTL/GJCD/JV*[65] and *Joint selling of the commercial rights to the UEFA Champions League*,[66] the Commission considered more generally sports broadcasting rights as a field distinct from other TV programming. Moreover, it distinguished more specifically within the field of sports broadcasting rights for football events that take place regularly throughout every year on the one hand (e.g. UEFA Champions League and the UEFA Cup) and those that are played intermittently (e.g. World Cup) on the other as being separate product markets. The Commission also stated that, at least within the EEA, football broadcasting rights may not be regarded as substitutes to other sports broadcasting rights. Other sports broadcasting rights do not constitute a constraint on the pricing behaviour of the owners of football broadcasting rights, the latter rights consistently generating prices exceeding by far those of the former rights.[67]

72. In *Joint selling of the commercial rights to the UEFA Champions League*, the Commission further held that TV rights for football events create a particular brand image for a TV channel and allow the broadcaster to reach a particular audience at the retail level that cannot be reached by other programmes. Thus, pay-TV football constitutes a main driver for selling subscriptions and creating a credible channel

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63 Commission Decision of 14.8.2002 in Case COMP/M.2845 – Sogecable/Canalsatellite Digital/Via Digital, paras. 25-26. See also Commission Decision of 2.4.2003 in Case No COMP/M.2876 – Newscorp/Telepiù, para. 58.

64 Commission Decision 2001/478/EC – UEFA Broadcasting Regulations, OJ L 171, 26.6.2001, p. 12, paras. 24-42.

65 Commission Decision of 13.11.2001 in Case COMP/M.2483 – Canal+/RTL/GJCD/JV, (IP 01/1579), paras. 19-21.

66 Commission Decision of 23.7.2003 in Case COMP/C.2-37.398 – Joint selling of the commercial rights of the UEFA Champions League, paras. 59 et seq.

67 Commission Decision of 13.11.2001 in Case COMP/M.2483 – Canal+/RTL/GJCD/JV, (IP 01/1579), paras. 18-19; Commission Decision of 23.7.2003 in Case COMP/C.2-37.398 – Joint selling of the commercial rights of the UEFA Champions League, para. 70.

brand image as well as the viewers' brand loyalty based on regular retransmissions of the relevant competitions. The Commission finally concluded that TV rights to other sports events or other types of programmes, such as feature films, do not put a competitive constraint on the holder of the TV rights to such football events and that there is no substitutability between the TV rights to football and the TV rights to other types of programmes.[68]

73. The Commission takes the view that by reason of the above distinctive features that have been confirmed by the investigation in the present case and for the purpose of pay-TV exploitation in the Nordic region, there are at least two separate markets for the acquisition of premium film rights on the one hand and sports broadcasting rights on the other, regardless of any possible sub-segmentation of these markets. It can be ultimately left open in the present case whether or not within these markets, in accordance with the nature, the quality and the economic value of the copyrighted content supplied, distinct sub-markets for the acquisition of premium film and/or sports rights exist. The outcome of the competition assessment would not change as the pay-TV operators at issue – as suppliers of premium pay-TV services compounded of various highly valued content, being generally a mix of premium movies and top sports events – have a similar positioning in the relevant Nordic markets.

74. Accordingly, the relevant markets for the purpose of the present case are the market for the acquisition of premium film licences and the market for the acquisition of premium sports rights for the purpose of pay-TV exploitation.

4.1.6. The wholesale and retail markets for the distribution of content via new media platforms

75. The agreements as originally notified also affected the markets related to the delivery of new services and content through new media platforms, such as broadband Internet and xDSL-technology. As the Commission recently held in *Joint selling of the commercial rights of the UEFA Champions League*,[69] these technologies and infrastructures are still at an early stage of development. Also in the Nordic region, there appears to be no reliable empirical evidence on which a proper market definition could be based. Nonetheless, it is obvious that for an effective and commercially successful roll-out of these technologies and the related services, whatever specific form they may take, access to the relevant content rights, in particular premium content such as top sports events, is indispensable just in the same way as such rights are necessary for the economic success of TV broadcasting services.[70] The Commission therefore takes the view that it is likely that new media markets will emerge in the Nordic region at both the upstream and downstream levels, which will parallel the development of the pay-TV

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68 Commission Decision of 23.7.2003 in Case COMP/C.2-37.398 – Joint selling of the commercial rights of the UEFA Champions League, paras. 59 et seq.

69 Commission Decision of 23.7.2003 in Case COMP/C.2-37.398 – Joint selling of the commercial rights of the UEFA Champions League, para. 82.

70 Ibid., paras. 83-84.

broadcasting markets. However, as the revised agreements no longer affect these markets, this aspect does not need to be further analysed in the present case.

4.1.7. Market for the supply of satellite transponder capacity for TV broadcasting

76. TV signals originating from any broadcaster are transmitted to the satellite from an earth station, a process known as "up-linking". Satellite transponders receive the signals, amplify and retransmit them to satellite antennas on the earth surface, known as "down-linking" before being forwarded to the end-consumers' TV set. There are three distinct groups of potential receivers of the satellite signals, namely:

- CATV (cable TV operators);
- SMATV (satellite master antenna TV operators – typically used by building associations for apartment blocks); and
- DTH (direct-to-home consumer households).

The satellite operator does not ultimately control which of these three groups of potential receivers finally intercept its signals.

77. For the purpose of the present decision, it does not seem necessary to consider whether the supply of satellite transponder capacity for CATV, SMATV and DTH retransmission of TV signals constitute separate product markets. [**Confidential**] The only economically relevant criteria for differentiation appear to be the number of the channels transmitted as well as the issue as to whether this is done in analogue or digital form. These criteria are decisive for the volume of transponder capacity required, and accordingly the costs involved, for the satellite retransmission of the TV signals.[71]

78. Therefore, the Commission considers that there probably is a market for the supply of satellite transponder capacity for TV broadcasting irrespective of the retail transmission mode. However, the exact market delineation can be left open in the present case since even under the narrowest markets, i.e. CATV, SMATV and DTH satellite services, respectively, the outcome of the competition assessment would not change.

79. Accordingly, in the following the relevant product market is that for the supply of satellite transponder capacity for TV broadcasting.

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[71] Thus, digital technology allows retransmitting 6-8 channels on the same transponder, cf. e.g. http://www.canaldigital.com/tech.asp.

4.2. Geographic markets

4.2.1. The markets for DTH satellite, terrestrial and cable retail distribution of pay-TV and PPV/NVOD film services

80. Canal Digital distributes Canal+ Nordic's pay-TV premium content channels – as Viasat does for premium pay-TV channels produced by MTG – primarily to DTH households in Denmark, Finland, Norway and Sweden through separate subsidiaries for each of the Nordic countries: Canal Digital Danmark A/S, Canal Digital Finland Oy, Canal Digital Norge AS and Canal Digital Sverige AB. To a somewhat lesser extent, these pay-TV channels are also distributed to cable households in all Nordic countries via large CATV operators, mostly acting as commission agents on behalf of either Canal+ Nordic and/or MTG/Viasat. Also Viasat operates its retail business on a national basis per Nordic country.[72] Moreover, although both MTG/Viasat and Canal Digital/Canal+ Nordic offer their pay-TV services in the Nordic region under a single brand and a specific "Scandinavian TV channel format" the different channels are being gradually adapted to the national taste (e.g. in the field of sports) and language per country of retransmission. Thus, though being similar in composition in all of the Nordic countries, Canal+ Nordic's country specific pay-TV premium content channels have different schedules and offer somewhat different movies and sports contents. Moreover, subscribers only have access to the specific pay-TV offering available in the country where they are domiciled, regardless of the transmission mode.

81. Therefore, in accordance with previous decisions where the Commission considered the geographic scope for the retail market for pay-TV services to be national, in particular for cultural reasons, language barriers and differing regulatory regimes, each of the Nordic countries constitute separate geographic markets, namely Denmark, Finland, Norway and Sweden.

4.2.2. Market for the wholesale supply of pay-TV premium content channels and PPV/NVOD film channels

82. Both the language characteristics and the largely uniform programming and distribution mode for pay-TV in Denmark, Finland, Norway and Sweden indicate that an overall Nordic market for the wholesale supply of pay-TV premium content channels exists.[73]

83. On the supply-side, producers and suppliers of pay-TV, such as Canal+ Nordic and MTG/Viasat, respectively use more or less the same premium content feed – acquired from rights holders on the basis of Nordic licences – for the compounding of their pay-TV bouquets and provide similar, if not identical pay-TV services under a single brand image throughout the Nordic region. Moreover, there seem to be no appreciable technical or economic obstacles for these suppliers to use largely the same content feed across all Nordic countries and to adapt their pay-TV

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[72] Cf. http://www.viasat.no/; http://www.viasat.dk/; http://www.viasat.fi/; http://www.viasat.se/.

[73] See also Commission Decision 1999/781/EC in Case IV/36.539 – British Interactive Broadcasting/Open, OJ L 312, 6.12.1999, p. 1, para. 43; Commission Decision 2001/98/EC in Case IV/M.1439 – Telia/Telenor, OJ L 40 of 9.2.2001, p. 1, para. 285.

programming according to country specific needs, thus benefiting from large economies of scale. This is due *inter alia* to cultural similarities and the common tradition in the Nordic countries of broadcasting movies in original language and other programmes with subtitles. Moreover, Nordic pay-TV suppliers lease satellite transponder capacity for retransmission of their channels to all Nordic countries from satellite providers offering a Nordic satellite "footprint", such as Telenor Satellite Broadcasting or NSAB, equally on a Nordic basis.[74] Also from the demand side and the multichannel TV distributors' perspective, the Nordic pay-TV premium content channels offered by Canal+ Nordic and MTG/Viasat, for the above reasons, constitute at least similar and therefore largely substitutable services.

84. These considerations lead to the conclusion that the market for the wholesale supply of pay-TV premium content channels in its geographic scope extends to the Nordic region as a whole.

4.2.3. Markets for the supply of premium film and sports rights and other audio-visual content rights for TV programming

85. The upstream markets for the supply of premium movies and sports broadcasting rights as well as other content for TV programming appear to extend at least to the Nordic region. Viewer preferences for a certain type of premium content are similar all over the Nordic region, thus inducing channel producers/broadcasters to create and broadcast channels to match specifically the "Nordic taste".[75] In addition, cultural and linguistic factors are not considered as significant obstacles to transmitting largely the same content in all of the Nordic countries which share the common tradition of having programmes/movies with subtitles. It is accordingly established practice between rights holders and buyers, in particular regarding premium films, that licensing contracts are concluded on a Nordic basis, i.e. the broadcasting license being granted for the Nordic region as a whole.

86. The relevant geographic scope for these markets is therefore at least the Nordic region as a whole.

4.2.4. The wholesale and retail markets for the distribution of content via new media platforms

87. For the reasons stated above (4.1.6.), the exact delineation of the relevant geographic wholesale and retail markets for the distribution of content via DTT and new media platforms can be left open in the present case. However, taking into account the criteria for delineating the parallel pay-TV wholesale and retail markets in the Nordic region, it is reasonable to assume that wholesale markets will probably develop on a Nordic basis whereas the retail markets are likely to becoming national for regulatory, language and cultural reasons.

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[74] Ibid., para. 285.

[75] This "Nordic taste" appears to extend further to the Baltic countries where MTG/Viasat have recently launched a pay-TV business similar to that run in the Nordic region on the basis of the TV1000 premium channels, cf. MTG, Financial Results for the Period January – June 2003, p. 5 – http://www.mtg.se.

4.2.5. *Market for the supply of satellite transponder capacity for TV broadcasting*

88. The narrowest possible definition of the geographic market for the supply of satellite transponder capacity is that of the satellite "footprint".

89. In *Nordic Satellite Distribution* the Commission defined the relevant satellite footprint as the geographic area where it is possible for Nordic viewers to receive TV signals with a satellite dish of 60cm diameter. Only the transponders on the Nordic satellites, i.e. those of Telenor and NSAB, have a footprint enabling all Nordic viewers with a 60cm dish to receive TV signals transmitted from those transponders. For a broadcaster who wants to operate on a Nordic basis, transponders which only cover part of the Nordic region will not be considered as an attractive alternative or only as imperfect substitutes.[76]

90. In *Telia/Telenor*, the Commission upheld its view expressed in the *Nordic Satellite Distribution* case. It found that satellite operators not having a specific Nordic footprint, such as Eutelsat or Astra, are not a viable alternative, both technically and economically, for broadcasters wishing to reach viewers across the Nordic region. Almost all potential viewers in that area have their dishes directed to the Telenor and NSAB satellites. Consequently, from a broadcaster's perspective, the use of any other satellite position for the purposes of broadcasting to the Nordic viewers would involve very significant costs related to convincing a sufficient proportion of viewers to either stop watching all the Nordic interest programming offered from Telenor's and NSAB's satellites, or to invest in a second satellite dish. From a viewer's perspective, it is not possible simply to turn the dish towards Eutelsat or Astra, as there is no Nordic broadcaster transmitting from those satellites. The Commission therefore found that the market for satellite transponder capacity is Nordic.[77]

91. In the present case, the Commission does not see any reason to depart from the findings in the previous decisions. Using the criterion applied in the *Nordic Satellite Distribution* case, the relevant geographic market for the provision of transponder capacity for the purposes satellite TV broadcasting is the Nordic region. Only the satellites of Telenor and NSAB have a footprint that is relevant for the Nordic DTH satellite business. All Nordic pay-TV premium content channels, whether supplied by Canal+ Nordic or MTG/Viasat, reach the Nordic viewers via these satellites.

92. The Commission therefore considers the relevant geographic market to be the Nordic region.

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[76] Commission Decision 96/177/EG in Case IV/M.490 – Nordic Satellite Distribution, OJ L 53, 2.3.1996, p. 20, paras. 67-71.

[77] Commission Decision 2001/98/EC in Case IV/M.1439 – Telia/Telenor, OJ L 40 of 9.2.2001, p. 1, para. 284.

5. Structure of the market

5.1. Pay-TV retail

5.1.1. Canal Digital's and Viasat's market positions in the DTH satellite pay-TV retail segment including PPV/NVOD

93. In the Nordic region, DTH satellite pay-TV services are offered to customers by Canal Digital and MTG/Viasat. The DTH segment is characterised by fierce competition between the two operators on the markets for the retailing of digital pay-TV and commercial TV (basic tier) services accessible via DTH satellite platforms as well as the associated technical services (in particular decoders). The structure of the DTH multichannel TV packages proposed by Canal Digital and Viasat are similar, in that they consist of a number of channels – general interest and theme channels – either available as basic-tier subscription or in combination with the Canal+ Nordic or TV 1000 pay-TV premium content channels respectively. The Canal Digital package with the Canal+ Nordic pay-TV channels, which are focussed on sports and movies, and the Viasat Gold package with the TV 1000 channels, have a comparable commercial positioning.

94. In its notification, TBS indicated Canal Digital's and Viasat's respective positions in 2000 in the market segment for DTH pay-TV retail distribution in terms of the following subscriber numbers:[78]

Nordic region, 2000	Smart card holders	Premium subscribers
Canal Digital	[…]	[…]
Viasat	[…]	[…]

Denmark, 2000	Smart card holders	Premium subscribers
Canal Digital	[…]	[…]
Viasat	[…]	[…]

Norway, 2000	Smart card holders	Premium subscribers
Canal Digital	[…]	[…]
Viasat	[…]	[…]

Sweden, 2000	Smart card holders	Premium subscribers
Canal Digital	[…]	[…]
Viasat	[…]	[…]

Finland, 2000	Smart card holders	Premium subscribers
Canal Digital	[…]	[…]
Viasat	[…]	[…]

95. End of 2002, Canal Digital had [**confidential**] DTH digital subscribers across the Nordic region, [**confidential**] of which had subscribed to premium pay-TV

78 The term smart card holder is meant to comprise subscribers to basic TV services including analogue customers whereas the term premium subscriber covers all (digital) customers accessing the premium pay-TV channels of either Canal+ Nordic or MTG/Viasat.

services. On the other hand, Viasat had [**confidential**] DTH digital subscribers in the Nordic region with [**confidential**] premium pay-TV subscriptions.[79] Taking into account the pay-TV subscriber growth over the past two years, Viasat's share in the DTH pay-TV segment, partly due to piracy problems, is slightly shrinking to the benefit of Canal Digital. As will be seen below (5.2.3.) these market positions are also relevant for the PPV/NVOD segment.

5.1.2. Telenor's market position and that of its closest competitors in the cable pay-TV retail segment

96. The Nordic countries are highly cabled. On average more than 50% of TV households across the Nordic region are cable connected households.[80] A number of CATV operators, such as Telenor Avidi, Sweden On Line (both belonging to the Telenor group), UPC, ComHem, Kabelvision, TDC Kabel, Telia Stofa and Helsinki Televisio Oy, supply pay-TV services in the Nordic region to individual households.

97. In Norway, Telenor owns the CATV operator Telenor Avidi with approximately [**confidential**] households connected in 2001. The Telenor Avidi cable network is Norway's largest one and accounts for [**confidential**] of the total of cabled households. In Sweden, Telenor owns the CATV network operated by Sweden On Line with [**confidential**] households connected and the Seth's cable TV network with [**confidential**] households connected (in 2001) which have been merged recently. This accounts for [**confidential**] of the total of cabled households in Sweden. However, Telenor does not own or control CATV networks in Denmark and Finland.

98. Telenor provided the following figures for 2001 about pay-TV operations run via CATV in Norway and Sweden where its subsidiaries are active, expressed in number of cable pay-TV subscribers:

NORWAY	Sales/Revenues (Euro)	Share (%)	Subscribers	Share (%)
UPC	[…]m	[…]	[…]	[…]
Telenor Avidi	[…]m	[…]	[…]	[…]
Total	[…]m	100	[…]	[…]

SWEDEN	Sales/Revenues (Euro)	Share (%)	Subscribers	Share (%)
ComHem	[…]m	[…]	[…]	[…]
Kabelvision	[…]m	[…]	[…]	[…]
UPC	[…]m	[…]	[…]	[…]
Sweden On Line	[…]m	[…]	[…]	[…]
Total	[…]m	100	[…]	100

99. The above pay-TV operations by the Telenor group comprise subscriptions to Canal+ Nordic's premium content channels. Most cable operators in the Nordic region including Telenor Avidi offer Canal+ Nordic's premium pay-TV packages simultaneously with MTG/Viasat's premium pay-TV packages. Based on the

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[79] Cf. MTG, Financial Results for the Period January – December 2002, p. 4; http://www.mtg.se.

[80] Cf. Screen Digest, European Cable Yearbook, 2002, p. 55, 67, 121, 157; IDATE, The World Television Market, Vol.1: Markets, 2003, p. 123, 139, 203.

number of premium pay-TV (analogue and digital) subscriptions alone the Commission has found the following market positions in 2001/2002:

NORWAY	2001		2002	
	Premium subscribers	share %	Premium subscribers	Share %
UPC	[…]	[…]	[…]	[…]
Telenor Avidi	[…]	[…]	[…]	[…]
Total	[…]	100	[…]	100

SWEDEN	2001		2002	
	Premium subscribers	share %	Premium subscribers	Share %
ComHem	[…]	[…]	[…]	[…]
Kabelvision	[…]	[…]	[…]	[…]
UPC	[…]	[…]	[…]	[…]
Sweden On Line	[…]	[…]	[…]	[…]
Total	[…]	100	[…]	100

5.2. Wholesale supply of pay-TV premium content and PPV/NVOD channels

5.2.1. Supply side and selling power

5.2.1.1. Suppliers

100. The most important, if not only suppliers active on the upstream market for the wholesale supply of pay-TV premium content channels throughout the Nordic region are Canal+ Nordic and MTG/Viasat.

101. In the Nordic region, Canal+ is active in the wholesaling of its pay-TV premium content channels to multichannel TV distribution platforms through its subsidiary Canal+ Nordic. This activity is however subject to the restrictions agreed with Telenor/Canal Digital in the notified agreements. As a result, Canal Digital enjoys the exclusive right to distribute Canal+ Nordic's pay-TV premium content channels and PPV/NVOD film services to DTH and SMATV households and small cable networks which, for the purpose of the Distribution agreement, are included in the notion of DTH distribution. However, Canal+ Nordic continues wholesaling its pay-TV premium content channels to third CATV operators and DTT providers.

102. Also Telenor, through its subsidiaries Canal Digital and Telenor Vision, is active in the wholesaling of pay-TV and commercial TV channels in the Nordic region. However, Canal Digital's activity merely consists of sub-wholesaling Canal+ Nordic's pay-TV premium content channels to SMATV, small cable networks and Telenor's CATV networks on the basis of the exclusivity granted by Canal+. Similarly, Telenor Vision operates as a commission agent wholesaler and – to a much lesser extent – retailer of Canal Digital's "basic" and "extended" pay- and commercial TV packages in the Nordic countries. These activities therefore do not form part of the market for the wholesale supply of pay-TV premium content channels in which Canal+ Nordic and MTG/Viasat are active.

103. Thus, in the following only Canal+/Canal+ Nordic's and MTG/Viasat's respective market positions will be considered.

5.2.1.2. Canal+/Canal+ Nordic’s and MTG/Viasat’s market positions

104. In the Nordic region, Canal+ Nordic supplies a bundle of different pay-TV premium content channels, called “Canal+”, “Canal+ Zap”, “Canal+ Yellow” and “Canal+ Blue”, as well as a PPV/NVOD channel named “Kiosk”. MTG/Viasat provides throughout the Nordic region comparable pay-TV premium content channels, such as “TV1000”, “TV1000 Cinema”, “Viasat Sport” and “Viasat Nature/Action”, which are packed in different bundles, namely “Viasat Gold” and “Viasat Silver”. Moreover, Viasat offers a PPV channel named “Ticket”.

105. The most reliable methodology to measure Canal+ Nordic’s and MTG/Viasat’s respective positions in the relevant market is the number of subscribers to their pay-TV premium content channels downstream, thus including DTH and cable pay-TV subscribers. This methodology corresponds to the pay-mechanisms commonly agreed in “output deals” with the Hollywood major film production studios where the number of actual and/or potential pay-TV subscribers as well as so-called minimum subscriber guarantees constitute the economic key factors for measuring the market significance of pay-TV bouquet suppliers and negotiating the licence fee.

106. On the other hand, market share calculation on the basis of pay-TV revenue would not reflect the real market positions of Canal+ Nordic and MTG/Viasat in relation to each other. This mainly stems from the vertical integration of MTG/Viasat and the resulting difficulty, if not impossibility, to differentiate the pay-TV revenue streams gained from wholesale supply on the one hand and retail activity by the Viasat DTH platform on the other. The marketing of Canal+ Nordic’s pay-TV premium content channels via DTH however entails a split of pay-TV revenue between Canal+ Nordic and Canal Digital which are no longer vertically integrated. The wholesale pay-TV revenue gained by Canal+ is thus necessarily lower in relative terms as the aggregate revenue generated by MTG/Viasat as it does not include the pay-TV revenue flowing from Canal Digital’s DTH retail activity. Moreover, a proper comparison of the wholesale revenues by Canal+ Nordic and MTG/Viasat would pre-suppose the application of arms length prices on both sides, which is however not guaranteed within the MTG group.

107. The total of Canal+ Nordic’s analogue and digital pay-TV subscriptions across the Nordic region by June 2002 was [**confidential**] including [**confidential**] subscribers via cable and DTT (in Sweden). By contrast, Canal+ Nordic’s only competitor in the supply of premium content channels for pay-TV in the Nordic countries MTG/Viasat had [**confidential**] digital pay-TV subscribers on both DTH and cable at the end of June 2002. This equates with a current and consistently growing market share throughout the Nordic region of roughly [45-65]% on the part of Canal+ Nordic while MTG/Viasat have the remaining [35-55]%.[81]

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81 End of 2001 Canal+ Nordic had [**confidential**] subscribers over all platforms (end 2002: [**confidential**]) whereas MTG had approximately [**confidential**] premium subscribers in total (end 2002: [**confidential**]) so that more recently the respective market shares have oscillated between [45-

108. These market shares appear to be corroborated firstly by the strong foothold of Canal+ Nordic in the upstream market segments for the acquisition of premium films from U.S. film production studios, where Canal+ Nordic has secured a number of important [**confidential**] licences for the Nordic region, and secondly by a comparable positioning of Canal+ Nordic to that of MTG/Viasat in the sports rights acquisition segment (see below 5.3). Canal+ Nordic's relatively high market share though does not induce a finding of dominance. There are no indications that Canal+ Nordic could behave independently of its competitors and consumers in the Nordic region. On the contrary, Canal+ Nordic's behaviour in the relevant market, as evidenced, for instance, by its current joint business strategy with Canal Digital continues to be heavily constrained, in particular by its only competitor MTG/Viasat who also has a very significant market positioning and offers similarly attractive pay-TV services in terms of both quality and price. [**Confidential**].

5.2.2. Buying side and buying power

109. On the buying side, a range of multichannel TV distribution platforms, including DTH and CATV operators, are active across the Nordic region. By contrast to the selling side, in order properly to assess the DTH and cable platform operators' respective market positions as actual and/or potential buyers of pay-TV premium content channels, the Commission does not consider the number of premium subscribers, though being indicative, a fully reliable measurement criterion. Rather, the number of basic-tier and/or extended-tier analogue and digital customers to the platform seems to be important as it provides a representative and immediate basis on which to assess the potential for pay-TV subscriber growth from both the supply and demand perspective. Moreover, for the reasons already mentioned, pay-TV revenue is not considered to be a decisive factor for measuring market strength on the buying side either.

DTH segment

110. As already indicated, Canal Digital had [**confidential**] digital DTH subscribers in 2002 whilst Viasat totalled [**confidential**] digital DTH subscribers. In terms of <u>smart card holders</u>, which include both analogue and digital subscribers, the respective market positions of Canal Digital ([**confidential**] customers) and Viasat ([**confidential**] customers[82]) are more balanced.

Cable segment

111. In addition, Nordic cable operators are active in the redistribution of Canal+ Nordic's and MTG/Viasat's pay-TV premium content channels. In line with the view taken by the Commission in *Telia/Telenor*,[83] the <u>number of households</u>

65] and [45-65]% for Canal+ Nordic and between [35-55] and [35-55]% for MTG. Since April 2001 Viasat no longer has analogue pay-TV subscribers.

82 Cf. MTG, Annual Report, 2002, p. 4.

83 Commission Decision 2001/98/EC in Case IV/M.1439 – Telia/Telenor, OJ L 40 of 9.2.2001, p. 1, paras. 311 et seq.

connected – including subscriptions to the basic-tier TV packages – rather than pay-TV revenue constitutes the most reliable method to measure the actual buying power of Nordic CATV operators. This methodology is warranted by the different measurement criteria and methods used by the various operators in allocating their revenues to either pay-TV or basic/extended subscription services[84] and the fact that Nordic CATV operators, by making use of the commercial flexibility offered through digitalisation, have started bundling the various TV channels in a greater variety of distinct packages. Moreover, from the viewpoint of the suppliers of pay-TV premium content channels, pay-TV subscribers alone do not reflect the real extent of business opportunities offered by, in particular, CATV operators in the distribution of such services. Rather the overall number of households connected tends more accurately to mirror the bargaining power on the side of CATV operators *vis-à-vis* wholesale suppliers of pay-TV premium content channels. These households, even if they have not (yet) subscribed to cable pay-TV services, may easily be targeted by advertisement campaigns for pay-TV bouquets and thus constitute a considerable potential for pay-TV subscriber growth.

112. The largest CATV operators' market positions in the Nordic region in 2001 in terms of subscriber figures are:[85]

Nordic cable operator	**Subscribers**
Telenor Avidi (Telenor group, Norway)	362.000
UPC Norge (Norway)	334.000
Com Hem (Sweden)	1.400.000
Kabelvision/Tele 2 (Sweden)	300.000
UPC Sverige (Sweden)	253.000
Sweden On Line (Telenor group, Sweden)	185.000
Seth's Kabel TV (Telenor group, Sweden)	15.000
Tele Danmark/oncable (Denmark)	800.000
Telia Stofa (Denmark)	250.000
Helsinki Televisio Oy (HTV, Finland)	202.000
Sonera Oy (Finland)	138.000
Tampereen Tietoverkko Oy (Finland)	70.000

DTH and cable segment combined

113. In sum the Telenor group CATV operators cumulate some [**confidential**] subscribers. After adding the total number of subscribers to Canal Digital in 2001 [**confidential**]) the Telenor group accounts for approximately [**confidential**] subscribers to its DTH and cable TV services in the Nordic region as a whole.

114. Against the background of the total number of subscribers to DTH and cable TV services in the Nordic region in 2001, i.e. [**confidential**],[86] and on the basis of a

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84 Ibid., paras. 314-315.

85 Source: Screen Digest, Europe's Cable Power Players, June 2001, p. 185; See also Screen Digest, European Cable Yearbook, 2002, p. 56, 68, 122, and 158 with slightly varying figures.

86 5.310.000 cable TV subscribers (cf. Screen Digest, Europe's Cable Power Players, June 2001, p. 183) + [**confidential**] DTH subscribers.

broad market delineation comprising cable DTH and cable pay-TV retail distribution this amounts to a share of approximately [**confidential**] held by the Telenor group and [**confidential**] for Canal Digital alone on the buying side. In contrast, Viasat's share on the buying side, equally calculated on its subscriber base, would be around [**confidential**]. However, MTG/Viasat are only potential buyers of third party premium content channels as they currently focus on the redistribution of their own – in-house produced – channels.

115. In the case of a narrower market delineation – with the wholesale supply of pay-TV channels for DTH retransmission as a separate product market – the market strength and buying power of Canal Digital would increase in relative terms to over [**confidential**] based on its share in the overall number of DTH subscribers in the Nordic region. Viasat's position would be comparable by taking into account its vertical integration with the MTG group.

5.2.3. Market positions in the PPV/NVOD segment

116. Although the wholesale and retail supply of PPV/NVOD services are likely to belong to product markets distinct from those for the wholesale and retail provision of pay-TV channels, the market strength evaluated on the overall (pay-TV) subscriber base appears to be also relevant for the PPV/NVOD segment. In that segment Canal+ Nordic/Canal Digital, through the PPV channel "Kiosk", and MTG/Viasat, through their PPV offering "Viasat Ticket", respectively provide similar PPV/NVOD services all over the Nordic region. In the latter case, these services are also provided to basic-tier subscribers whereas Canal+ Nordic/Canal Digital grant access to PPV/NVOD to pay-TV customers only.

117. For technical reasons it is hardly possible accurately to measure the subscriber base for PPV/NVOD services as this would have to be done on an individual film order or per-view basis. Moreover, revenue gained from PPV/NVOD services generally is negligible in relation to the overall pay-TV revenue[87] and thus does not accurately reflect the market position of pay-TV operators in that segment. Accordingly, the same methodology applies as in the case of measuring the market strength in the general pay-TV segment. Following on from this, the market shares established for both Canal+ Nordic ([45-65]%) and MTG/Viasat ([35-55]%) in the upstream wholesale market for the provision of pay-TV premium content channels are transposable to the supply-side in the PPV/NVOD segment.

118. As regards the market significance on the buying side account is to be taken of the fact that across the Nordic region generally only the two DTH platforms, i.e. Canal Digital and Viasat, are (potential) buyers of PPV channels whereas CATV operators to date rarely offer these pay-TV services to their customers.[88] Thus, Canal Digital and Viasat, having similar buying power respectively, appear to have a market share of approximately [**confidential**].

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[87] Canal+' general pay-TV revenue in the Nordic region in 2001 was [**confidential**] SEK whereas the PPV share amounted to [**confidential**] SEK only ([**confidential**]%).

[88] Currently only ComHem in Sweden and TDC in Denmark offer the Canal+ Nordic "Kiosk" PPV channel to their subscribers, in the latter case under a sub-licence granted by Canal Digital.

5.3. Acquisition of premium films and sports rights for TV programming

119. Most of the Nordic multichannel TV platforms, in particular CATV operators, are not active in the acquisition of premium films and sports rights for the production of pay-TV channels in the Nordic region but rather acquire bouquets of pre-packaged pay-TV channels from pay-TV wholesalers, such as MTG/Viasat, Canal+ Nordic and to some extent also from Canal Digital and Telenor Vision. Canal+ Nordic and MTG appear to be the most important buyers of premium content for the purpose of pay-TV exploitation *vis-à-vis* rights holders and production studios.

120. Canal+ has a very strong position on the market segment for the acquisition of premium movies European-wide. Canal+ has signed a number of output deals with regard to premium film rights with the majority of U.S. film production studios ("majors"). Moreover, it has so far been vertically integrated with the Universal studio being a subsidiary of Vivendi Universal.[89] The relevant agreements include [**confidential**] licences that are generally acquired on an exclusive basis. However, Canal+' position is somewhat less strong in the Nordic region.[90] Canal+ Nordic entered into [**confidential**] deals covering mainly [**confidential**] licences for pay-TV as well as [**confidential**] licences for PPV for the Nordic region with several U.S. film production companies, such as Dreamworks, Time Warner, Fox, Universal, Paramount, MGM ([**confidential**]) and Buena Vista/Disney ([**confidential**]). Moreover, Canal+ Nordic also holds [**confidential**] licences from Nordic film producers, such as AB Svensk Filmindustri and Sandrew Metronome International, as well as [**confidential**] with film production studio [**confidential**] and [**confidential**].

121. MTG/Viasat currently has contractual [**confidential**] links with a number of major U.S. and Nordic studios with respect to the marketing of premium films, such as *inter alia* [**confidential**] and [**confidential**] ([**confidential**] pay-TV and partly PPV), [**confidential**] and [**confidential**] ([**confidential**] pay-TV).[91] Moreover, MTG/Viasat recently launched a separate "Disney channel" in the Nordic region.[92] In addition, through its subsidiary "Modern Studios" to which the branch Sonet film belongs, MTG has a strong presence in the production and distribution of *inter alia* Swedish feature films, which are very popular and even rank above major U.S. movie releases in terms of movie tickets sold in Sweden.[93]

122. As regards premium sports broadcasting rights, Canal+ Nordic holds exclusive Nordic broadcasting rights for major and very popular sport events such as national and NHL Ice-hockey as well as first division football in the UK and Italy

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[89] Cf. however the recently notified sale of Vivendi Universal Entertainment to General Electric Company, OJ C 285, 28.11.2003, p. 26.

[90] Cf. Commission Decision of 13.10.2000 in Case COMP/M.2050 – Vivendi/Canal+/Seagram, paras. 39-41.

[91] Cf. also Screen Digest, European Television Movie Rights, 2002, p. 154.

[92] See MTG press release of 23.9.2002 "Viasat launches Disney channel in Nordic region".

[93] See MTG, Annual report, 2000, p. 45.

which are distributed through the different Canal+ Nordic channels. MTG/Viasat, with its premium sports channel Viasat Sport, also offers a range of prestigious sports events very popular in Scandinavia on an exclusive basis, such as top football (notably UEFA Champions League), Formula1 motor racing, golf and boxing.[94]

5.4. Supply of satellite transponder capacity for TV broadcasting

123. In accordance with the Commission's findings in *Nordic Satellite Distribution*[95] and *Telia/Telenor*[96] there are currently only two relevant providers of satellite transponder capacity for TV broadcasting with a specific Nordic satellite "footprint", Telenor Satellite Broadcasting and Nordic Satellite AB (hereinafter "NSAB"). Telenor owns and operates the Thor II and III satellites and has leased transponder capacity on satellite Intelsat 707 positioned at 1°West through which it currently distributes approximately 120 digital and analogue TV programmes across the Nordic region via DTH, SMATV and CATV.[97] NSAB owns and operates the Sirius 1, 2 and 3 – now renamed Sirius W – satellites positioned at 5°East and 13°West through which it presently distributes over 100 digital and analogue TV channels across the Nordic region.[98] The great majority of DTH households in the Nordic countries used to have dishes pointed to satellites positioned at 1°West, promoted by Telenor and 5° East, promoted by NSAB ("double-headed" satellite dishes). According to Telenor, today 95% of the DTH satellite dishes and 100 percent of the head-end antennas for CATV and SMATV operators in the Nordic region point toward 1°West.[99]

124. Apart from the number of TV channels distributed the transponder capacity available appears to be one important criterion to assess the respective market positioning of the satellite operators. It is currently divided between Telenor and NASB, on the basis of comparable transponder bandwidth available for the purpose of TV channel retransmission, as follows:

Satellite	Number of transponders	Market share %
Telenor Thor 2, 3, Intelsat 707	[…]	[…]
NSAB Sirius 1, 2, W:	[…]	[…]
Total	[…]	100%

94 Cf. the overview on the rights held by both Canal+ Nordic and MTG for the Nordic region in 2002 in: Screen Digest, European Television Sports Rights, March 2002, p. 90.

95 Commission Decision 96/177/EC in Case IV/M.490 - Nordic Satellite Distribution, OJ L 53 of 2.3.1996, p. 20.

96 Commission Decision 2001/98/EC in Case IV/M.1439 – Telia/Telenor, OJ L 40 of 9.2.2001, p. 1, para. 284.

97 Cf. http://www.telenorsbc.com.

98 Cf. http://www.nsab-sirius.com/. For a full overview on the satellite distribution of TV programmes across the Nordic region cf. http://www.1-west.com/.

99 http://www.telenorsbc.com/index.jsp?view=sb_wizard&id=131&extra=body:2.

125. Telenor Satellite Broadcasting therefore has transponder capacity which amounts to a market share of approximately [40-60]% of the Nordic satellite market.

6. THIRD-PARTY OBSERVATIONS

126. The Commission published a notice pursuant to Article 19(3) of Regulation No 17 in the Official Journal of the European Union of 26 June 2003, which prompted reactions from a number of interested third parties.

127. In response to the above notice Nordic cable operator UPC confined itself to refer to earlier submissions made in the proceedings prior to the parties' commitments and the publication of the Commission's notice. In these submissions, UPC had expressed concern about Telenor's strong position in most of the relevant TV related segments particularly in Norway and the fact that Telenor has entered into a range of exclusive distribution agreements for important TV content. Moreover, Telenor would act as a commission agent wholesaler for a number of TV programme providers through its subsidiary Telenor Vision, which offers distribution agreements to other CATV operators. This would mean that CATV operators must buy content from their largest competitor. At the same time, Telenor's exclusive distribution agreements would entail that companies like UPC are prevented from obtaining direct agreements with content providers.[100]

128. Also MTG, following the Commission's notice, essentially relied on a submission made at an earlier stage of the proceedings prior to the parties' commitments. In that submission, MTG considered that the notified agreements have a direct negative impact on its business and that of future DTH/SMATV distributors in the Nordic region by preventing them from buying and offering Canal+' pay-TV premium content channels via DTH and SMATV during a long period of time. Moreover, as a result of the prohibition imposed on Canal Digital to include premium content channels provided by MTG and other broadcasters during the same period, foreclosure effects would be created in view of the significant market positions of Telenor and Canal+ in the Nordic region that could not be offset by any benefits for the consumers. MTG also referred to Canal+' very strong position on the market for pay-TV premium content because of its access to recently released U.S. films representing allegedly approximately up to 80-90% of the total volume traded and to exclusive Nordic broadcasting rights for major sport events such as first division football in England and Italy. MTG moreover stressed Telenor's overall market power in the Nordic TV related sector and in particular its high degree of vertical integration enabling it to adopt bundling strategies aimed at leveraging its strong position from one area into "its overall position" in the Nordic TV sector. MTG finally observed that a non-compete obligation imposed on Telenor creates additional negative effects on competition as "in such a scenario MTG's platform would be the only theoretically possible way for a new pay-TV operator to reach the viewers on the DTH and SMATV segments".

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[100] UPC currently distributes MTG/Viasat's as well as Canal+ Nordic's pay-TV premium content channels.

129. Film production company Disney observed in reply to the Commission's notice that the duration of content agreements should be determined by market forces and that any intervention by the Commission is unnecessary and inappropriate. As a creator of content, Disney had an entirely legitimate and justifiable interest in seeking to negotiate long-term, stable revenue streams in order to generate sufficient returns to continue investing in the high-risk business of film and channel production. According to Disney, also the creation and operation of high quality premium pay-TV channels requires significant investment. Without sufficiently long-term distribution contracts, such investments are less likely to be made and this will obviously reduce consumer choice. Given that content suppliers are increasingly facing consolidation in the pay-TV platforms sector any move towards fettering their ability to try and negotiate contracts to support investment is unnecessary and harmful to the legitimate interests of suppliers as well as the interests of consumers.

7. Article 81 of the Treaty and Article 53 of the EEA Agreement

7.1. Jurisdiction

130. In this case, the Commission is the competent authority to apply both Article 81(1) of the Treaty and Article 53(1) of the EEA Agreement on the basis of Article 56(1) lit.c) and (3) of the EEA Agreement, since the notified agreements have an appreciable effect on competition in the common market as well as on trade between Member States.

7.2. Applicability of Article 81(1) of the Treaty and Article 53(1) of the EEA Agreement

131. Article 81(1) of the Treaty prohibits as incompatible with the common market all agreements between undertakings, decisions by associations of undertakings and concerted practices, which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the common market.

132. Article 53(1) of the EEA Agreement, being modelled on Article 81(1) of the Treaty, contains a similar prohibition. However, the reference in Article 81(1) of the Treaty to "trade between Member States" is replaced by a reference to "trade between contracting Parties" and the reference to competition "within the common market" is replaced by a reference to competition "within the territory covered by the … [EEA] agreement". In the following the Commission will therefore mainly refer to Article 81(1) of the EC Treaty unless different treatment under Article 53(1) of the EEA Agreement is required.

133. The agreements in their notified form are caught by Article 81(1) of the Treaty and Article 53(1) of the EEA Agreement.

134. According to the Community courts' case law and the spirit of the Commission's approach set out in its Guidelines on Vertical Restraints,[101] also in the TV

[101] Commission Notice Guidelines on Vertical Restraints (2000/C 291/01), OJ C 291, 13.10.2000, p.1.

broadcasting sector the restriction of the commercial freedom of one ore more of the parties to an agreement is not sufficient in itself to conclude that the prohibition of Article 81(1) of the Treaty applies. Rather, when assessing the applicability of Article 81(1) of the Treaty to an agreement, account is to be taken of the actual conditions in which it functions, in particular the economic context in which the undertakings operate, the products or services covered by the agreement and the actual structure of the market concerned.[102] In so doing, the Commission in the present case has particularly to take into account the respective positions of the market players present – i.e. the suppliers, their competitors and the buyers – including their countervailing power as well as the existence and the weight of barriers to entry in order to appraise possible foreclosure effects in both the upstream and downstream markets, which may result from either the substance or the duration – or a combination of the two – of the exclusivity and non-compete arrangements.[103]

135. As to the economic context in which the parties operate and the relevant agreements function, it has moreover to be borne in mind that Canal Digital initially constituted a venture jointly controlled and operated by Telenor and Canal+ [**confidential**]. The notified agreements concern the continuation of Canal Digital's economic activity under the sole control of Telenor subsequent to Canal+' divestiture, while at the same time securing, through a bundle of contractual exclusivity and non-compete ties, the benefits previously derived from vertical integration between Canal Digital and Canal+ Nordic. A key motivation for maintaining these contractual ties is the parties' willingness to recoup their investment into a hitherto loss-making economic venture.

136. As a matter of principle, the Commission takes the view that Article 81 of the Treaty and Article 53 of the EEA Agreement are applicable to agreements entered into between (economically) distinct undertakings, such as Telenor/Canal Digital on the one hand and Canal+/Canal+ Nordic on the other, that constitute part and parcel of an overall divestment transaction and the separation of previously vertically integrated companies. The Commission, while fully taking account of the economic context in which the relevant transactions take place, is called upon to ensure that these agreements either do not restrict competition within the meaning of Article 81(1) or that the conditions of Article 81(3) of the Treaty are fulfilled. To the extent that the agreements have as their object or effect appreciably to restrict competition within the meaning of Article 81(1) of the Treaty, the Commission furthermore needs to undertake a prospective analysis as to the likely evolution of competition in the relevant markets on the basis of a set of facts absent the restrictions agreed between the parties to the notified agreements.

137. The agreements in their amended form give rise to competition concerns in respect of three sets of provisions:

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102 Cf. in particular, Court of First Instance of the European Communities, Case T-112/99 *M6 and others v. Commission* [2001] ECR 1057, para. 76.

103 Commission Notice Guidelines on Vertical Restraints (2000/C 291/01), OJ C 291, 13.10.2000, p.1, paras. 121 et seq.

- First, a bundle of clauses establishing exclusive DTH satellite distribution of Canal+ Nordic's pay-TV and PPV/NVOD channels through Canal Digital;

- Secondly, a bundle of non-compete provisions and co-operation clauses having the purpose of shielding DTH satellite distribution of Canal+ Nordic's pay-TV and PPV/NVOD channels by Canal Digital from competition emanating from both third pay-TV channel suppliers and the Telenor group itself;

- Thirdly, a non-compete arrangement regarding the supply of satellite transponder services.

7.3. Parties' arguments for negative clearance of the agreements as originally notified

138. The parties maintained that the agreements as originally notified did not restrict competition within the meaning of Article 81(1) of the Treaty and Article 53(1) of the EEA Agreement.

139. They supported their argument by reference to the Community courts' judgments in cases *Nungesser*[104] and *M6.*[105] In *Nungesser* the Court of Justice had concluded that an exclusive license is not in itself incompatible with Article 81(1) of the Treaty because it accepted that under certain circumstances a licensee is not prepared to take the financial risk involved in producing patented goods without being given protection from intra-brand competition. In *M6* the Court of First Instance had held that an agreement restricting the commercial freedom of the parties does not necessarily fall under Article 81(1) of the Treaty when being assessed in the economic context in which the parties to the agreement operate.

140. The parties furthermore stated that the relevant economic context entailed that the notified agreements fall outside Article 81(1) of the Treaty for essentially the following reasons: [**Confidential**].

141. Moreover, the parties argued that the agreements as originally notified did not create any significant foreclosure effects to the detriment of third parties. As Viasat already operates highly popular premium content channels like TV1000, there would be no need for Viasat also to distribute Canal+' premium content channels in order to compete effectively with Canal Digital. Moreover, the launch of a new third DTH platform would be unlikely as the DTH markets in the Nordic region [**confidential**]. On the other hand, potential entrants, such as Canal+ or BSkyB, in the Nordic markets for DTH distribution would not face significant barriers to entry as a result of the notified agreements "at the expiry of the 10 years' exclusivity period", *inter alia* because of the future introduction of the open technical standard MHP in the Nordic region. Finally, the market for DTH

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[104] Court of Justice of the European Communities, Case 258/78 *Nungesser KG v. Commission* [1982] ECR 2015, para. 58.

[105] Court of First Instance of the European Communities, Case T-112/99 *M6 and others v. Commission* [2001] ECR 1057, para. 76.

distribution of premium content channels would be characterised by a marked need for product differentiation as the key driver for pay-TV and the principal means of competition between pay-TV operators. This coincides with a strong need for branding and marketing of selected (and exclusive) premium content channels. In the Nordic region, following considerable combined marketing efforts and investment since 1997, subscribers continue to associate the Canal+ brand image with Canal Digital. Continuity of this association would accrue to the benefit of both Canal+ and Canal Digital by helping to increase the subscriber base of the latter.

142. In addition, the parties maintained that the ten year exclusive relationship agreed between Canal+ and Canal Digital/TBS was indispensable and in any event not restrictive of competition [**confidential**]. The long-term exclusive relationship would furthermore provide Canal+ with the required commercial stability in order to invest in premium films and major sporting events for pay-TV distribution in the Nordic region and in service improvements. Also current long-term contracts for programming rights with premium film producers and the related fee calculation mechanism (minimum subscriber guarantee requirements) would warrant long-term security of distribution to DTH subscribers.

143. Finally, the parties alleged that the Commission's Decision in *TPS*[106] should not form the basis for assessing the admissible time period for the exclusivity and the non-compete provisions in the notified agreements. The economic context in *TPS* had been substantially different from that of the present case. The parties further contended that in *TPS* the Commission had exempted the exclusive distribution of four free-to-air channels via DTH with an audience share of approximately 90% for a period of three years (the non-compete provisions being considered as ancillary restraints). However, Canal+' premium content channels distributed by Canal Digital accounted for an insignificant percentage of the TV audience in the Nordic countries.

7.4. Appreciable restriction of competition

144. The parties' contention that the various exclusivity and non-compete clauses contained in the agreements as initially notified did not appreciably restrict competition cannot be accepted. As will be set out further below, even in their revised form most of the relevant clauses are restrictive of competition. Moreover, it should also be noted that the Court of First Instance in *M6*, to which the parties repeatedly referred in support of their argument, explicitly upheld the Commission's finding – based on an assessment of the relevant clauses in their economic and legal context –, that an exclusivity of ten year duration denying TPS' competitors access to certain TV programmes constituted a restriction of competition within the meaning of Article 81(1) of the Treaty.[107]

145. In the following, the notified agreements in their amended form, implementing the commitments given by the parties, will be addressed. First, the restrictive effects of

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[106] Commission Decision 1999/242/EC in Case No IV/36.237 – TPS, OJ L 90, 2.4.1999, p. 6.

[107] Court of First Instance of the European Communities, Case T-112/99 *M6 and others v. Commission* [2001] ECR 1057, para. 79.

the contractual clauses governing the exclusivity for pay-TV channel DTH satellite distribution will be analysed, followed by an assessment of the related non-compete obligations. The PPV exclusivity and non-compete arrangements will be dealt with in a separate section (see below 7.4.2.).

7.4.1. Exclusive pay-TV premium content channel distribution and related non-compete obligations

7.4.1.1. Exclusive distribution: market foreclosure

Duration and reach of the exclusivity

146. Under the Distribution agreement as originally notified, Canal Digital had the exclusive right to distribute (wholesale and retail) Canal+ Nordic's pay-TV premium content channels for the purpose of DTH/SMATV broadcasting in the Nordic region for a period of ten years with the option of automatic renewal for further two years. The parties agreed to shorten this duration to a maximum period of four years which forms the basis of the following analysis.

147. Canal Digital's exclusive status is not absolute since it does not preclude parallel distribution of Canal+ Nordic's pay-TV premium content channels by and through Nordic CATV platforms. In turn, the agreements explicitly allow Canal+ Nordic to wholesale its pay-TV channels to Nordic CATV operators with more than [**confidential**] households connected which do not fall within the agreed definition of DTH/SMATV. Therefore, in practice the exclusivity hinders distribution of Canal+ Nordic's pay-TV channels via competing DTH satellite platforms only.[108] Ultimately, the exclusivity results in limited distribution of the services at issue independently of that categorisation and the exact delineation of the downstream retail market (DTH pay-TV only or DTH and cable pay-TV as a single market).

Market positions on both the supply and the buying sides

148. The parties' respective positions on the market for the wholesale supply of pay-TV premium content channels – i.e. on both the supply and the buying sides – are primarily to be taken into consideration in order to assess whether or not the exclusivity has as its object or effect to restrict competition within the meaning of Article 81(1) of the Treaty. In the case of limited distribution the market position of the supplier and its competitors is of primary importance, in particular, with a view to the risk of market foreclosure on the buying side.[109] As stated above (cf. 5.2.1.2.), on the supply side Canal+ Nordic's share – based on the number of premium subscribers downstream – represents approximately [45-65]% while MTG/Viasat have the remaining [35-55]%. The resulting duopolistic market structure on the supply side is coupled with a relatively low number of strongly

[108] Given the possibility of parallel cable distribution, the exclusivity displays features similar to both "exclusive distribution" and "exclusive customer allocation" (allocation of DTH subscribers only, as opposed to cable subscribers) within the meaning of the Guidelines on Vertical Restraints; cf. OJ C 291 of 13.10.2000, p. 1, paras. 161 et seq. according to which "the supplier agrees to sell his products only to one distributor for resale in a particular territory", and paras. 178 et seq.

[109] Ibid., paras. 110 and 163.

differentiated pay-TV services/brands available, which is typical of the pay-TV sector in general. On the other hand, on the buying side Canal Digital and MTG/Viasat would have a share of [**confidential**] in the event of a narrow market definition covering DTH only, whereas the respective market share of Telenor/Canal Digital and MTG/Viasat would be [**confidential**] and [**confidential**] in the case of a broader market delineation comprising both DTH and cable.

Foreclosure effects

149. The exclusivity granted to Canal Digital in practice results in denying on the buying side third DTH platforms, i.e. Viasat and potential DTH entrants, access to the Canal+ Nordic pay-TV premium content channels whereas CATV operators in the Nordic region may continue to acquire these channels from Canal+ Nordic direct. The exclusivity thereby considerably strengthens market entry barriers and contributes to foreclosing potential entrants in the DTH segment.

150. The barriers to enter the Nordic pay-TV markets are already very high on both the upstream (supply of pay-TV premium content channels) and downstream levels (pay-TV distribution platforms). New entrants would need to make substantial market-specific sunk investment to create a specific pay-TV premium channel brand – including the acquisition of mostly long-term exclusive and expensive content licences – that matches the “Nordic taste” as well as to make available or lease the satellite capacity needed for the channels’ retransmission. Likewise, the establishment of a downstream distribution platform, be it DTH or, *a fortiori*, a CATV network, and the acquisition of various TV channels and satellite capacity as well as the build-up of the technical infrastructure needed for the purpose of redistribution to the end-consumer requires considerable market-specific sunk investment. Moreover, the possibility of offering attractive pay-TV services constitutes an essential pillar and driving force in any multichannel TV platform’s commercial success. In the Nordic region, the already strong positioning of two competing entities both upstream and downstream, i.e. Canal+ Nordic/Canal Digital and MTG/Viasat, reinforces the barriers for new entrants to penetrate the relevant markets successfully. In that context, the vertical integration of MTG/Viasat on the one hand and the contractual exclusive relationship agreed between Canal+ Nordic and Canal Digital, replacing their previous vertical integration, on the other, strengthen these entry barriers even further. They render it more difficult for new entrants not only to acquire important pay-TV content upstream but also to get access to the required DTH distribution outlet downstream.

151. The cumulation of the above elements results in a situation in which the exclusivity granted to Canal Digital constitutes the ultimate foreclosing brick to the detriment of potential DTH entrants. By cutting off during four years third DTH operators’ access to premium content channels that are important for their economic success and the viability of their business the exclusivity renders any independent market entry by a DTH platform, outside the acquisition of one of the players already present, more difficult. Moreover, from the perspective of the DTH entrant the acquisition of specific premium content for the creation of an own pay-TV brand does not constitute a viable alternative to the acquisition of pay-TV channels in the short and mid-term because of at least equally strong entry barriers to the Nordic

upstream markets for premium sports and film licences.[110] That foreclosure effect is the weightier and more deterrent for potential entrants the longer the exclusivity lasts and the higher the buying power of the downstream operators already present is.[111] On the assumption of a narrow market definition covering DTH pay-TV only, Canal Digital's and Viasat's buying power and market strength downstream would be [**confidential**], while Canal Digital would be granted the exclusive distributorship for a very large territory, namely for the Nordic region as a whole. In such situation foreclosure and the resulting reduction of potential competition during a period of four years are to be considered appreciable.[112]

152. Even assuming a wider market delineation comprising both DTH and cable pay-TV, as a result of which the buying power and market strength of Canal Digital/Telenor would be reduced to [**confidential**], appreciable foreclosure would still be present. In fact, even though there would be no outright exclusive status of Canal Digital in the face of parallel CATV distribution of Canal+ Nordic's pay-TV channels, the Commission's investigation has shown that most of Canal+ Nordic's and MTG/Viasat's subscriptions are held and generated through DTH business – with an average ratio between smart card holders and premium subscribers above [**confidential**] – while pay-TV distribution over CATV represents a much smaller ratio of pay-TV customers if compared with the number of basic TV subscribers (between [**confidential**]). This confirms that access to premium pay-TV channels is indispensable for the economic viability of any DTH business, just in the same way as the economic success of pay-TV is primarily dependent on the effective availability of a DTH outlet. Moreover, market entry in the DTH segment relies to a much broader extent on the availability of premium content for pay-TV than in the case of CATV entrants where a number of other factors hitherto usually unrelated to TV broadcasting, such as the availability of telecommunications and broadband related services,[113] are also relevant. Therefore, the exclusivity contributes to raise the already high barriers to entry in the DTH segment and accordingly restricts competition appreciably regardless of the exact delineation of the relevant market.

153. As a result of the above foreclosure effect, credible DTH entrants already having the necessary expertise, the financial and TV content resources at their disposal, such as BSkyB/News Corporation, are prevented from independently entering the Nordic pay-TV markets at the level of the distribution platforms during four years. Telenor itself submits that BSkyB is a potential entrant in the Nordic markets for DTH distribution by referring *inter alia* to its vertical integration with the U.S. Fox film production studios, its movie and news channels and its co-ownership of

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110 Thus, in the Nordic region exclusive premium film licences for pay-TV are normally sold by rights holders for a minimum period of five years whereas exclusive sports broadcasting rights have an average duration of three years; cf. Screen Digest, European Television Movie Rights, May 2002, p. 154; Screen Digest, European Television Sports Rights, March 2002, p. 90.

111 Guidelines on Vertical Restraints, OJ C 291 of 13.10.2000, p. 1, para. 166.

112 Ibid.

113 Cf. e.g. Commission Decision of 10.7.2002 in Case COMP/M.2803 – Telia/Sonera, in particular paras. 78 et seq.

various DTH TV channels that are already distributed in the Nordic region, such as the National Geographic Channel, Nickelodeon and The History Channel. Also the previous investigation in case *Telia/Telenor* has shown that potential entry in the Nordic DTH segment is far from being a hypothetical option. The Commission found that Swedish CATV operator Telia had positioned itself in 1997, before its merger with Telenor, independently to enter the DTH segment in the Nordic region in competition with Canal Digital and formerly Netcom/MTG. It therefore held that the creation of the merged entity would have removed a potential competitor in the Nordic DTH segment.[114]

Prohibition on Canal+ to own/operate a DTH/SMATV platform

154. The exclusivity is coupled with a complementary obligation, namely, the prohibition on Canal+ and its subsidiaries to own and operate a DTH/SMATV platform in the Nordic region – in its amended form – during a period of four years. That prohibition overlaps with the exclusivity in as much as Canal+ Nordic is at any rate prevented from distributing its pay-TV premium content channels through a DTH platform other than that of Canal Digital.

155. The Commission takes the view that the prohibition appreciably restricts competition by foreclosing Canal+/Canal+ Nordic as a potential competitor from the DTH segment for a period of four years. Telenor itself has admitted in its notification that Canal+ is a credible entrant in the Nordic DTH segment, essentially because of its extensive experience in the DTH business in other European countries and its guaranteed access to premium content *inter alia* through its vertical integration with Universal. Moreover, the prohibition reaches even beyond the core premium pay-TV business covered by the exclusivity in so far as it also disables Canal+ Nordic to distribute via DTH commercial/free TV channels. On the other hand, Canal+ currently does not own or operate a DTH/SMATV platform in the Nordic region nor is it active in the distribution of Nordic commercial TV channels. Moreover, following its decision to divest from Canal Digital, Canal+ Nordic is unlikely to re-enter the Nordic DTH business in the short term. Even if that were the case, Canal+ Nordic would initially be prevented from successfully operating an own DTH platform because it would need to offer premium pay-TV services as an important driver for attracting subscribers. However, the possibility for Canal+ Nordic to exploit its premium channels through an own DTH platform during the first four years is already precluded by the exclusivity granted to Canal Digital. Therefore, the Commission considers the prohibition on Canal+/Canal+ Nordic to own and operate a DTH platform as a restraint that is complementary and in its effects subordinate to the exclusivity throughout the four year term of its validity.

Conclusion

156. The Commission therefore concludes that the exclusivity granted to Canal Digital and the prohibition on Canal+ to operate an own DTH platform create substantial additional entry barriers in the Nordic DTH pay-TV segment capable of

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[114] Commission Decision 2001/98/EC in Case IV/M.1439 – Telia/Telenor, OJ L 40 of 9.2.2001, p. 1, paras. 331-334.

foreclosing market entry by potential DTH entrants during four years. The relevant contractual provisions thus have as their object and effect to restrict competition appreciably within the meaning of Article 81(1) of the Treaty.

7.4.1.2. Non-compete obligation: market foreclosure and horizontal restrictive effects

Duration and reach of the non-compete obligations

157. The relevant non-compete clauses[115] contained in the notified agreements as amended essentially prevent Canal Digital/Telenor during three years from

- owning and operating through DTH/SMATV and CATV a pay-TV premium content channel competing with those of Canal+ Nordic and

- acquiring and redistributing through DTH/SMATV pay-TV premium content channels offered by third pay-TV channel suppliers.

158. Against the background of the parties' commercial strategy to secure the economic advantages previously derived from vertical integration, these non-compete obligations are the logical complements to the exclusive distribution arrangement and effectively result in establishing reciprocal exclusivity between Canal+/Canal+ Nordic and Canal Digital. However, it is important to note that the scope of the non-compete arrangement is, in principle, limited to DTH/SMATV distribution. The notified agreements expressly allow Canal Digital/Telenor to distribute third parties' pay-TV premium content channels through Telenor's own CATV networks (not falling under the definition of DTH/SMATV). The non-compete obligations are further complemented and strengthened by a number of clauses regarding the joint acquisition of and preferential access to premium content by Telenor/Canal Digital and Canal+/Canal+ Nordic that will be addressed further below.

Foreclosure effects

159. In accordance with the Guidelines on Vertical Restraints, the supplier's market position is of main importance to determine the possible foreclosure effects created by a non-compete obligation *vis-à-vis* competing suppliers.[116] As mentioned above, Canal+ Nordic has a market share of approximately [45-65]% whereas MTG/Viasat have the remaining [35-55]%.

160. The non-compete obligation imposed on Canal Digital not to acquire pay-TV premium content channels from third suppliers affects MTG in its position as the second most important pay-TV channel provider in the Nordic region as well as potential entrants on the supply-side. However, even though Canal+ Nordic has the leading market position on the selling side the non-compete obligation is very unlikely to result in appreciable foreclosure at the expense of the MTG group.

[115] Cf. Commission Notice on the Guidelines on Vertical Restraints, OJ C 291 of 13.10.2000, p. 1, para. 138: "A non-compete arrangement is based on an obligation … which makes the buyer purchase practically all his requirements on a particular market from only one supplier".

[116] Ibid., para. 140.

MTG has an almost equally strong market position and offers similarly attractive pay-TV services.[117] Moreover, its vertical integration with the second most important DTH platform in the Nordic region, Viasat, durably guarantees MTG the required distribution outlet *vis-à-vis* Nordic DTH customers. In addition, MTG's as well as potential entrant's wholesaling activity *vis-à-vis* CATV in the Nordic region is entirely unaffected by the non-compete obligations. In actual fact, Telenor continues to distribute the TV1000 premium channels of MTG/Viasat through its CATV operation Telenor Avidi.

161. However, against the background of the already existing high barriers to entry on the supply-side the non-compete arrangement makes it very difficult for potential pay-TV channel suppliers to establish in the Nordic region unless that market entry is secured by means of an acquisition of one of the operators already present. The prohibition on Canal Digital to acquire third parties' pay-TV content, in particular, cuts off third suppliers from the strongest and only independent DTH distribution platform in the Nordic region with a reach of more than [**confidential**] subscribers. That exclusionary effect is even more appreciable having regard to the fact that the second most important Nordic DTH platform, Viasat, by reason of its vertical integration with MTG and its focus on promoting the in-house created premium brand Viasat TV1000, is unlikely to constitute a realistic alternative for potential entrants on the supply-side. Moreover, because any successful pay-TV business in the Nordic countries is at present heavily dependent on DTH satellite distribution that foreclosure effect is not sensibly mitigated by the potential access of pay-TV suppliers to Nordic CATV operators. The relatively small ratio of premium pay-TV subscribers via CATV as compared with the corresponding subscriber ratio via DTH shows that CATV pay-TV distribution alone would not constitute a viable alternative from a pay-TV supplier's perspective for recouping market-specific investment. As a result, foreclosure of potential entrants on the supply-side is in any event appreciable regardless of whether a narrow (DTH) or broad (DTH and cable) market delineation is chosen. These restrictive effects are the more significant as the non-compete obligation remains applicable during three years.[118]

162. As a further consequence of the non-compete arrangement Canal Digital is prevented from enlarging its pay-TV retail portfolio beyond that already provided by Canal+ Nordic by having recourse to third pay-TV suppliers, with a potential negative downstream effect on both inter-brand competition and consumer choice. Moreover, the prohibition on Canal Digital/Telenor to create and operate an own pay-TV channel not only considerably strengthens these negative downstream effects but also, and even more importantly, appreciably restricts competition at the <u>horizontal</u> level. It precludes any attempt on the part of the Telenor group as a potential competitor to Canal+ Nordic to benefit from its commercial experience in the pay-TV sector and from the availability of its DTH and cable infrastructure to build up an own at least complementary pay-TV premium brand during three years.

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[117] Compare ibid., para. 142: "Foreclosure of competitors is not very likely where they have similar market positions and can offer similarly attractive products".

[118] See ibid., para. 141, establishing a presumption of the restrictive nature of non-compete obligations lasting between one and five years and requiring a proper balancing of "pro- and anti-competitive effects" (under Article 81(3) of the Treaty).

The prohibition imposed on Telenor/Canal Digital to operate own pay-TV premium content channels via CATV during three years finally ensures that these horizontal restrictive effects also extend to the CATV pay-TV business.

Prohibition on Telenor to acquire premium movie rights in competition with Canal+/Canal+ Nordic

163. The prohibition on Telenor to acquire in competition with Canal+ Nordic premium movie rights (except Nordic rights) for a premium content channel designed for both DTH/SMATV and CATV distribution strengthens the above negative effects of the non-compete obligations substantially, in particular at the horizontal level. The overall purpose of these clauses is to ensure that Telenor/Canal Digital, apart from being hindered to acquire and retail third suppliers' pay-TV channels, do not engage in efforts and investments to create an own pay-TV premium content channel which would compete with those offered by Canal+ Nordic in the Nordic region, in particular, via DTH or CATV. The prohibition therefore cuts Telenor off the source that provides the necessary input for the compounding of complementary premium channels that Telenor/Canal Digital are not allowed to operate as a consequence of the non-compete arrangement.

164. Apart from reinforcing the above restrictive effects the acquisition prohibition also constitutes a horizontal restriction of competition in the upstream market for the acquisition of premium film content. Telenor, as an owner and important operator of several TV distribution platforms, in particular DTH, cable and terrestrial networks across the Nordic region, is thus denied the possibility of acquiring premium content for its TV businesses during three years in order to protect and reinforce Canal+ Nordic's already strong position as a buyer in that market. The prohibition effectively guarantees that Telenor does not bid for premium film licences for the Nordic region in competition with Canal+ Nordic, notably *vis-à-vis* the U.S. film production studios. Given Canal+ Nordic's high share on the buying side, this clearly results in an appreciable horizontal restriction of competition emanating, in particular, from the Telenor group as an important, at least potential buyer of premium content in the Nordic region. Finally, a prohibition to acquire premium content for the distribution of pay-TV via DTH during a period of three years aggravates the above restrictive effects, *a fortiori*, at the horizontal level.[119]

Information sharing, co-operation and joint bidding

165. The information sharing, co-ordination and joint bidding mechanism established between Canal+ Nordic and Telenor regarding the acquisition of various kind of content rights – during three years – under the Sale agreement[120] further

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[119] The three year acquisition prohibition for premium content specifically targeting CATV distribution does not seem to have a practical significance on its own. Established commercial practice in the Nordic region shows that pay-TV premium content channels need to be designed to be deliverable via both DTH and CATV. Under these circumstances, the parties' distinction between premium content for either DTH or CATV redistribution appears artificial and not to reflect economic reality. In the practical result, Telenor/Canal Digital are hindered to acquire premium content regardless of whether they plan its redistribution via DTH or CATV, since the creation of a pay-TV channel for CATV distribution alone would not be an economically viable option.

[120] In general, the parties' co-ordination is to be carried out on a case-by-case basis and conditional upon mutual *ad hoc* agreement. The Sale agreement, subject to certain conditions, establishes the mutual

strengthens the above negative vertical and horizontal effects.[121] In practice, it guarantees Canal+ Nordic full control of Telenor's/Canal Digital's acquisition policy and gives it absolute protection against competition from the latter in the relevant upstream premium content supply markets including the acquisition of premium sports rights. The mechanism thereby pursues essentially a twofold purpose: First, it shields Canal+ Nordic's exclusive right to acquire premium film content and at the same time enhances the monitoring of the observance by Telenor and hence the enforceability of the non-compete obligations. Secondly, the mechanism allows Canal+ Nordic to have recourse to Telenor's/Canal Digital's financial resources in order to share the economic burden of costly premium film licence or sports rights acquisitions, which are in the common interest because they serve the compounding of the jointly marketed Canal+ Nordic pay-TV premium content channels. The relevant clauses thereby seek to perpetuate the advantages of the previous structural vertical integration between Canal+ Nordic and Canal Digital/Telenor by both bundling forces and eliminating competition between each other. This is further confirmed by the PPV non-compete obligation which extends the above control and co-operation mechanism to acquisitions in the PPV film segment. This aspect will be considered in more detail further below (7.4.2.2.).

166. The joint purchasing mechanism as such leads the parties to avoid competing bids for any kind of premium content including sports rights for the purpose of pay-TV exploitation. Because of its broader scope its restrictive effects stray beyond of those already flowing from the prohibition on Telenor to acquire premium films in competition with Canal+ Nordic. From the viewpoint of the rights holders that mechanism sensibly reduces the circle of competing buyers of various premium content for pay-TV distribution in the Nordic region for a long period of time. It aims at eliminating competition between on the one hand a powerful traditional buyer, Canal+ Nordic, and on the other hand an important and at least potential buyer, the Telenor group, which is already very active in the Nordic pay-TV business. Moreover, the mechanism generates harmful downstream effects in that it is capable of resulting in output restrictions regarding the exploitation of film and sports content rights via pay-TV offerings and certain distribution platforms including the creation of complementary or additional pay-TV channels, which the Telenor group may not undertake.

167. Therefore, the Commission considers that the above clauses have as their object and effect to restrict competition within the meaning of Article 81(1) of the Treaty.

Bilateral right of first refusal regarding the acquisition of premium sports rights

168. As a complement to the prohibition on Telenor to acquire premium films as well as the co-ordinated acquisition mechanism, the Sale agreement provides for a bilateral right of first refusal on the sale of premium sports rights for both pay-TV and PPV

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obligation of informing each other party regarding planned bids for movies and sports rights in order to "assess the possibility of joint bids". Only if no joint bid is agreed are the parties free to act as they wish. The Sale agreement further foresees the establishment of a "co-operative forum" with regular meetings to ensure the well-functioning of the co-operation mechanisms.

[121] For the restrictive effects of mechanisms for joint acquisition of TV content see also Commission Decision 2000/400/EC in Case IV/32.150 – Eurovision, OJ L 152, 24.6.2000, p. 18, paras. 71-75.

to third parties during three years. In practice, it prevents third parties' access to the premium sports rights acquired by either Telenor or Canal+ Nordic which they wish to resell. This adds force to the negative horizontal and vertical effects of the co-ordination and joint bidding arrangement. At the same time, the bilateral right of first refusal strengthens the ties established by the reciprocal exclusivity for the pay-TV channel distribution (i.e. Canal Digital's exclusive status in conjunction with the non-compete arrangement) and, accordingly its foreclosure effects *vis-à-vis* potential entrants both upstream and downstream.[122]

Conclusion

169. The Commission therefore considers that the non-compete clauses in respect of the pay-TV channel distribution have as their object and effect appreciably to restrict competition within the meaning of Article 81(1) of the Treaty, in particular, by creating additional entry barriers and appreciable foreclosure at the expense of potential entrants to the Nordic pay-TV market on the supply-side during three years. The acquisition prohibition imposed on Telenor, *a fortiori*, in its combination with the joint acquisition and co-operation mechanism including the bilateral rights of first refusal strengthens these vertical restrictive effects considerably. Moreover, the acquisition prohibition as well as the joint acquisition and preferential access arrangement have as their object and effect appreciably to restrict competition horizontally within the meaning of Article 81(1) of the Treaty.

7.4.2. Exclusive PPV/NVOD movie channel distribution and non-compete obligation

7.4.2.1. Exclusive distribution: no market foreclosure

Duration and reach of the exclusivity

170. Under the PPV/NVOD agreement Canal Digital is granted the exclusive right and obligation to distribute all of the PPV/NVOD movie channels broadcast by Canal+ Nordic as part of a multichannel service through DTH/SMATV, smaller cable networks and Telenor's CATV networks in the Nordic region for a period of five years. Canal Digital also has the exclusive right and duty to distribute (wholesale) Canal+ Nordic's PPV/NVOD movie channels to other CATV operators than Telenor at least for a period of two years. Thus, by contrast to the pay-TV premium channel exclusivity, the PPV exclusivity in principle encompasses both DTH/SMATV and CATV distribution. In the practical result, Canal Digital's exclusive status disables Viasat and potential DTH entrants to access Canal+ Nordic's "Kiosk" channel for redistribution downstream; nor can CATV operators acquire the relevant PPV/NVOD movie services directly from Canal+ Nordic. However, the exclusivity does not cover PPV/NVOD sports channel distribution.

Lack of appreciable effects on competition

171. Before assessing the exclusivity's effects on competition the particular nature of the PPV/NVOD services at issue are to be considered.

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[122] See also Commission Decision 1999/242/EC in Case No IV/36.237 – TPS, OJ L 90, 2.4.1999, p. 6, para. 101 regarding a right of first refusal binding for ten years.

172. PPV/NVOD movie services within the meaning of the notified agreements consist of individual feature and erotic film offerings during a given period after their theatrical release. From the perspective of the end-consumer, what is essential in PPV/NVOD distribution of that kind is the attractiveness of the individual movie rather than the channel as a whole. Therefore, the channel brand as such plays a much less important role than in the case of promoting pay-TV channel bouquets. Moreover, as a result of the commercial focus on individual films a potential foreclosure problem would be most likely to occur on the upstream market for the acquisition of premium film licences. That risk is however considerably reduced, if not discounted altogether, by the fact that all of the relevant PPV/NVOD film distribution licences acquired and used by Canal+ Nordic for the compounding of the "Kiosk" channel are non-exclusive. Competitors to Canal+ Nordic, such as MTG/Viasat or potential entrants on the selling side, may thus acquire the same rights from the movie producers for the purpose of compounding PPV movie services and distribution downstream as Canal+ Nordic does. On the buying side or from the TV multichannel distributor's viewpoint, a sensible foreclosure effect appears unlikely for essentially the same reasons. Although TV distribution platforms generally acquire compounded PPV channels rather than individual film licences direct from the rights holders, that latter option is not precluded in case the platform wishes to offer a PPV service on its own.

173. Under these circumstances, the PPV exclusivity does not entail appreciable foreclosure effects to the detriment of third DTH or CATV operators for the following reasons:

174. First, as a result of the non-exclusive distribution of PPV film licences by production studios, MTG/Viasat have the possibility to acquire and offer through their own "Viasat Ticket" PPV channel the same movies as those provided by Canal+ Nordic through Canal Digital and Nordic CATV operators. The fact that the Canal+ Nordic "Kiosk" channel as such is not accessible for the Viasat DTH platform is not decisive because of the continuous availability of the relevant film raw material in the upstream acquisition market and the structural vertical link of Viasat with MTG.

175. Secondly, Canal Digital has a contractual duty to sub-licence the "Kiosk" channel to Nordic CATV operators who thus have at least indirect access to the Canal+ Nordic's PPV movie offering.[123]

176. Thirdly, the exclusivity does not appreciably foreclose potential entrants in the Nordic DTH or CATV segments either. Although potential entrants – by analogy to the reasons set forth above (7.4.1.1.) – will probably be unable to distribute either of the two PPV movie channels supplied by MTG and Canal+ Nordic, respectively, they are not prevented from acquiring and distributing the relevant film content through an own PPV offering. Moreover, as already mentioned under 7.4.1.1., the successful establishment of a new DTH operator in the Nordic region is primarily dependent on the availability of attractive pay-TV channel bouquets rather than PPV movie services, whereas from the viewpoint of the majority of

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[123] Canal+ Nordic licences [**confidential**]. Moreover, TDC in Denmark currently offers "Kiosk" under a sub-licensing agreement with Canal Digital.

Nordic CATV operators PPV distribution has so far not been an important business at all.[124] Thus, in the past, PPV movie services have proven to be a commercially relatively unattractive service linked and complementary to the premium pay-TV offering and, therefore, do not in themselves appear to constitute a decisive input for the purpose of successful market penetration from the perspective of both DTH and CATV operators.

177. Therefore, the Commission considers that the PPV exclusivity does not create additional entry barriers to DTH or CATV distribution of PPV services in the Nordic region to an extent which would justify concluding that appreciable market foreclosure is present. In accordance with these findings the Commission had not raised with the parties any objection against the PPV/NVOD agreement as notified.

Conclusion

178. The Commission accordingly concludes that the PPV/NVOD channel exclusivity does not fall within the scope of Article 81(1) of the Treaty.

7.4.2.2. Non-compete obligation: market foreclosure and horizontal restrictive effects

Duration and reach of the non-compete obligation

179. The PPV exclusivity is combined with a non-compete obligation imposed on Canal Digital not to distribute PPV/NVOD (premium) film channels other than those provided by Canal+ Nordic during a period of three years. However, the non-compete is not absolute since Canal Digital – after having observed a consultation and negotiation procedure with Canal+ Nordic – may acquire and supply additional PPV/NVOD movie channels/services provided by third suppliers subject to the minimum transponder capacity reserved for Canal+ Nordic. Canal+ Nordic, in turn, has no possibility ultimately to veto such transactions.

Market positions

180. As mentioned above (5.2.1.2.), the respective shares of Canal+ Nordic and MTG on the selling side in the wholesale distribution of PPV channels are [45-65]% and [35-55]% whereas on the buying side Canal Digital's and Viasat's share may be estimated to be [**confidential**] in the event of a narrow market delineation (DTH only). However, under a broader market delineation (DTH and cable) Telenor/Canal Digital would have a share of [**confidential**] and MTG/Viasat of [**confidential**].

Effects on competition

181. The non-compete obligation principally prevents third suppliers from distributing their PPV movie services to and through Canal Digital. The possibility for these suppliers exceptionally to provide Canal Digital with "additional" PPV services – i.e. movies which are not (yet) part of the Canal+ Nordic PPV offering – results in very limited access only. Access is further restrained by the above mentioned

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[124] The exception currently being Com Hem in Sweden and TDC Kabel in Denmark.

procedural hurdles that Canal Digital has to overcome before acquiring such PPV/NVOD movie services from third suppliers. Taking into account the countervailing strength of Canal+ Nordic as an important pay-TV and PPV channel supplier as well as the control and joint acquisition mechanism addressed above, the consultation and negotiation obligation in practice is not unlikely to lead Canal Digital to renounce acquiring third party's PPV movie services at all or, at best, to acquire them jointly with Canal+ Nordic. Therefore, in reality, MTG/Viasat's and other (potential) PPV suppliers' access to the Canal Digital DTH platform and, in turn, Canal Digital's PPV acquisitions from third suppliers are substantially reduced, if not entirely impossible.

182. For the reasons given above (7.4.1.2.), it is rather unlikely that Canal+ Nordic's main competitor MTG, having a comparable market positioning because of its similarly attractive PPV offering, will be foreclosed from the PPV film services market as a consequence of the non-compete arrangement. However, potential entrants on the supply side are faced with an important entry barrier as the non-compete obligation ensures that access to the only independent DTH distribution platform in the Nordic region is barred. As there is no economically viable alternative for PPV movie service retail distribution to DTH customers, the non-compete obligation thus ultimately forecloses potential suppliers' entry to the Nordic PPV movie services market for a period of three years. Moreover that exclusionary effect and the foreclosure of potential entrants on the supply side in the neighbouring market for the wholesale supply of pay-TV premium channels (cf. above 7.4.1.2.) mutually reinforce each other in a "cumulative effect" type of result. This stems from the fact that pay-TV suppliers generally exploit pay-TV and PPV licences in parallel, bearing in mind that PPV constitutes a service complementary and linked to general pay-TV and that TV operators normally do not enter the PPV segment without engaging into broader pay-TV business at the same time. Moreover, in the same way as in the case of general pay-TV business in the Nordic countries, potential access of PPV suppliers to Nordic CATV operators does not constitute a viable alternative to DTH satellite distribution. This already flows from the fact that CATV operators rarely offer an own PPV service to their subscribers[125] and that the pay-TV subscriber ratio via CATV is in general insufficient for any pay-TV supplier to recoup market-specific investment. As a result, foreclosure of potential entrants on the supply-side is in any event appreciable regardless of whether the market is defined narrowly (DTH) or broadly (DTH and cable).

183. Furthermore, at the horizontal level the PPV non-compete arrangement protects Canal+ Nordic from competition by Canal Digital as an at least potential buyer upstream of individual film licences for the purpose of PPV distribution. By means of the consultation obligation – in conjunction with the control and joint acquisition mechanism foreseen by the Sale agreement – Canal+ Nordic is able fully to control Canal Digital's acquisition policy *vis-à-vis* third PPV service and film licence suppliers while Canal Digital faces sensible procedural constraints that limit its margin of manoeuvre during a period of three years. In addition, as Canal Digital is, in principle, prevented from enlarging its film library beyond the PPV offering made available by Canal+ Nordic, the non-compete obligation also

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[125] Ibid.

produces a potentially negative impact on inter-brand competition and consumer choice downstream.

Conclusion

184. Therefore, the Commission takes the view that the PPV/NVOD channel non-compete obligation has as its object and effect to restrict competition within the meaning of Article 81(1) of the Treaty.

7.4.2.3. Overall conclusion on PPV/NVOD distribution

185. The Commission accordingly concludes that the five year exclusivity for the distribution of PPV/NVOD movie channels via DTH/SMATV – including the two year exclusivity for CATV distribution – does not have as its object or effect appreciably to restrict competition within the meaning of Article 81(1) of the Treaty.

186. On the other hand, the non-compete obligation of three year duration has as its object and effect to restrict competition appreciably within the meaning of Article 81(1) of the Treaty.

7.4.3. Satellite transponder non-compete obligation

187. Under the Sale agreement as amended, Canal+/Canal+ Nordic is obliged to continue to retransmit its premium content channels as well as related content, such as enhanced TV and interactive TV, for DTH reception exclusively via satellites owned and operated by Telenor during five years.

188. The relevant clause imposes a non-compete obligation on Canal+ Nordic to the effect that it may not retransmit its premium content channels for DTH reception via competing satellite service providers, such as NSAB. On the other hand, Telenor Satellite Services continues to be free to offer spare satellite transponder capacity to third TV channel providers. Moreover, the non-compete obligation does not cover the retransmission of Canal+ Nordic's premium content channels to CATV operators' head-ends. As a consequence, Canal+ Nordic remains free to use third parties' satellite capacity for that purpose. However, according to the parties' own admission, that possibility is economically unattractive since Canal+ Nordic is not prepared to bear the additional cost of using two different satellites in parallel for the purpose of retransmitting the same bundle of pay-TV channels via DTH and CATV, respectively.

189. Even though Telenor enjoys a high market share in the Nordic market for the supply of satellite transponder capacity for TV broadcasting in the Nordic region (40-60%) foreclosure of its only actual competitor, NSAB, is unlikely because of its similarly strong market positioning (40-60%) and its contractual long-term ties with *inter alia* the MTG/Viasat group.

190. However, the non-compete obligation contributes to foreclosing potential entrants in the Nordic market for the supply of satellite capacity. Entry barriers to the Nordic satellite market are already very high. The setting-up of a new satellite service including production and placing of the satellite on a geostationary orbit

requires extraordinarily high sunk investment.[126] Moreover, the Nordic satellite market's rigid duopolistic structure and the long-term exclusive ties between the present suppliers of transponder capacity on the one hand and the various Nordic TV broadcasters on the other further strengthen these barriers. Thus, for instance, MTG/Viasat are tied to NSAB for the use of the Sirius satellite capacity for retransmission of the Viasat channels via 5°East for a period of five years.

191. As a result of the non-compete arrangement and for a period of five years during which Canal+ Nordic is obliged to retransmit the bundle of its premium content channels exclusively via the Telenor satellites, the above entry barriers on the supply side are significantly increased. It precludes potential entrants from providing their satellite services to the second most important pay-TV broadcaster in the Nordic region for a long period of time. According to Telenor's own admission, the attractive Canal+ Nordic premium channels positioned at 1°West with a reach of more than [**confidential**] DTH subscribers constitute an important driver for the distribution of its satellite services to other TV broadcasters who wish to cluster their channels on neighbouring transponders in order to be received by as many households as possible. Moreover, the duration of the non-compete obligation overlaps considerably with the average operational life time of the currently available Nordic satellites (between 10 to a maximum of 15 years) before the expiry of which any satellite operator needs to invest considerably in the maintenance of its satellite fleet and capacity. To the extent that such renewed investment is needed, the incumbent satellite operators are in a position comparable to that of a new entrant, except for the fact that they can rely on already agreed long-term supply arrangements with a number of TV broadcasters which guarantee that market-specific investment can be recouped.

192. Therefore, the Commission takes the view that the non-compete obligation of five years duration appreciably contributes to foreclosing future potential entrants in the Nordic market for the supply of satellite capacity. Accordingly, the non-compete obligation has as its object and effect appreciably to restrict competition within the meaning of Article 81(1) of the Treaty.

7.5. Effect on trade between Member States

193. Article 81(1) of the Treaty is aimed at agreements which might harm the attainment of a single market between the Member States, whether by partitioning national markets, or by affecting the structure of competition within the common market. Similarly, Article 53(1) of the EEA Agreement is directed at agreements that undermine the achievement of a homogeneous European Economic Area.

194. The notified agreements pertain to the acquisition and redistribution of pay-TV services by the parties across the Nordic region. The distribution rights granted cover the Nordic countries including the European Union's Member States Finland, Denmark and Sweden as well as EEA Member State Norway. Moreover, the exclusivity and non-compete obligations as well as co-operation arrangements agreed between the parties for the acquisition and redistribution of such services create restrictive effects both vertically and horizontally throughout the Nordic

[126] Cf. e.g. http://www.thor-satellites.com/.

region. In particular, they foreclose potential entry in the relevant Nordic product and services markets at both the upstream and downstream levels.

195. The Commission therefore concludes that the notified agreements have a significant influence on the pattern of trade between EU and EEA Member States. Accordingly, trade between Member States is affected appreciably within the meaning of Article 81(1) of the Treaty and Article 53(1) of the EEA Agreement.

8. ARTICLE 81(3) OF THE TREATY AND ARTICLE 53(3) OF THE EEA AGREEMENT

8.1. Need for individual exemption

196. The application of the Block Exemption Regulation on Vertical Restraints (hereinafter "BER")[127] to the notified agreements is precluded in the present case. As regards pay-TV and PPV/NVOD channel distribution the primary purpose of the relevant exclusivity and non-compete arrangements is the use by the buyer of intellectual property rights (hereinafter "IPR") within the meaning of Article 2(3) of the BER. As explained in the Guidelines on Vertical Restraints, "copyright licensing such as broadcasting contracts concerning … the right to broadcast an event" fall outside the scope of the BER.[128] The licensing of Canal+ Nordic's pay-TV premium content channels to Canal Digital implies the use of IPRs held by content providers (e.g. film production studios) as well as Canal+ Nordic in connection with the creation, editing and compounding of the pay-TV channels. Moreover, the primary purpose of the exclusive licence is the use of these IPRs via the distribution of TV broadcasts to end-consumers. In addition, the notified agreements also fall outside the BER because of the relevant suppliers' strong market positions exceeding the 30% threshold of Article 3(1) BER – i.e. Canal+ Nordic in the case of the wholesale supply of pay-TV channels and Telenor in the case of the supply of satellite transponder services. However, in line with paragraph 62 of the Guidelines on Vertical Restraints the inapplicability of the BER in the present case does not entail a presumption that the vertical agreements at issue are illegal. Rather the agreements need individual examination by the Commission in application of Article 81(3) of the Treaty and Article 53(3) of the EEA Agreement. This also applies to the horizontal restrictions flowing from the notified agreements.

197. In evaluating the restrictions of competition created by the notified agreements pursuant to the criteria for exemption set out in Article 81(3) of the Treaty and Article 53(3) of the EEA Agreement, the Commission considers the efficiencies generated by the restrictive arrangements. It grants an exemption under Article 81(3) of the Treaty and Article 53(3) of the EEA Agreement when the efficiencies are such as to offset the restrictive effects. In so doing, the Commission

[127] Commission Regulation (EC) 2790/1999 of 22.12.1999 on the application of Article 81(3) of the Treaty to categories of vertical agreements and concerted practices, OJ L 336, 29.12.1999, p. 21.

[128] Commission Notice Guidelines on Vertical Restraints (2000/C 291/01), OJ C 291, 13.10.2000, p.1, para. 32.

furthermore takes full account of the principles and the spirit enshrined in the Guidelines on Vertical Restraints.[129]

198. Article 81(3) of the Treaty and Article 53(3) of the EEA Agreement provide that the provisions of Article 81(1) of the Treaty and Article 53(1) of the EEA Agreement respectively may be declared inapplicable to any agreements between undertakings which contribute to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit, and which do not impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives, nor afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question. The following sections contain an assessment in relation to each of those four conditions. In that regard it will be mainly referred to Article 81(3) of the EC Treaty unless different treatment under Article 53(3) of the EEA Agreement is required.

8.2. Improvement in production or distribution and/or promoting technical or economic progress

199. The parties contended that the agreements as initially notified foster a number of efficiencies. The Commission in principle concurs with this view to the extent as is set out below.

8.2.2 Pay-TV channel exclusivity

200. Telenor argued that the agreements as initially notified improve distribution of services to DTH households since they result in the presence of two balanced DTH distributors [**confidential**]. Failing the exclusive ties between Canal+ and Canal Digital [**confidential**].

201. Moreover, Telenor contended that the agreements as initially notified promote the development of digital TV services going hand in hand with the roll-out of digital decoders and the growth of the DTH sector in the Nordic area in general. Thanks to Canal Digitals' digital TV investments customers would get access to subsidised digital set-top boxes and benefit from new developments in the digital environment, such as more channels being distributed without price increase, improvement of quality of picture and sound, access to an electronic programme guide (hereinafter "EPG") and to interactive TV services.

202. While the second argument raised by Telenor does not address benefits directly related to the restrictions flowing from the exclusivity, the Commission acknowledges that the first argument reflects the presence of a number of improvements in distribution coupled with economic progress that immediately result from the exclusivity arrangement as such. This covers in particular the following aspects directly related to the relevant restrictions:

203. Firstly, the exclusivity helps Canal Digital avoid an acute "free-riding" problem[130] emanating in particular from the presence of a powerful and vertically integrated

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[129] Ibid., paras. 100 et seq.

[130] Ibid., para. 116(1).

competitor in the Nordic DTH pay-TV segment, i.e. MTG/Viasat. The possibility for Viasat or potential DTH entrants to access Canal+ Nordic's pay-TV premium content channels for the purpose of DTH redistribution would ultimately give rise to such a free-rider issue that could probably not be balanced by Canal Digital's reciprocal access to MTG's pay-TV premium channels. In fact, since MTG wholly owns and controls Canal Digital's sole direct competitor Viasat the latter option continues to be unrealistic. Thus, failing the exclusivity Canal Digital would possibly not be able to offer its subscribers the same broad portfolio of attractive pay-TV services or only at much less favourable conditions than Viasat. Moreover, Canal Digital would be deprived of the possibility to build exclusively on the Canal+ channel brand, hitherto strongly associated with its business and its own brand image – conveyed by the duplication of the term "Canal" – in order to attract subscribers to its platform. Viasat and potential DTH entrants in turn could free-ride on Canal Digital's promotional and branding efforts in respect of DTH distribution of Canal+ Nordic's channels and, as a result, extract a considerable competitive advantage from Canal Digital's market-specific investment. For these reasons, the economic viability of Canal Digital's DTH business could be seriously affected without the exclusive supply guarantee given by Canal+ Nordic.

204. Secondly, also from the viewpoint of Canal+ Nordic, DTH distribution of its pay-TV channels through Viasat would be unlikely to constitute a viable alternative. Because of MTG/Viasat's strong incentive to favour DTH distribution of its in-house produced premium channels there would be a real risk that, in contrast to Canal Digital, Viasat fixes its efforts and investments in promoting and distributing Canal+ Nordic's premium channels at a sub-optimal level. Even more importantly, as a consequence of MTG/Viasat's vertical integration, granting Viasat the possibility to retail Canal+ Nordic's pay-TV channels would effectively amount to distribution of these channels via Canal+ Nordic's sole competitor on the selling side, the MTG group. The Commission considers that in a duopolistic market structure, such as the one at issue, a vertical exclusivity arrangement is beneficial to distribution within the meaning of Article 81(3) of the Treaty by promoting the efforts deployed by actual competitors to enhance distinctive branding and channel penetration, provided the vertical restriction is strictly limited in time so that the possibilities for potential entry are preserved.

205. Thirdly, exclusive access to Canal+ Nordic's premium content channels allows Canal Digital to rationalise its programming activities and to secure cost efficiencies that enable it to continue operating [**confidential**]. Canal Digital's exclusive status creates and maintains [**confidential**]. Without a supply guarantee over a certain period of time Telenor would be faced with a typical "hold-up" problem[131] [**confidential**]. In particular, absent an exclusive distribution guarantee for Canal+ Nordic's pay-TV channels, as an essential input and key driver for subscriber growth in the DTH segment [**confidential**] and, conversely, the chances for Telenor to recoup its relationship-specific in Canal Digital's pay-TV operations [would be] substantially reduced.

206. Finally, it cannot be denied that in a short and mid-term perspective tight competition between Canal Digital and Viasat, stimulated through the exclusivity,

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131 Ibid., para. 116(4).

is beneficial not only to substantial growth in DTH pay-TV distribution but also to the roll-out of digital TV, thus preparing the economic ground for a variety of new digital (pay-)TV services including new decoder technology in the Nordic region. This is confirmed by the recent development in the Nordic pay-TV segment in which enhanced competition between Canal+ Nordic/Canal Digital on the one hand and MTG/Viasat on the other has accelerated the digitalisation process including the conversion of a large number of pay-TV subscriptions from analogue to digital and the increased roll-out of digital decoders at low cost.[132]

207. Accordingly, the exclusivity contributes to the improvement in distribution and the promotion of economic progress within the meaning of Article 81(3) of the Treaty. The above reasoning applies by analogy to the prohibition on Canal+/Canal+ Nordic to own/operate a DTH/SMATV platform as it is complementary and in its effects subordinate to the exclusivity during the term of its validity (see above 7.4.1.1.).

8.2.1. Pay-TV and PPV channel non-compete obligations

208. The non-compete obligations including the related clauses on joint acquisition of and preferential access to audio-visual content for pay-TV exploitation grant Canal+ Nordic full protection against competition from third pay-TV providers and the Telenor group as a potential pay-TV supplier while at the same time obliging Telenor/Canal Digital to focus on the distribution of the Canal+ Nordic pay-TV offerings.

209. According to the parties, the agreements as initially notified promote high quality pay-TV services as Canal+ would no longer invest in costly long-term distribution rights for the Nordic region without having secured access to a distribution platform. If Canal+ were to cease its activity as a provider of Nordic pay-TV channels the choice of pay-TV households would be substantially reduced in terms of both volume and quality. It would be unlikely that Viasat – already having a complete premium pay-TV offering – launch additional channels in response to a market exit of Canal+.

210. The Commission acknowledges that the non-compete arrangements in their entirety entail efficiencies that may be summarised as follows:

- Efficiency gains through guaranteeing that Canal Digital continuously concentrates its efforts on promoting the Canal+ Nordic pay-TV premium brand via DTH rather than distributing third party channels or engaging in the creation of an own pay-TV service, thereby stimulating inter-brand competition via DTH between Canal+ Nordic/Canal Digital and MTG/Viasat;

- The guarantee of an “exclusive outlet” as the economic pre-condition and primary incentive for Canal+ Nordic’s further market-specific investment in costly premium content acquisition and the creation of an

[132] MTG/Viasat converted its 350.000 analogue pay-TV subscribers in April 2001 to digital pay-TV by giving away decoders free-of-charge, cf. http://www.mtg.se. A similar strategy had been adopted by Canal Digital in 2000, cf. IDATE, The World Television Market, Vol.1: Markets, 2003, p. 143.

attractive pay-TV brand designed to match the "Nordic taste". Failing that guarantee the business' economic viability would be seriously affected up to the point that Canal+ Nordic could possibly exit the market with a strong risk of monopolisation in the Nordic DTH pay-TV segment.

211. In the following, the efficiencies generated by each of the relevant restrictions under the non-compete arrangement and the related clauses will be considered.

8.2.1.1. Non-compete obligations

212. The non-compete arrangements help in particular remedy a "hold-up" problem[133] on Canal+ Nordic's side. Being assured that Canal Digital does neither distribute third parties' pay-TV channels nor create its own pay-TV business constitutes an important incentive for Canal+ Nordic to continue to make relationship-specific investments into its pay-TV operations in as much as they are conducted through the Canal Digital DTH platform. Conversely, the non-compete arrangement ensures that during three years Telenor/Canal Digital focus their efforts on the distribution of Canal+ Nordic's pay-TV premium content channels rather than acquire and distribute third suppliers' premium channels and/or build-up and market an own pay-TV brand. In line with the Guidelines on Vertical Restraints, a non-compete obligation which provides an "incentive for the exclusive distributor to focus his efforts on the particular brand" can be considered as beneficial in the absence of significant foreclosure.[134]

213. The Commission further concurs with the parties' view that absent Canal Digital's concentrated efforts and investments in promoting DTH distribution of the Canal+ Nordic pay-TV channels, a number of related efficiencies, such as enhanced branding, product differentiation and channel penetration in the Nordic region and ultimately the maintenance of a reasonable degree of inter-brand competition between MTG/Viasat and Canal+ Nordic/Canal Digital – as introduced in 1997 when the Canal Digital platform was launched – could not be attained or only to a much lesser extent. The need for branding and product differentiation in the DTH pay-TV segment requires certain stability over time in the vertical commercial relationships between upstream pay-TV channel providers and downstream DTH distribution platforms which largely explains the strong overall trend among European pay-TV providers to operate on a vertically integrated basis. In the pay-TV sector, the creation and maintenance of a specific channel brand image, based on exclusive content input, is key to increase the attractiveness of the service and, accordingly, the number of subscriptions. It is thereby decisive for the commercial success of both the pay-TV channel suppliers and the TV distribution platforms. Canal+ Nordic's and Viasat's premium pay-TV bouquets, while being similar in their qualitative set-up and attractiveness, are highly branded and, on the basis of the exclusive content respectively exploited, distinctive products from the viewpoint of the end-consumers. In the case of the Canal+ Nordic's premium channels this has lead consumers over the years strongly to associate the Canal+

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133 Ibid., para. 116(4).

134 Cf. ibid., para. 171.

brand with the Canal Digital platform (as is already conveyed by the duplication of the term “Canal”). In the duopolistic market structure at issue with a marked product and platform differentiation, the non-compete arrangement ultimately helps maintain these features of inter-brand competition in as much as it provides an incentive for Canal Digital to focus its marketing efforts on the Canal+ brand. Therefore, upholding the non-compete obligations for a certain period of time appears to be beneficial to the maintenance of a competitive marketplace and distribution within the meaning of Article 81(3) of the Treaty.

214. This reasoning applies by analogy to the PPV/NVOD film distribution non-compete obligation in as much as the PPV/NVOD business via DTH is economically linked and complementary to the overall pay-TV operations of the market players involved (cf. above 7.4.2.). Moreover, much in the same way as in the case of the pay-TV channel non-compete obligation, the PPV/NVOD non-compete arrangement provides an incentive for both Canal+ Nordic to invest in PPV film licences and Canal Digital to promote the Canal+ Nordic PPV channel brand “Kiosk” in competition with the “Ticket” channel brand marketed by MTG/Viasat.

8.2.1.2. Prohibition on Telenor to acquire premium movie rights in competition with Canal+

215. The parties have not claimed any specific benefits justifying the three year prohibition on Telenor to acquire premium movie rights in competition with Canal+, apart from stating that Telenor has not historically been a significant buyer of premium content.

216. Nonetheless, with a view to the economic logic of the non-compete arrangement addressed above, it is evident that the acquisition prohibition purports to ensure that Telenor/Canal Digital do not invest significant resources in creating and promoting an own premium Nordic pay-TV bouquet which would compete with those offered by Canal+ Nordic, in particular, via DTH distribution. It would ultimately be damaging to the efficiencies fostered by the non-compete arrangement if Telenor/Canal Digital were to concentrate on building its own pay-TV premium brand including the necessary film content rights acquisition rather than focus their commercial efforts on the branding and distribution of Canal+ Nordic’s pay-TV channels. In addition, competition between Telenor and Canal+ Nordic in the acquisition of premium content needed for the packaging of pay-TV channels is likely to lead to price increases by rights holders in the upstream supply market, thus indirectly absorbing part of the cost savings and synergies gained through the co-operation foreseen by the notified agreements at the vertical level. Therefore, the acquisition prohibition imposed on Telenor is a necessary pre-condition for securing the efficiencies generated by the vertical non-compete arrangement during the three year term of its validity.

217. For these reasons, the Commission considers that the prohibition on Telenor to acquire premium content for pay-TV is beneficial in so far as it serves to secure the efficiencies pursued by the non-compete arrangements. To that extent it also contributes to the promotion of distribution and economic progress in the Nordic pay-TV sector within the meaning of Article 81(3) of the Treaty.

8.2.1.3. Information sharing, co-operation and joint bidding

218. Telenor has not expressly claimed specific efficiency gains in relation to the information sharing and joint bidding arrangement with Canal+/Canal+ Nordic. The Commission nonetheless takes the view that the joint acquisition mechanism is susceptible of translating into cost savings and synergies for both Canal+ Nordic and Telenor/Canal Digital. More specifically, it allows them to join financial forces and to share costly investment in premium content rights designed for their joint pay-TV exploitation in as much as it is based on the vertical co-operation for the purpose of distributing Canal+ Nordic's premium channels. Therefore, the joint acquisition mechanism is also beneficial to the overall functioning of the vertical exclusivity and non-compete arrangements and thus enhances the efficiencies flowing therefrom (cf. above 8.2.1.-2.).

219. The Commission accordingly concludes that the clauses on joint acquisition of content rights for pay-TV promote production and distribution as well as economic progress in the Nordic pay-TV sector within the meaning of Article 81(3) of the Treaty.

8.2.1.4. Bilateral rights of first refusal on the sale of premium sports rights

220. The bilateral right of first refusal on the sale of premium sports rights to third parties is linked to the vertical exclusive relationship between Canal+ Nordic and Telenor/Canal Digital in a similar way as the acquisition prohibition and the joint acquisition arrangement. It ensures that premium sports content at the parties' disposal for the compounding of pay-TV and PPV/NVOD channels is efficiently exploited by the parties themselves in the framework of their vertical relationship rather than in relation to third parties. This preferential access also contributes to the build-up and maintenance of the Canal+ pay-TV brand via the DTH distribution mode and thus reinforces the efficiency gains flowing from Canal+ Nordic's and Telenor/Canal Digital's co-operation at the vertical and horizontal levels.

221. The Commission therefore concludes that the rights of first refusal regarding the acquisition of premium sports rights for pay-TV and PPV/NVOD distribution sustain the attainment of the efficiency gains fostered by the non-compete arrangement during the three year term. They accordingly also promote the production and distribution as well as economic progress in the Nordic pay-TV sector within the meaning of Article 81(3) of the Treaty.

8.2.1.5. Conclusion

222. Accordingly, the Commission concludes that the relevant non-compete obligations in conjunction with the joint acquisition and preferential access arrangements regarding premium content for pay-TV contribute to the improvement in production and distribution and the promotion of economic progress within the meaning of Article 81(3) of the Treaty.

8.2.2. Satellite transponder non-compete obligation

223. Telenor argued in respect of the satellite transponder non-compete obligation as initially notified that broadcasters targeting the Nordic region benefit from the existence of two competing satellite positions capable of delivering channel services to DTH households, namely 1°West promoted by Telenor and 5°East promoted by NSAB [**confidential**]. Other broadcasters wished to cluster their channels on neighbouring satellite transponders to ensure that they can be received by all DTH households able to receive Canal+' channels. [**Confidential**] Thus, Telenor's investment in both satellite capacity positioned on 1°West and Canal Digital would be undermined without a long-term commitment of Canal+ to use 1°West.

224. Telenor further submitted that the exclusive use of Telenor satellite capacity is an essential part of the notified agreements. [**Confidential**] Moreover, the exclusive transponder use would not impose significant restrictions on competition as it is limited to Canal+' premium content channels, their distribution via DTH and merely prolongs Canal+' long-standing commitment already in force to use Telenor's satellites.

225. In conformity with the Commission's position taken in case *NSAB/MTG* where it exempted a bilateral satellite transponder exclusivity between NSAB and MTG for the purpose of TV broadcasting in the Nordic region for a period of five years,[135] the Commission in principle concurs with Telenor's view that the satellite transponder non-compete obligation entails a number of efficiencies.

226. The non-compete obligation in particular helps resolve a "hold-up" problem on Telenor's side. [**Confidential**] To that extent, it ultimately also contributes to achieving the efficiencies created by the pay-TV channel exclusivity (see above 8.2.1.). Canal Digital's business is inextricably linked, since its launch in 1997, to Canal+ Nordic's premium pay-TV retransmission via satellite transponder capacity positioned at 1°West. [**Confidential**] Therefore, the Commission considers that satellite transponder non-compete obligation forms an integral part of the vertical relationship created between Canal+ Nordic and Telenor/Canal Digital for the purpose of the exclusive distribution of Canal+ Nordic's pay-TV premium content channels via DTH and cannot be separated from the latter without undermining its efficiencies.

227. Accordingly, the Commission concludes that the satellite transponder non-compete obligation of five years duration promotes the attainment of the efficiencies flowing from the exclusive distribution arrangement. It thus contributes to the improvement in distribution and the promotion of economic progress within the meaning of Article 81(3) of the Treaty.

8.2.3. Conclusion

228. The Commission therefore concludes that the relevant restrictions in the notified agreements contribute to the improvement of production and distribution as well as

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[135] Comfort letter dated 6.12.2001 in Case COMP/C-2/38.016 – NSAB/MTG (IP/01/Nordiska, 17.12.2001).

the promotion of technical and/or economic progress within the meaning of Article 81(3) of the Treaty.

8.3. Fair share of the benefit to consumers

229. Apart from the consumer benefits already addressed above Telenor put forward a number of advantages as a consequence of the agreements as initially notified. This includes the conversion of about [**confidential**] analogue households to higher quality DTH services until September 2001, the parallel increase of the number of pay-TV households, the availability of pay-TV and other digital services at competitive prices because of ongoing fierce competition between Canal Digital and Viasat as well as the promotion of new interactive services to the benefit of more consumers, such as PPV, NVOD, home shopping, banking, holiday and travel services as well as interactive games by reason of enhanced competition between Canal Digital and Viasat in the Nordic region.

230. The Commission acknowledges that at least parts of the above listed advantages are to be considered as consumer benefits flowing from the restrictions enshrined in the notified agreements. More specifically, as a result of the relevant restrictions, taken individually or in their combination, the Commission recognises the following consumer benefits that directly result from the efficiencies gains referred to above (8.2.):

231. Firstly, in a short and mid-term perspective, consumers receive a fair share of the benefits resulting from the exclusivity in as much as it helps maintain a reasonable degree of inter-brand competition between the two entities Canal+ Nordic/Canal Digital and MTG/Viasat and hence of consumer choice of pay-TV services in the Nordic region that largely outweighs the parallel loss of intra-brand competition. Moreover, the cost efficiencies secured by Telenor/Canal Digital as result of the supply guarantee granted by Canal+ Nordic is not unlikely to translate into price advantages for DTH consumers in the face of tight competition between Canal+ Nordic/Canal Digital and MTG/Viasat. Enhanced digitalisation and the roll-out of digital decoders at low cost by each of these entities as a consequence of the competitive process during recent years confirm that finding.[136] This reasoning applies by analogy to the prohibition on Canal+/Canal+ Nordic to own/operate a DTH/SMATV platform as it is complementary and in its effects subordinate to the exclusivity (see above 7.4.1.1.).

232. Secondly, the Commission considers that the non-compete obligations, at least in the short-term, equally guarantee a fair share of the resulting benefits to consumers to the extent that they also contribute to maintain the level of inter-brand competition and consumer choice in pay-TV services referred to above. Likewise, the prohibition on Telenor to acquire premium content and the provisions on joint content acquisition and preferential bilateral access to content in the short-term are beneficial to consumers in as much as they enable the parties to combine buying power *vis-à-vis* rights holders in order to reduce upstream acquisition costs. This ultimately enables Canal+ Nordic and Canal Digital to improve their pay-TV offering in terms of quality and price and hence their competitive position *vis-à-vis*

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[136] See footnote 132.

MTG/Viasat and, as a result of enhanced competition with the latter, creates in important incentive for them to pass on part of the relevant cost savings to the end-consumer.

233. Thirdly, the satellite transponder non-compete obligation provides, at least indirectly, the same consumer benefits as the distribution exclusivity (cf. 8.2.1.) which it helps guarantee. Moreover, it secures that consumers already receiving signals from 1°West, such as Canal Digital's subscribers to the Canal+ Nordic pay-TV services, may continue to use their technical equipment to access the various services provided. Finally, these consumers will indirectly benefit from Canal+ Nordic's presence on Telenor's satellite capacity because it is likely to attract third TV broadcasters willing to reach the customer base of Canal+ Nordic receiving signals from 1°West.

234. Therefore, the Commission concludes that consumers receive a fair share of the benefits flowing from the relevant restrictions within the meaning of Article 81(3) of the Treaty.

8.4. Restrictions that are indispensable

8.4.1. Pay-TV channel exclusivity

Parties' arguments

235. Telenor, partly reiterating its arguments in favour of negative clearance, contended in respect of the agreements as notified originally that the ten year distribution exclusivity is indispensable to secure the alleged efficiencies. The purpose of the exclusivity would be to ensure that Canal Digital is the sole DTH/SMATV distributor of Canal+' pay-TV premium content channels in the Nordic region. More specifically, Telenor argued that without the exclusivity [**confidential**]. Moreover, were Canal+ to give Viasat the right also to distribute its pay-TV channels, Canal Digital's offering would be substantially less attractive than that of Viasat. The latter could gain free-rider benefits in terms of increased commissions from premium channel subscriptions sold as a result of Canal Digital's promotional investments in Canal+ channels and [**confidential**]. According to Telenor, Canal+ is the only possible provider of premium channels for Canal Digital, as MTG is not a potential source of supply – at least at commercially reasonable conditions – due to the structural link between MTG and Viasat. In addition, it would take a long period for Canal Digital to build up its own premium pay-TV channels including acquiring its own content rights where as [**confidential**]. Finally, the prohibition on Canal+ to own and operate a DTH/SMATV platform in the Nordic region would be subordinate to the exclusivity arrangement and in itself have no material impact on competition. From a commercial perspective, it would be highly unlikely that Canal+ acquire or set up its own DTH/SMATV operations during the ten year period. Canal+ would not be able to distribute its own pay-TV services and a third DTH platform would be highly unlikely to enter the market.

Assessment

236. Most of the above arguments raised by Telenor have already been addressed under 8.2. In light of these findings, the Commission concurs with the parties' view that in its substance Canal Digital's exclusive right to distribute Canal+ Nordic's pay-

TV premium content channels via DTH is indispensable to attain the above efficiencies. This is however subject to a strict limitation in time. The parties accordingly abandoned their initial request and proposed to shorten the duration of the exclusivity to four years which forms the object of the present assessment.

237. The Commission considers that the shortened duration of four years is adequate and necessary to achieve the efficiencies flowing from the exclusivity.[137] The Guidelines on Vertical Restraints make the justification of the duration of vertical arrangements particularly dependent on the time necessary to recoup relationship-specific investment.[138] Telenor/Canal Digital submitted a business plan [**confidential**]. This coincides with the parties' "Settlement and Amendment Agreement" dated 13 June 2002, [**confidential**]. [**Confidential**] This suggests that also from Telenor's point of view the four year exclusivity period is not only necessary [**confidential**].

238. The above reasoning applies by analogy to the prohibition on Canal+ to own/operate a DTH/SMATV platform which is complementary and in is effects subordinate to the exclusivity.

239. Therefore, the Commission concludes that the four year duration of the exclusivity is indispensable to guarantee the efficiency gains pursued by the latter within the meaning of Article 81(3) of the Treaty.

8.4.2. Pay-TV channel and PPV/NVOD channel non-compete obligations

Parties' arguments

240. Canal+ initially contended in respect of the agreements as notified originally that the ten years duration for Telenor's non-compete obligations is indispensable within the meaning of Article 81(3) of the Treaty. Canal+ would need long-term security and commercial stability in order to invest in rights for premium films and major sports events for pay-TV programming designed for distribution in the Nordic region. Film right holders require multi-year supply agreements – typically [**confidential**] years – with annually increasing minimum subscriber guarantees. Also sports event licences are sold by right holders for three years and more. According to Canal+, the long-term security granted by the non-compete obligation is necessary for recouping the high sunk investment in Canal+ Nordic and the premium pay-TV channels which essentially accrue to the benefit of Canal Digital, given the intimate relationship between the identity of the DTH platform and that of its "flagship" channels. Absent the full term of the non-compete arrangement Canal+ would not make the long-term investment needed for the maintenance of its Nordic pay-TV channels as well as new digital services including technical service improvements required for the necessary increase of the subscriber base. Moreover, the long-term non-compete obligation on Telenor/Canal Digital not to own, operate or distribute any other pay-TV premium content channel than those of Canal+

[137] See also Commission Decision 1999/242/EC in Case No IV/36.237 – TPS, OJ L 90, 2.4.1999, p. 6, paras.122-134 where the Commission accepted a three year exclusivity for the distribution of satellite TV channels as indispensable.

[138] Cf. paras. 116(4) and 119(9) of the Guidelines.

would be indispensable to give Canal Digital an incentive to maximise the penetration of Canal+' channels so that the required subscriber growth can be achieved. If Canal Digital started distributing channels with a similar commercial profile to that of the Canal+ pay-TV channels, the competing suppliers would directly benefit from and "free-ride" on the existing pay-TV subscriber base to the Canal Digital platform – built and maintained by Canal+ investments.

241. The parties however did not put forward arguments to support the indispensability of the acquisition prohibition on Telenor regarding premium films, the joint content acquisition arrangement and the bilateral rights of first refusals concerning premium sports rights. Nor did they submit any argument in favour of the indispensability of the non-compete and co-ordination arrangement regarding PPV film distribution. The parties however accepted to reduce the duration of the non-compete obligations including those regarding joint acquisition and bilateral preferential access to content rights to three years in order to meet the requirement of indispensability.

Assessment

242. The Commission considers that the non-compete obligation on Telenor/Canal Digital not to own, operate or distribute via DTH any other pay-TV premium content channels than those of Canal+ Nordic in its substance and during the three year term is indispensable for attaining the efficiencies pursued, in particular with a view to maintaining a reasonable competitive balance in the marketplace. However, a longer duration of the non-compete obligation would not be justifiable because of its weighty negative long-term effects on competition. In the long run the non-compete obligation is likely to reduce inter-brand competition and consumer choice by durably preventing Telenor/Canal Digital from enlarging their DTH pay-TV offerings through either including third suppliers' channels or, more importantly, from creating its own pay-TV channels competing with those of Canal+ Nordic and MTG/Viasat. The continuous and increased efforts on the part of Canal Digital in promoting the Canal+ brand as a consequence of the non-compete arrangement would not outweigh these negative long-term effects. Thus, the presence of weighty restrictive effects combined with a lack of compelling long-term efficiencies warrant a strict limitation of the non-compete arrangement in time which in the present case is to be set at three years.

243. The three year duration is also adequate and necessary to address the "hold-up" problem faced by Canal+ Nordic. According to the Guidelines on Vertical Restraints, as a matter of principle, "non-compete obligations exceeding five years are for most types of investments not considered necessary to achieve the claimed efficiencies or the efficiencies are not sufficient to outweigh their foreclosure effect".[139] Canal+ has shown to the requisite degree that a three year prohibition on Canal Digital/Telenor to market third suppliers' premium content channels or to create an own pay-TV services is indispensable to secure the claimed efficiencies and, in particular, the commercial stability needed by Canal+ Nordic including the recouping of relationship-specific investment. The business plan initially submitted by Canal+ sets out the subscriber and revenue growth needed in order to recoup the

[139] Para. 141 of the Guidelines.

sunk investment in Canal+ Nordic over the next years, having its culmination point in [**confidential**]. Moreover, the minimum subscriber guarantee laid down in Clause 2.1 of the Parties' "Settlement and Amendment Agreement" of 13 June 2002 foresee [**confidential**][140] whereas in subsequent years the speed and volume of growth slows down considerably. [**Confidential**].

244. However, even though the subscriber/revenue growth foreseen in the business plans extends to a duration longer than three years it is to be borne in mind that a substantial portion of the investment made by Canal+ is imputable to general or market-specific investment[141] unrelated to the DTH distribution of Canal+ Nordic's pay-TV channels by Canal Digital. Indeed, almost one third of the Canal+ Nordic pay-TV subscriptions in 2002 (~[**confidential**]) were marketed via Nordic CATV and DTT platforms rather than DTH. In addition, Canal+' divestiture from Canal Digital suggests that at least part of the investment prior to the divestiture transaction has already been successfully recouped via the sales price for the 50% stake in Canal Digital paid by Telenor.[142] Canal+ has not raised any objective economic justification why there would be nonetheless the need to continue to protect Canal+' previous "client-specific" investment into the Canal Digital platform and, in particular to protect that investment against potential competition emanating from Canal Digital itself beyond the term of three years. Finally, Canal+ Nordic's obligations under the relevant licensing contracts with film studios, such as minimum subscriber guarantees, do not justify a duration longer than three years. As a matter of principle, the Commission is reluctant to accept the long duration of exclusive film licensing contracts with movie studios as a specific justification for a downstream non-compete obligation as they may give rise to restrictive effects too. However, this aspect is not decisive in the present case, as these contracts in themselves would not even justify an outright non-compete arrangement. The same stability could also be achieved through less restrictive means, namely, an obligation on Canal Digital to purchase the Canal+ Nordic channels over a certain period of time.

245. Bearing in mind the particularly strong restrictive effects flowing from the non-compete obligations, the limitation of its duration to three years is thus both appropriate and necessary. It constitutes a reasonable balance between securing the claimed efficiencies on the one hand and the negative effects on the other. These findings by analogy also extend to the complementary non-compete obligations regarding PPV film channel distribution. Therefore, the Commission concludes that the non-compete arrangements during three years meets the requirement of indispensability pursuant to Article 81(3) of the Treaty.

Prohibition on Telenor to acquire premium movie rights in competition with Canal+/Canal+ Nordic

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140 Canal+ forecasting subscriber growth from [**confidential**] (in 2000) and [confidential] (in 2001) to [**confidential**] (in [**confidential**]) while actually reaching [**confidential**] subscribers in 2001.

141 See para. 155 of the Guidelines on Vertical Restraints.

142 Telenor had to pay at closing (17.6.2002) 2.000.000 NOK to Canal+.

246. For the reasons set out above (8.2.2.), the Commission considers that the prohibition on the acquisition of premium film content for pay-TV channels is indispensable for the attainment of the efficiencies pursued by the non-compete obligations. In accordance with the findings on the admissible maximum duration of the non-compete obligation that prohibition may however not exceed <u>three years</u>.

Information sharing, co-operation and joint bidding

247. As already indicated, the negative effects created by the co-operation in acquiring premium content are largely outweighed by the efficiencies fostered through the vertical non-compete arrangement applicable for three years, which denies Telenor to build a separate pay-TV brand – including the relevant right acquisitions – in any event. Thus, in so far as the joint acquisition arrangement targets premium content specifically designed for commercial exploitation through the Canal+ Nordic pay-TV channels – whose distribution by Canal Digital is protected by the non-compete obligations – the Commission considers that arrangement as indispensable in the same way as this is the case with the non-compete clauses. However, in accordance with the findings on the admissible maximum duration of the non-compete obligations that arrangement may not last longer than <u>three years</u>. This strict time limitation is warranted with a view to the weighty negative long-term effects resulting from the joint acquisition mechanism. In the long run that mechanism is susceptible of giving rise to output restrictions potentially harmful to inter-brand competition and consumer choice because it grants Canal+ Nordic full control on Telenor's behaviour in the acquisition markets and thus durably stifles the autonomous creation of complementary and/or competing pay-TV services by Telenor for the purpose of any kind of downstream TV distribution.

248. The Commission therefore concludes that the clauses on joint acquisition of premium content rights during <u>three years</u> are indispensable within the meaning of Article 81(3) of the Treaty.

Bilateral right of first refusal on the sale of premium sports rights

249. The reasoning regarding the indispensability of the joint acquisition arrangement applies by analogy to the rights of first refusal, in as much as they concern the acquisition of premium sports rights for pay-TV and PPV/NVOD distribution. This however is subject to a <u>three year</u> time-limit in conformity with the admissible maximum duration of the non-compete obligation. The Commission therefore concludes that the bilateral rights of first refusal regarding premium sports rights during three years are indispensable within the meaning of Article 81(3) of the Treaty.

8.4.3. Satellite transponder non-compete obligation

250. As mentioned above (8.2.2.), the satellite transponder non-compete obligation forms an integral part of the vertical relationship created between Canal+ Nordic and Telenor/Canal Digital for the purpose of the exclusive distribution of Canal+ Nordic's pay-TV premium content channels via DTH and cannot be separated from the latter without undermining its efficiencies. Moreover, the restrictive effects produced by the non-compete obligation in the short and mid-term, i.e. the foreclosure effect *vis-à-vis* potential entrants, appear to be largely outweighed by

the above efficiencies including the need for Telenor to protect its relationship-specific investment [**confidential**]. Therefore, the Commission considers it necessary to uphold the non-compete obligation at least for the same period of time as the downstream pay-TV channel exclusivity. In addition, the foreclosure effect resulting from the tying of Canal+ Nordic to Telenor's satellites is less appreciable than that flowing from the pay-TV channel non-compete arrangement in the downstream market for the wholesale supply of pay-TV channels. Among the overall transponder capacity currently available in the Nordic upstream satellite market, Canal+ Nordic occupies less than [**confidential**]% which includes a number of [**confidential**] pay-TV and PPV channels. In this context the Commission also takes into account the fact that Canal+ Nordic has been a traditional user of the Telenor satellites – even absent a non-compete obligation prior to the entry into effect of the notified agreements – and that there is no immediate or mid-term commercial incentive for it to switch to another satellite service supplier, in particular NSAB. Finally, the five year duration is justified with a view to the Commission's position taken in the *NSAB/MTG* case where a bilateral five year transponder capacity exclusivity between NSAB and MTG/Viasat was also granted an exemption, however in the form of a comfort letter.[143] A comparable non-compete arrangement between Telenor and Canal+ Nordic thus ultimately contributes to maintaining a reasonable competitive balance in the duopolistically structured Nordic satellite service market.

251. Therefore, the Commission takes the view that the satellite transponder non-compete obligation during <u>five years</u> is indispensable for the attainment of the efficiencies flowing from the notified agreements within the meaning of Article 81(3) of the EC Treaty.

8.5. No elimination of competition

252. Telenor argued that the agreements as initially notified help maintain competition in the Nordic region and that without them Canal Digital [**confidential**] in competition with vertically integrated MTG/Viasat. Furthermore, as the pay-TV channel exclusivity does not cover distribution of Canal+ pay-TV channels via CATV operators, competition via these networks would be maintained.

253. The Commission concurs with the parties' view that the notified agreements including the distribution exclusivity and the non-compete arrangements in their revised form do not eliminate competition. This is true for all of the relevant affected markets for the following reasons:

254. Competition in the <u>downstream retail pay-TV distribution markets</u> is not eliminated because of the maintenance of a competitive balance between the two major DTH platforms in the Nordic region and a reasonable degree of inter-brand competition through the continuous availability of two distinct and highly attractive pay-TV brands for DTH consumers. In fact, Viasat and Canal Digital are embedded in strong vertical relationships with the most important upstream suppliers of pay-TV channels in the Nordic region, i.e. Canal+ Nordic and MTG, respectively, and

[143] Comfort letter dated 6.12.2001 in Case COMP/C-2/38.016 – NSAB/MTG (IP/01/Nordiska, 17.12.2001).

accordingly benefit from a supply guarantee regarding the necessary content input to conduct their pay-TV businesses successfully downstream. The only relevant difference is that in the case of MTG/Viasat the supply guarantee is based on structural vertical integration whereas in the case of Canal+ Nordic/Canal Digital previous vertical integration has been superseded by a contractual exclusive supply agreement valid for four years. Moreover, competition in the upstream market for the supply for pay-TV premium content channels is not eliminated either during the validity of the non-compete arrangements for essentially the same reasons.

255. The acquisition prohibition on Telenor and the joint purchasing arrangements between Telenor and Canal+ Nordic do not eliminate competition in the Nordic upstream markets for the acquisition of audio-visual content for pay-TV because of the continuous presence of at least two major competing purchasers, i.e. Canal+ Nordic and MTG. Finally, competition in the upstream satellite transponder services market is not eliminated because of the maintenance of the competitive balance between Telenor/Canal+ Nordic on the one hand and NSAB/MTG/Viasat on the other, each of them tying one of the Nordic pay-TV operators to their transponder capacity.

256. For these reasons, the Commission takes the view that the various contractual arrangements addressed in the present decision do not eliminate competition in the relevant affected markets during the term of their validity.

8.6. Conclusion

257. In the light of the foregoing, the Commission concludes that, on the basis of the agreements in their notified form, the cumulative conditions of Article 81(3) of the Treaty and Article 53(3) of the EEA Agreement are fulfilled. However, the PPV/NVOD channel exclusivity does not restrict competition and is therefore open to negative clearance pursuant to Article 81(1) of the Treaty in conjunction with Article 2 of Regulation No 17.

9. DURATION OF EXEMPTION

258. Pursuant to Article 8(1) of Regulation No 17, a decision in application of Article 81(3) of the Treaty and Article 53(3) of the EEA Agreement is to be issued for a specified period. Moreover, in accordance with Article 6(1) of Regulation No 17 the date from which such decision may take effect cannot be earlier than the date of notification.

259. In line with those provisions and the requirements set forth above, the Commission grants the notified agreements as amended an exemption for a duration of five years starting from the date on which the parties notified to the Commission that closing had occurred, i.e. from 21 June 2002 until 21 June 2007.

10. CONCLUSION

260. It is therefore appropriate to grant a negative clearance pursuant to Article 81(1) of the Treaty and Article 53(1) of the EEA Agreement in combination with an exemption pursuant to Article 81(3) of the Treaty and Article 53(3) of the EEA Agreement,

HAS ADOPTED THIS DECISION:

Article 1

On the basis of the facts in its possession there are no grounds under Article 81(1) of the Treaty and Article 53(1) of the EEA Agreement for action on the part of the Commission in respect of the clauses governing the exclusive distribution by Canal Digital of Canal+ Nordic's PPV/NVOD channels, as described in this decision.

Article 2

Pursuant to Article 81(3) of the Treaty and Article 53(3) of the EEA Agreement, the provisions of Article 81(1) of the Treaty and Article 53(1) of the EEA Agreement are declared inapplicable, for the period from 21 June 2002 to 21 June 2007 to the revised agreements, subject to Article 1, as described in this decision.

Article 3

This Decision is addressed to:

Telenor Broadcast Holding AS
Snarøyveien 30,
N-1331 Fornebu
Norway

Done at Brussels, 29/12/2003

For the Commission

Mario MONTI

Member of the Commission