

II

(Acts whose publication is not obligatory)

COMMISSION

COMMISSION DECISION

of 15 September 1999

relating to a proceeding under Article 81 of the EC Treaty

(Case IV/36.539 — British Interactive Broadcasting/Open)

(notified under document number C(1999/2935))

(Only the English text is authentic)

(1999/781/EC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

I. THE FACTS

Having regard to the Treaty establishing the European Community,

A. INTRODUCTION

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 6 and 8 thereof,

Having regard to the application for negative clearance and the notification for exemption submitted, pursuant to Articles 2 and 4 of Regulation No 17, on 13 June 1997,

Having regard to the summary of the application and notification published pursuant to Article 19(3) of Regulation No 17⁽³⁾,

After consultation with the Advisory Committee for Restrictive Practices and Dominant Positions;

Whereas:

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

(2) BiB is to provide a new type of service, digital interactive television services, to consumers in the United Kingdom. This involves putting in place the necessary infrastructure and services to allow companies, such as banks, supermarkets and travel agents, to interact directly with the consumer. An important element of this infrastructure is a digital set-top box. BiB will subsidise the retail selling price of digital satellite set-top boxes, satellite dishes and low-noise blocks⁽⁴⁾ (LNBs).

⁽¹⁾ OJ L3, 21.2.1962, pp. 204 to 62.

⁽²⁾ OJ L148, 15.6.1999, p. 5.

⁽³⁾ OJ C 322, 21.10.1998, p. 6.

⁽⁴⁾ A low-noise block converter (LNB) detects the signal relayed from the feed, converts it to an electrical current, amplifies it and lowers its frequency.

- (3) The same infrastructure will be used by television companies, as it will allow them to integrate interactivity into their services: for instance, interactive advertisements and voting in quiz shows.
- (4) BiB will also provide certain services direct to the consumer, such as e-mail, 'walled garden' Internet access⁽⁵⁾ and downloading of computer games. Its service is expected to begin in the autumn of 1999.

B. THE PARTIES

1. BT Holdings Limited

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

2. British Sky Broadcasting Ltd

- (6) British Sky Broadcasting Ltd (BSkyB) is a wholly-owned subsidiary of British Sky Broadcasting Group plc. News Corporation owns 39,88% of the shares of BSkyB Group plc's shares.
- (7) BSkyB is a broadcaster of analogue pay television ('pay-tv') services delivered by the ASTRA satellites for direct-to-home (DTH) and cable reception in the United Kingdom and Ireland. BSkyB operates at both retail and wholesale levels in these areas. It launched a digital satellite pay-tv service on 1 October 1998 using the digital set-top box, satellite dish and low-noise block which BiB will subsidise. BSkyB Group is also active in the provision of conditional access services and other technical services necessary for pay television.

⁽⁵⁾ The parties use this term to describe access to a limited amount of Internet content.

3. Midland Bank plc

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

4. Matsushita Electric Europe (Headquarters) Limited

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

C. THE RELEVANT MARKETS

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

1. Product markets

(a) Digital interactive television services

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

- (12) In the view of the Commission, the digital interactive television services market is a separate market.
- (13) In defining product markets, the most important factor is evaluation of demand substitutability. Given that digital interactive television services, such as those to be offered by BiB, are not currently available throughout the United Kingdom⁽⁶⁾, past data does not exist to evaluate the likely response of customers to a hypothetical small, non-transitory change in relative prices of BiB's services and possible substitutes⁽⁷⁾. Demand substitutability can also be assessed by comparing the characteristics of products or services in order to determine whether they are particularly suited to satisfy constant needs and are only to a limited extent interchangeable with other products or services⁽⁸⁾.
- (14) The Commission contacted BiB's main prospective customers and the main companies in the industry to ask for their views about the boundaries of the relevant market and to obtain the necessary factual evidence to reach a conclusion. In this context, the Commission also has taken into account the fact that content providers' willingness to pay BiB to be part of its service, and their likely reaction to a small permanent increase in the price charged, will ultimately depend on the attitude of end-users. It is therefore the retail-demand substitutability for digital interactive television services which is determinant in defining the upstream market of the supply of digital interactive television services by service providers, such as BiB, to content providers.
- (15) Prospective content providers have confirmed to the Commission that it is the breadth of the package of services which will attract them to a digital interactive television services platform, as they believe that it is the availability of a broad range of services which will attract consumers⁽⁹⁾. In other words, such a range of services will increase the number of potential customers for the content providers' services. The television interface will also allow content providers access to a unique mass market for their products or services, reaching potentially almost 100% of British households.
- (16) End-user demand substitutability for a package of interactive services is distinguishable from demand substitutability of the individual services which form part of the package or from close alternative sources of supply for the customers of BiB's services such as high-street retailing or interactive services via personal computers. The digital interactive television services and pay-television services are different markets.
- (17) As it explained in recitals 18 to 23, this conclusion is based on the different characteristics of the types of goods and services provided and on the consumers' views on their substitutability which mean that customers will not be in a position to switch easily to available alternative products and/or services or to suppliers located elsewhere.
- Market distinct from high-street retailing*
- (18) Retailing services represent only one part of the typical package of services forming digital interactive television services. E-mail, downloading of computer games, limited Internet access and information services will also form part of the package. There are economies of scope in the provision of such a package of services, because the infrastructure required for each of the individual services is the same. BiB will market this package of services and has entered into an agreement with BSkyB to this end. The promotion of an interactive service brand, distinct from that of the individual content providers, strongly suggests that BiB regards its own services as distinct from those of high-street retailing.
- (19) The characteristics of the retailing services of the type to be offered by BiB and high-street retailing are markedly different. For example, the range of products or services offered on-line by retailers is likely to be far more

⁽⁶⁾ However, commercial trials in limited areas are underway.

⁽⁷⁾ See Commission Notice on the definition of the relevant market for the purposes of Community competition law, (OJ C 372, 9.12.1997, p. 5).

⁽⁸⁾ In its judgment of 26 November 1998, in Case C-7/97, *Oscar Bronner GmbH Co. KG v Mediaprint* [1998] ECR I-7791, the Court of Justice repeated the formula (paragraph 33) that 'the market for the product or service in question comprises all the products or services which in view of their characteristics are particularly suited to satisfy constant needs and are only to a limited extent interchangeable with other products or services (Case 31/80 *L'Oréal v De Nieuwe AMCK* [1980] ECR 3775, paragraph 25; Case C-62/86 *AKZO v Commission* [1991] ECR I-3359, paragraph 51)'.

⁽⁹⁾ An operator explained that 'what seems clear ... is that shopping is not a sufficient stand alone reason for customers to want to invest in the equipment for such services. The offer must be part of a larger offer, including entertainment and education, which again favours the BSkyB based channel as it is part of the wider digital relaunch of the network'.

limited than what is available in high-street shops. This is most likely to be the case with perishable goods, such as food, or bulky goods where storage and delivery charges would be high. There will be a price difference between goods or services purchased in the high street and those obtained via a package of digital interactive television services, if only on account of the delivery charge. In terms of price, it seems that consumers would be willing to pay a premium for the convenience of home shopping ⁽¹⁰⁾.

- (20) It follows from the above that the market for digital interactive television services is separate from that for the traditional retailing of goods and services in high streets.

Distinction between markets for digital interactive services available via televisions and those available via personal computers

- (21) Both the demand-substitutability test and differences in the characteristics of interactive services available via television sets and via personal computers lead to the conclusion that they are separate product markets. A small permanent increase in the price of such services available via televisions is unlikely to be constrained by the existence of services available on personal computers. While television sets are ubiquitous, in the United Kingdom only some 25% of households have a personal computer and fewer than half of these are equipped with a modem. Moreover, the relatively high cost of personal computers means that the switching cost for end-users would be high. The parties themselves have pointed out that consumer demand for services available via television is different from that for services delivered via personal computers. They point to differences both in purchase prices of televisions and personal computers and in their characteristics of use ⁽¹¹⁾. Digital interactive services delivered to televisions can also be distinguished from services delivered to personal computers by the fact that

interactivity can be integrated into traditional broadcast entertainment channels.

- (22) This distinction is confirmed by the reaction of some retailers ⁽¹²⁾ who have said that they will target different customers using different brands belonging to the same group of companies when providing digital interactive services available via television sets and personal computers ⁽¹³⁾.

Market separate from pay television

- (23) Finally, the demand for, and characteristics and intended use of, pay-television services are largely different from those of digital interactive television services, the former being largely entertainment services, the latter being largely transactional or informational services ⁽¹⁴⁾. The business scope of interactive television service providers such as BiB excludes forms of entertainment where viewing itself is the primary form of entertainment for the viewer, such as pay-television channels. The digital interactive television services market is complementary to and separate from, that for pay-television.

(b) Pay-television

- (24) Pay-television constitutes a product market separate from that for free-access television, namely advertising-financed television and television financed wholly or partly through licence fees ⁽¹⁵⁾. While, in the case of fee- and advertising-financed television, there is a trade relationship only between the programme supplier and the advertising industry, in the case of pay-television 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 television. Whereas in the case of fee- and

⁽¹⁰⁾ Binary Compass Enterprises Report, 1997, by David Reibstein and Sunil Gupta 'The online retail commerce report' rated price competition fourth in what was important to customers.

⁽¹¹⁾ The parties' statements coincide with independent analysis. See 'Regulating Communications: approaching convergence in the Information age' July 1998, policy document of British Departments of Trade and Industry and of Culture, Media and Sport at paragraphs 1.13-1.15: 'Traditional television and radio are likely to retain their strong and distinctive position because of their ubiquity, familiarity, low cost and ease of use. The environments of the living room (the traditional place for the TV) and the work room (the home of the PC) are generally quite distinct.' Furthermore, BiB will offer limited internet access via TV sets.

⁽¹²⁾ 'We see BiB and the current Internet offers as being differing customer groups, rather than two ways to reach the same group'. 'mass market development on on-line retail requires a TV interface rather than a PC/internet channel which we see as being relatively limited for mass market apparel'. 'PC and TV delivered services are "complementary"'.

⁽¹³⁾ This distinction is similar to the one made in the advertising markets in that different distribution mechanisms reach different target audiences. See Commission Decision 96/346/EC (IV/M.553-RTL-Veronica-Endemol) (OJ L 134, 5.6.1996, p. 32, in particular recital 23).

⁽¹⁴⁾ See Commission Decision 94/922/EC (IV/M.469-MSG Media Service) (OJ L 364, 31.12.1994, p. 1, recital 38).

⁽¹⁵⁾ See MSG Media Service, at paragraphs 32 and 33; Commission Decision 1999/153/EC (IV/M993-Bertelsmann/Kirch/Premiere) (OJ L 53, 27.2.1999, p. 1, recital 18); Commission Decision 1999/242/EC (IV/36.237-TPS) (OJ L 90, 2.4.1999, p. 6).

advertising-financed television the audience share and the advertising rates are the key parameters, in the case of pay-television the key factors are the shaping of programmes to meet the interests of the target groups and the level of subscriptions.

(c) ***Markets for the wholesale supply of films and sports channels for pay-television***

(25) The Commission has stated in the past that there is no reason to distinguish between markets for analogue and digital pay television⁽¹⁶⁾. Digital pay-television is only a further development of analogue pay-television and therefore does not constitute a separate relevant product market. Moreover, account should be taken of the fact that in the next few years analogue broadcast pay-television will be completely superseded by digital broadcast pay-television.

(26) Pay-television is available to subscribers in the United Kingdom by various means of transmission: digital terrestrial, satellite (analogue and digital) and cable (analogue, with digital cable services expected to start up in the near future). In the United Kingdom, it is not appropriate to distinguish between pay-television markets on the basis of their mode of transmission. Pay-television services provided by one means of transmission act as a competitive constraint on their provision using other means. Historical data shows this to be the case in respect of pay-television delivered by satellite and cable. It is clear from end-user behaviour that the services are considered as substitutes. The composition of cable and satellite pay-television services is broadly similar⁽¹⁷⁾ as is the price. BSkyB's penetration rate is [...] (*)⁽¹⁸⁾. Moreover, BSkyB's 'churn rate'⁽¹⁸⁾ is [...] (*). Thus, the fact that satellite customers may have purchased a satellite set-top box and/or satellite dish does not create such a significant lock-in effect that switching between satellite and cable services is unlikely. There is no justification, either, for distinguishing a separate product market in respect of digital terrestrial pay television.

(27) There is, therefore, a single pay-television market in the United Kingdom, with no distinction between analogue and digital, nor between modes of transmission.

(28) Experience has shown that, to be successful as a pay-television operator, it is essential to include film and sports channels as part of the service⁽¹⁹⁾. BSkyB has itself identified 'movies and sports as key sales drivers'⁽²⁰⁾. Pay-television operators' demand for particular channels reflects the demand of their subscribers. Pay-television channels composed of recently released films and live exclusive coverage of attractive sports events attract the largest viewing figures⁽²¹⁾. The subscriptions to such channels are the most expensive: while thematic or general interest pay-television channels are supplied to customers as part of a package, film and sports channels are charged on an individual basis. For pay-television, the fact that sports and films programmes achieve very high viewing rates is crucial as it is a reflection of viewer's willingness to pay more for sports and films channels.

(29) The wholesale price of acquiring film and sports channels is also far higher than that of other channels: small permanent increases in relative prices have been profitable. Taking the figures most favourable to BSkyB from BSkyB's wholesale price list (rate card) for the supply of its channels to cable operators, the cost to a cable operator of acquiring a single film or sport channel is at least seven times as much as the most expensive Sky basic channel⁽²²⁾. This demonstrates that the wholesale supply of film and sports channels forms

⁽¹⁹⁾ See Bertelsmann/Kirch/Premiere Decision, in particular recitals 34 and 48.

⁽²⁰⁾ BSkyB annual report 1997, page 3. See also conclusion in the The Director-General's Review of BSkyB's Position in the Wholesale Pay-TV Market, December 1996, point 2.18: 'We concluded that premium sports and movie channels were the main drivers of subscription to pay-TV. Without rights to high quality sports and/or movies there seems no way that competing broadcasters would be able to enter the market at the premium level'.

⁽²¹⁾ In the United Kingdom in 1995, 44 of the top 50 satellite pay television programmes in terms of audience ratings were either films or sports. Sports programmes accounted for 27 of the top 50 programmes, films for 17 and other programmes for 6. Football alone accounted for 22 of the top 50 programmes, amongst which 14 of the top 20. Source: Cable and Satellite Express, 25 January 1996. The four top programmes ever on cable and satellite television in the United Kingdom were all sports programmes: the top programme was a football match, number two a boxing match, followed by two football matches. Source: New Media Markets, 21 March 1996. In the United Kingdom in 1997, 42 of the top 50 pay-television programmes available on cable and satellite were either films or sports. The top 10 programmes were all films or sports; films accounted for 26 of the top 50 programmes; and sports for 16. Source: Cable and Satellite Express, 29 January 1998.

⁽²²⁾ [...] (*).

⁽¹⁶⁾ Bertelsmann/Kirch/Premiere, recital 18 and TPS.

⁽¹⁷⁾ In terms of premium film and sports channels, BSkyB's channels are available via both satellite and cable. Differences in the composition of the basic packages of service are not significant.

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

⁽¹⁸⁾ 'Churn rate' represents the average number of customers who stop their subscription to a pay-television service over a given period of time.

a separate market⁽²³⁾. For the purposes of this case, it is not necessary to decide whether there are separate wholesale markets in respect of films and sports channels⁽²⁴⁾.

(d) Technical services for digital interactive television services and pay television

(30) The Commission has defined a product market for the wholesale provision of the technical services necessary for pay-television in a number of decisions⁽²⁵⁾. These services essentially comprise the making available of set-top boxes, the provision of conditional access services⁽²⁶⁾ including smart cards, subscriber management services⁽²⁷⁾ and possibly the services relating to accessing the electronic programme guide⁽²⁸⁾ and the writing of applications compatible with the application programming interface included in the set-top box⁽²⁹⁾. In addition, the provision of digital interactive television services also requires a system to allow financial transactions to be conducted in a secure environment. A transaction management system (TMS) forms part of this system. It is a software system for authorising and undertaking financial transactions, and connects to the on-line servers of the various content providers. The TMS also routes requests for payment to the 'merchant acquirer': merchant acquiring is the general processing of credit and debit card payments made through retailers and other vendors of goods and services.

(31) There is a very large area of overlap between the technical services necessary for pay-television and the services necessary for digital interactive television such as the making available of set-top boxes or the

electronic programme guide. For the latter, provision of conditional access services for non-broadcast (that is, on-line) data ('access control services') and transaction management services are needed.

(32) The skills and technologies underlying each of the individual technical services necessary for pay-television and/or digital interactive television services are different in some aspects. Narrower product markets may, therefore, exist⁽³⁰⁾. However, it is not necessary to determine this point for the purposes of this case. The relevant product market is therefore that for technical services necessary for digital interactive television services and for pay television⁽³¹⁾.

(e) Customer access infrastructure market for telecommunications and related services

(33) The demand from consumers for telecommunications services in the past was almost exclusively for voice telephony services, although more recently demand for data services, such as Internet access, has grown significantly. To provide these services, companies need infrastructure capable of bringing them into the home.

(34) The fact that telecommunications services, by definition, require two-way communication capability has imposed a constraint on the types of infrastructure that can be used for such services. Historically, that demand could only be fulfilled by a copper-based public switched telecommunications network, although in recent years alternative access mechanisms, such as cable TV networks and wireless networks, have developed.

(35) Cable television networks are capable of providing a range of services from basic telephony through on-demand services to full broadcast services.

(36) Wireless fixed networks are generally less costly to install than wire networks. However, the current generation of wireless networks in the UK have relatively limited bandwidth and cannot be used for the

⁽²³⁾ See Commission Decision of 3 December 1998 (Case No IV/M.1327 — NC/Canal+/CDPQ/BankAmerica) (OJ C 233, 14.8.1999, p. 51).

⁽²⁴⁾ The British Office of Fair Trading concluded that films and sports each constitute separate wholesale programming supply markets for pay-television, in The Director-General's Review of BSkyB's Position in the Wholesale Pay-TV Market, December 1996.

⁽²⁵⁾ See for example, Bertelsmann/Kirch/Premiere, paragraphs 19, 20 and 21.

⁽²⁶⁾ Conditional access is the means by which only viewers who are authorised to watch a service are able to do so.

⁽²⁷⁾ Subscriber management services are necessary in order to collect subscriptions from viewers. This involves maintenance of information on subscribers so that they may be authorised and billed for the services which they view.

⁽²⁸⁾ An electronic programme guide (EPG) is a navigation system which lists channels and services and via which viewers are able to tune to different data signals, and thus to change channels or services.

⁽²⁹⁾ An application programming interface (API) allows applications to be written to run on a set-top box. In order to write applications compatible with the API embedded in a particular set-top box, authoring tools are also necessary.

⁽³⁰⁾ See Joint Oftel and DTI Notice and Consultation — July 1997, Chapter 3, paragraph 25: 'There can be very different supply and demand conditions surrounding the different (technical) services so that in principle they could be represented as separate product markets. However, in practice it is likely to be possible to exploit economies of scope (and possibly scale) in the SMS, SAS and customer management functions. There is also likely to be a close association between a particular encryption technology and the organisation of these associated administration services.'

⁽³¹⁾ See MSG Media Service, recital (31)(f).

range of services that can be provided over cable. Wireless networks should probably not form part of the relevant product market, although the conclusions in this case would not be changed if wireless networks were to be included in the market definition.

will be reliant on retailers with national or regional operations and will be priced in sterling. The information services will be largely related to national demand for information. The market for digital interactive services is national and in this case is limited to the United Kingdom.

(37) Digital mobile networks based on the GSM standard or on the DCS 1800 standard cannot provide the same range of services as copper or cable networks, although this may change in the medium to long term, with the introduction of the next generation mobile standard, the universal mobile telecommunications system (UMTS). At present, given the differing characteristics and prices for voice telephony services provided over fixed or wireless networks as compared with those services provided over digital mobile, the services constitute separate markets. In addition, given the very limited data transmission capacity of mobile networks at present, they cannot be regarded as substitutes at the infrastructure level.

(b) *Pay-television*

(42) Pay-television broadcasting markets are, largely for linguistic, cultural, licensing and copyright reasons, generally national or extend to single linguistic areas. In this case, whether the market is the United Kingdom or also covers Ireland, would make no difference to the legal assessment.

(38) A market therefore exists for the provision of a customer-access telecommunications infrastructure. This market includes the traditional copper network of BT, and the cable networks of the cable operators.

(c) *Wholesale supply of film and sport channels for pay-television*

(39) For present purposes it is not necessary to decide whether separate customer-access markets exist for call-origination and call-termination markets.

(43) BSkyB owns most of the underlying programme rights, and supplies the channels in both the United Kingdom and Ireland. National preferences, in particular with regard to sporting events, would point to a national service market. However, in this case, whether the market is the United Kingdom or also covers Ireland, would make no difference to the legal assessment.

2. Geographic markets

(40) The **United Kingdom** is the geographic market in which all the abovementioned relevant markets should be assessed.

(d) *Technical services for pay-television and digital interactive television services*

(a) *Digital interactive television services*

(41) BiB is to operate in the United Kingdom. There is an extremely close relationship between the digital interactive television services to be provided by the joint venture and the digital pay-television services provided by BSkyB in the United Kingdom. Both kinds of service are adapted to the national taste. The transaction, information and services to be provided by BiB will all largely have national demand: the transaction services

(44) The same geographic market definition as in pay-television applies to this market which the Commission has already recognised as being closely linked to the pay-television market⁽³²⁾.

(45) The finding that this market is national in character is corroborated by the fact of there being a specific regulatory regime in the United Kingdom in the framework of the implementation of European Parliament and Council Directive 95/47/EC of 24 October 1995 on the use of standards for the transmission of television signals⁽³³⁾.

⁽³²⁾ MSG Media Service (OJ L 364, 31.12.1994); Bertelsmann/Kirch/Premiere.

⁽³³⁾ OJ L 281, 23.11.1995, p. 51.

(46) Pursuant to Directive 95/47/EC, implemented in the United Kingdom by statute law and by statutory instrument⁽³⁴⁾, suppliers of conditional access services for digital television broadcast services must supply conditional access on fair, reasonable and non-discriminatory terms. In the United Kingdom, suppliers of such services must comply with the terms of the Conditional Access Class Licence, granted on 7 January 1997, pursuant to Section 7 of the Telecommunications Act 1984.

(47) The obligations in Directive 95/47/EC relating to digital conditional access services are limited in scope to the provision of such services to 'broadcasters' for 'digital television services'. Neither of these terms is defined. However, conditional access will be used both for non-broadcast services (such as on-line services) and for services other than television (such as digital radio). The United Kingdom regulatory regime refers to the provision of conditional access for these services as access control services. A class licence for the provision of access control services has been established by the Office of Telecommunications (OfTel) and the Department of Trade and Industry (DTI) which came into effect on 31 December 1997⁽³⁵⁾. This licence extends the obligations of the television standards Directive by extending the rights granted to broadcasters to other service providers.

(48) Access to electronic programme guides is regulated in the United Kingdom by both the Independent Television Commission (ITC) and OfTel. In 1997, the ITC issued a Code of Conduct on Electronic Programming Guides (EPG)⁽³⁶⁾, the object of which is to ensure that access to EPGs is granted on fair, reasonable and non-discriminatory terms⁽³⁷⁾. In particular, the code requires EPG providers to ensure that the EPG does not prevent or hinder viewers from accessing free-to-air services. The code further requires vertically integrated EPG providers, such as BSkyB, to treat television services of other broadcasters/service providers on an equal footing

with its own, or connected, services when granting access. OfTel laid down similar principles⁽³⁸⁾ in its Guidelines to the Regulation of the Provision of Conditional Access for Digital Television Services⁽³⁹⁾. OfTel considers the EPG to be part of the conditional access system in so far as it controls access by viewers to television services. It thus considers it to be a technical conditional access service within the scope of the Conditional Access Class Licence which implements the provisions of Directive 95/47/EC. There is consequently an obligation to offer such services on a fair, reasonable and non-discriminatory basis.

(49) In any event, whether the market is the United Kingdom or also covers Ireland, would make no difference to the legal assessment.

(e) Customer access infrastructure market for telecommunications and related services

(50) Finally, given the national nature of BT's former telecommunications monopoly, the national nature of the regulatory regime, and the national nature of demand for services to be delivered across the telecommunications infrastructure, the market for customer access infrastructure should also be regarded as national.

3. Market structure

(a) Digital interactive television services

(51) The services to be provided by BiB are not yet provided on a significant scale in the British market⁽⁴⁰⁾.

(52) There are a number of other projects under development or undergoing early deployment which

⁽³⁴⁾ SI 1996/3151 — The Advanced Television Services Regulations 1996 — implements most of the provisions of the Directive. It came into force on 7 January 1997. The statutory instrument has been supplemented by guidelines from OfTel — the UK regulatory body charged with enforcing the statutory instrument — 'Digital Television and Interactive Services/Ensuring access on fair, reasonable and non-discriminatory terms. A statement issued by the Director-General for Telecommunications. Pricing of conditional access and access control services/OfTel Guidelines April 1999'. Article 2 (save the last paragraph) of the Directive dealing with transmission signals is implemented for broadcasters other than the BBC by Section 142 of the Broadcasting Act 1996, and regulated by the Independent Television Commission (ITC).

⁽³⁵⁾ Telecommunications Class Licence, as revoked and re-issued on 31 December 1997, pursuant to section 7 of the Telecommunications Act 1984.

⁽³⁶⁾ A licensee found to be acting in a manner which impedes fair and effective competition is liable to directions and/or sanctions as set out in the Broadcasting Acts of 1990 and 1996, including the imposition of financial penalties and the revocation of its licence.

⁽³⁷⁾ ITC Code of Conduct on Electronic Programming Guides of 13 June 1997.

⁽³⁸⁾ The Guidelines list instances where OfTel believes that competitive neutrality would not be achieved. These include vertically integrated EPG providers that favour their own or connected television service by granting special terms of access, by the design of the EPG and/or by the listing of the television services provided.

⁽³⁹⁾ OfTel Guidelines: The Regulation of Conditional Access for Digital Television Services of 3 April 1997. Section 6. Electronic Programming Guides.

⁽⁴⁰⁾ Limited trials are under way.

would allow television sets to be used as display devices for viewing Internet-based content or content which is proprietary to the particular service. Other, similar, services are therefore likely to be launched on the British market in the short to medium term⁽⁴¹⁾.

Racing Channel' (dedicated to horse racing) and 'Zee TV' (Indian-language programming) are also provided via satellite. Subscriber numbers to BSkyB's pay-television service far outstrip those to individual niche channels⁽⁴³⁾.

(53) Cable networks in the United Kingdom have two-way capability. For the moment, both digital satellite and digital terrestrial transmission are capable of only one-way communication. However, interactivity is made possible by the use of the public switched telecommunications network (PSTN) as a return path. In the short to medium term, it will be possible to provide such services using only the PSTN, as digital technology such as the 'Digital Subscriber Line' (DSL) family of technologies can be used to upgrade its capability.

(56) BSkyB's satellite pay-television service is comprised, variously, of wholly-owned BSkyB channels, channels in which BSkyB has an interest, and third-party channels. BSkyB owns and operates 13 channels: six basic channels⁽⁴⁴⁾, six premium film and sports channels⁽⁴⁵⁾ and the pay-per-view channel, Sky Box Office. In addition, BSkyB operates 11 channels in joint ventures with third parties⁽⁴⁶⁾.

(54) The means of transmission employed can have an impact on the nature of the digital interactive television services provided. For example, capacity constraints on digital terrestrial transmission limit the number of services which can be provided. In addition, there is a regulatory limit, whereby only a maximum of 10% of digital terrestrial broadcast capacity can be used for non-programme services such as text or data⁽⁴²⁾. There are no such technical or regulatory constraints on digital cable or digital satellite, which is the means of transmission which BiB will use. A broader range of services can therefore be provided via digital satellite than via digital terrestrial transmission. Although technically feasible in the context of analogue broadcasting, it is the digitisation of broadcasting that allows BiB to provide the particular range and type of services proposed.

(57) On 1 October 1998, BSkyB launched a digital pay-television service, in addition to its analogue service. Both the analogue and digital services distinguish between basic and premium channels⁽⁴⁷⁾. However, while BSkyB offers a single analogue basic package of channels (the 'Sky Multi Channels Package' comprising 29 channels), it offers a number of different digital basic packages. In addition, the digital service offers a wider choice of premium services, including digital radio services. In total, BSkyB's digital pay-television service comprises some 200 channels.

(58) Roughly [...] (*) % of BSkyB's analogue subscribers take premium film and sport channels in addition to basic channels.

(59) BSkyB's analogue service is transmitted via the Astra satellites and is available to subscribers in the UK and

(b) Pay-television

Identity of pay-television operators in the United Kingdom

Satellite

(55) Satellite pay-television services are offered principally by BSkyB, although individual niche channels such as 'The

⁽⁴³⁾ In fact, the total number of subscribers to such satellite niche pay-television channels is less than 5% of the number of subscribers to BSkyB's satellite pay-television service.

⁽⁴⁴⁾ BSkyB wholly-owned basic channels are: Sky 1, Sky News, Sky Sports News (launched in 1998), Sky Travel, Sky Soap and 'tv' (re-named in 1998, previously The Computer Channel). Source: BSkyB Group plc 1998 annual report.

⁽⁴⁵⁾ BSkyB wholly-owned premium channels are: Sky Premier, Sky Moviemax, Sky Cinema (re-launched in 1998, previously known as The Movie Channel, Sky Movies and Sky Movies Gold), Sky Sports 1, 2 and 3. Source: BSkyB Group plc 1998 annual report.

⁽⁴⁶⁾ Joint venture basic channels are: Nickelodeon (50%), QVC (20%), The Paramount Comedy Channel (25%), Granada Plus, Granada Men and Motors and Granada Breeze (re-named in 1998, previously Granada Good Life) (all 49,5%), The History Channel (50%), National Geographic Channel (50%) and Music Choice (49%). Joint venture premium channels: Playboy TV UK (30%) and MUTV (Manchester United TV) (33,3%). Source: BSkyB Group plc 1998 annual report.

⁽⁴⁷⁾ Basic channels are supplied in the form of a package of channels. The customer cannot choose to subscribe to the individual channels comprised in the package, but must subscribe to the package as a whole. Premium channels are primarily films and sports channels, and are only available to customers who subscribe to basic services.

⁽⁴¹⁾ For example, Microsoft's Web TV has announced trials of its service combining internet access with some of its own content. The three largest cable operators in the United Kingdom, Cable & Wireless, Telewest and NTL, also have plans to launch television-delivered services similar to that of BiB, although their plans also include provision of full access to the Internet from television sets. It is not yet clear whether interactive services will be offered via digital terrestrial television in the United Kingdom.

⁽⁴²⁾ Limit set by the Broadcasting Act 1996.

Ireland. Satellite reception is possible in almost all areas of these countries. BSkyB's digital service is also transmitted via Astra satellites. However, it is not yet available in Ireland, although BSkyB intends to launch services there in the future.

Cable

- (60) A number of cable operators also supply pay-television services in the United Kingdom. Cable operators must bid for regional franchises in which they may offer services. In contrast to the situation in some other European countries, cable networks in the United Kingdom have been built to supply both television and telephony services. As at 1 July 1998, slightly more than 75%⁽⁴⁸⁾ of British television households were within an existing cable franchise. However, only some 48% of British television households were, in fact, passed by a cable network at that date⁽⁴⁹⁾. Although the construction rate of cable operators has recently slowed⁽⁵⁰⁾, cable coverage of the United Kingdom is expected to reach more than 70% of the population over the next five years.
- (61) The three largest cable operators are Cable & Wireless Communications, Telewest and NTL. Both Telewest and NTL carry the Front Row pay-per-view channel⁽⁵¹⁾, which is independent of BSkyB.
- (62) Cable operators in the United Kingdom offer both pay-television and telephony services. This combination of services appears to be a major reason why subscribers take cable pay-television. In fact, only 17,9%⁽⁵²⁾ of subscribers to cable pay-television take cable pay-television alone; the remainder are dual subscribers.
- (63) Various cable companies in the United Kingdom began digital pay-television services in the course of 1999 and others have announced their intention of doing so shortly.

Digital terrestrial

- (64) Digital terrestrial pay-television services were launched by ONdigital (previously known as British Digital

Broadcasting) on 15 November 1998. Capacity constraints prevent ONdigital from offering as many channels as BSkyB or cable operators. Initially, it will offer some 15 channels comprising both basic and premium channels.

- (65) ONdigital's parent companies will each supply certain channels, as will third parties. BSkyB will supply ONdigital with its premium film and sports channels under contract for the first [...] (*) years of its operation. It will also supply ONdigital with one of its basic channels.

Market position of pay-television operators in the United Kingdom

- (66) As at 30 June 1998, roughly a quarter of domestic television households⁽⁵³⁾ in the United Kingdom subscribe to a pay-television service⁽⁵⁴⁾ in addition to paying a licence fee which entitles them to watch the five terrestrial free-to-air channels which are available there.
- (67) If the domestic subscribers to pay-television, according to BSkyB [...] (*)% subscribe to BSkyB and [...] (*)% to the various cable pay-television operators⁽⁵⁵⁾.
- (68) It should be noted, however, that the figures⁽⁵⁶⁾ for the number of cable pay-television subscribers published by the competent industry regulator in the United Kingdom, the Independent Television Commission (ITC),

⁽⁵³⁾ It should also be noted that there are commercial subscribers to pay-television in addition to domestic subscribers. Commercial subscribers are typically hotels or pubs. Commercial subscribers are interested essentially in either premium film or premium sports channels. They do not normally subscribe to basic channels. By the end of June 1998, there was a total of [...] * commercial subscribers in the United Kingdom. Some [...] * of these subscribe directly to BSkyB's satellite pay-television service. The remainder subscribe to BSkyB's premium film and/or sports channels via a cable operator.

⁽⁵⁴⁾ There were some [...] * million such subscribers at this date. This figure reflects the addition of the total number of subscribers to BSkyB's satellite pay-television and the total number of subscribers to all cable pay-television operators. It does not take account of subscribers to 'niche' satellite pay-television channels. There are no figures available to clarify whether subscribers to such channels are also subscribers to BSkyB's service. If 'niche' subscribers were included, there would therefore be a risk of double counting. Source: BSkyB, response to request for information of 30 October 1998. The total number of domestic television households was 23,86 million: Source: Barb, quoted in New Media Markets, Volume 16, Number 33, 17 September 1998.

⁽⁵⁵⁾ Subscribers to BSkyB at the end of June 1998, [...] * million: source BSkyB, response to request for information of 9 November 1998. Subscribers to cable operators at the end of June 1998, [...] * million.

⁽⁵⁶⁾ In respect of the same period, i.e. at the end of June 1998.

⁽⁴⁸⁾ Financial Times New Media Markets, 17 September 1998, page 9.

⁽⁴⁹⁾ Independent Television Commission News Release (82/98) of 16 September 1998.

⁽⁵⁰⁾ The number of homes passed by cable increased by 3% in the quarter to 1 July 1998, as opposed to 17% over the previous nine months. Source: Cable Europe Volume 8, Issue 20, September 30, 1998.

⁽⁵¹⁾ Operated by a consortium of cable operators, including Telewest and NTL.

⁽⁵²⁾ Financial Times New Media Markets, 17 September 1998, page 9.

suggest that there are [...] (*) fewer cable pay-television subscribers than is suggested by BSkyB⁽⁵⁷⁾. If these figures were relied upon, then BSkyB would have a market share of [...] (*)% as compared to [...] (*)% for all cable operators.

(c) **Wholesale supply of channels for pay-television**

(69) If again we use the ITC figures⁽⁵⁸⁾, the largest single cable pay-television operator, Cable & Wireless Communications, had 781 944 subscribers at 1 July 1998⁽⁵⁹⁾. This equates to a market share of [...] (*)%.

(70) Using figures provided by BSkyB for the period at end June 1998, all subscribers to cable pay-television take [...] (*). Moreover, some [...] (*)% of subscribers to cable pay-television subscribe to one or more BSkyB premium channel.

(71) There are significant barriers to entry in the pay-television market. Entry into the pay-television market presupposes in the first place that transmission capacity is available. Owing to frequency shortages, no analogue capacity is available for terrestrial transmission. The digital terrestrial frequencies have already been allocated. There is no available capacity on the Astra analogue satellite transponders which BSkyB uses. Digital satellite transponder capacity on the Astra satellites is available. In terms of cable networks, franchises have been awarded which cover some 75% of television households in the United Kingdom. While these franchises have recently been made non-exclusive, the very significant costs of constructing such a network makes it highly unlikely that a second network operator would choose to build a cable network within an existing franchise area.

(72) An entrant into the pay-television market also requires programmes, and above all, premium film and sports channels⁽⁶⁰⁾. These are the basics around which other channels can be offered to subscribers. Providers of individual niche channels may be able to enter the market without such channels. As experience throughout the Community has shown, a pay-television platform provider is most unlikely to do so. As explained in recitals 73 to 81, BSkyB's position in this field is particularly strong. In the medium term, therefore, entry into the British pay-television market using digital satellite transmission independently of BSkyB appears a remote possibility.

(73) In 1996, the Office of Fair Trading (OFT) in the United Kingdom reviewed BSkyB's position in the wholesale pay-television market and found that it had more than 90% of the pay-television rights to first-run major films⁽⁶¹⁾. The OFT concluded that BSkyB held a 'very high market share'⁽⁶²⁾ in each of the separate markets for the wholesale supply of pay-television film and sports channels to cable operators. It further concluded that:

'BSkyB was dominant in the supply of sports channels in the United Kingdom Pay-TV market and was at that time the only provider of premium sports channels with the exception of one specialist channel (The Racing Channel)⁽⁶³⁾.

(74) In the light of its findings, the OFT imposed requirements on the terms and conditions under which BSkyB can supply its channels to cable operators. In particular, BSkyB may supply its channels only in accordance with terms which have previously been approved by the OFT⁽⁶⁴⁾.

(75) The Commission's investigation has confirmed that there has been little evolution in the situation described by the OFT in 1996.

(76) At present BSkyB has pay-television rights to first run major films under contracts with [...] (*) major Hollywood studios and [...] (*) larger independent studios. [...] (*) of BSkyB's pay-television rights contracts are 'output deals'. This means that they cover new product released by film studios⁽⁶⁵⁾. Some also cover library films. In terms of means of transmission, BSkyB's contracts concern exclusive rights for [...] (*). The majority of the contracts continue for at least [...] (*) years from the launch of digital pay-television in 1998.

⁽⁵⁷⁾ Independent Television Commission News Release (82/98) of 16 September 1998.

⁽⁵⁸⁾ BSkyB has not provided figures which distinguish between the various cable operators.

⁽⁵⁹⁾ Independent Television Commission News Release (82/98) of 16 September 1998.

⁽⁶⁰⁾ Bertelsmann/Kirch/Premiere, in particular recitals 34, 48 and 49.

⁽⁶¹⁾ 'BSkyB had long term rights contracts with the major Hollywood studios and with the larger independents which gave BSkyB Pay-TV rights to over 90% of first run major films' Paragraph 1.7 of 'The Director-General's Review of BSkyB's position in the wholesale Pay-TV market', December 1996.

⁽⁶²⁾ The Director-General's Review of BSkyB's Position in the Wholesale Pay-TV Market, December 1996, point 1.2.

⁽⁶³⁾ The Director-General's Review of BSkyB's Position in the Wholesale Pay-TV Market, December 1996, point 2.19.

⁽⁶⁴⁾ Informal undertakings published in OFT press release No. 32/96 of 24 July 1996 and at appendix A to The Director-General's Review of BSkyB's Position in the Wholesale Pay-TV Market, December 1996.

⁽⁶⁵⁾ Sometimes referred to as 'first run' or 'first release' rights.

(77) BSkyB's pay-per-view agreements are [...](*). In other respects their terms vary: [...](*).

(78) BSkyB's major pay-television sports rights contracts include rights to almost all national league football, rugby football, cricket, golf and boxing. The contracts relate to [...](*). As with films, the sports rights contracts generally cover [...](*). In line with industry practice the duration of the agreements is shorter than for films. The precise duration of the agreements varies: the majority continue until [...](*).

(79) The extent and duration of BSkyB's exclusive film contracts and sports rights contracts prevent the emergence of any significant competition to BSkyB in the supply of pay-television film and sports channels in, at least, the medium term⁽⁶⁶⁾. The fact that the rights contracts cover [...](*) modes of transmission also means that BSkyB's retail pay-television competitors, the various cable operators and ONdigital, have no choice but to purchase BSkyB's film and sports channels if they are to offer such channels as part of their own services to subscribers.

(80) BSkyB supplies both British cable operators and ONdigital with its premium film and sports channels, in addition to certain of its basic channels [...](*)% of subscribers to cable pay-television take at least one of BSkyB's film or sports channels. On average, BSkyB wholly-owned basic and premium film and sports channels account for some [...](*)% of total programming costs for cable operators. On average, acquisition of BSkyB film and sports channels accounts for some [...](*)% of cable operators' total programming costs⁽⁶⁷⁾. Again on average, between [...](*)% of expenditure on film and sports channels is paid to BSkyB.

(81) BSkyB's control of the pay-television rights to most major films and many of the most popular sports also means that BSkyB obtains revenue from its pay-television competitors as both cable companies and ONdigital are dependent on BSkyB for the supply of such channels. In the medium term, any gain in market

share of BSkyB's competitors on the pay-television market would, to a certain extent, be offset by increased revenue from the wholesale supply of film and sports channels.

(d) Technical services necessary for pay-television and digital interactive television services

(82) The various cable operators and ONdigital each use different technical services to BSkyB.

(83) BSkyB Group brings together a number of companies that deal with various aspects of these technical and administrative services⁽⁶⁸⁾. Sky Subscribers Services Ltd (SSSL) will provide Videoguard digital conditional access and access control services both to BSkyB Ltd and to third parties under the British regulatory regime, including BiB. BSkyB, through SSSL, has an exclusive licence for the United Kingdom and Ireland to use, and to offer to third parties, the Videoguard system developed by New International's wholly-owned subsidiary, News Data Systems⁽⁶⁹⁾.

(84) As the parties themselves recognise, 'demand for set-top boxes is directly linked to demand for TV broadcasting since the only purpose of purchasing a set-top box is to access the broadcast TV market'⁽⁷⁰⁾. It follows from this that the market position of a supplier of technical services is largely determined by the position on the pay-television market of the companies which use its services in their set-top boxes. BSkyB, through SSSL, therefore controls some [...](*)% of installed set-top boxes in the United Kingdom.

(85) BSkyB's position in the technical services market is also secured by its control of the content markets described at recitals 76 to 79⁽⁷¹⁾.

⁽⁶⁶⁾ This has been recognised by independent analysts. See for example, page 23 of the Nat West Markets analysis of Digital Broadcasting 'Looking for Direction — UK Media Sector' October 1997: '... the fact is that BSkyB's movie contracts remain in place through the first three years of its transition to digital. There is simply no route to market for aspiring competitors in the initial stages of the development of digital services'. In fact, these contracts remain in place for some six years.

⁽⁶⁷⁾ [...](*)% of BSkyB's expenditure on programmes is accounted for by films and sports.

⁽⁶⁸⁾ Sky Subscribers Services Ltd (SSSL) and Satellite Encryption Services Ltd (SESL) are both wholly-owned subsidiaries of BSkyB Ltd. SSSL provides analogue conditional access and subscriber management services to BSkyB Ltd. SESL provides the same services to third party satellite direct-to-home pay-television broadcasters using ASTRA transponders. Sky In-Home Services Limited (SIHSL, formerly Tele-Aerials Satellite Limited) is also a wholly-owned subsidiary. SIHSL is involved in the sale and installation of analogue and digital satellite dishes.

⁽⁶⁹⁾ BSkyB Group has a similar exclusive licence in respect of its analogue conditional access system, VideoCrypt.

⁽⁷⁰⁾ Form A/B, p. 51.

⁽⁷¹⁾ Bertelsmann/Kirch/Premiere, in particular at recital 108.

(e) ***Customer access telecommunications infrastructure market for telecommunications and related services***

providers of residential telecommunications services use the BT network in order to terminate the majority of calls in the United Kingdom.

(86) BT is the former telecommunications monopolist in the United Kingdom. Its telecommunications network covers almost the whole of the United Kingdom. 86 % of residential fixed lines in use were provided by BT⁽⁷²⁾. The remainder were mainly provided by cable operators.

(87) BT has made significant investments in digitising its network in recent years and now almost 100 % of BT's exchanges are digital.

(88) BT faces competition at both the infrastructure and service provision levels of its business. Looking only at residential services, BT competes with cable operators at both the infrastructure and the service level. In addition, BT competes at the service level with a number of operators who use BT's network to deliver services to consumers.

(89) Cable operators' networks currently pass 48 % of homes in the United Kingdom. This is expected to rise to 70 to 80 % over the coming years. In areas covered by cable networks, cable operators attract an average of approximately one in four potential residential customers.

(90) It is unclear whether there will be significant coverage of the United Kingdom by wireless fixed networks in the short to medium term. In the longer term, other forms of infrastructure may be used for telecommunications services in the United Kingdom. For example, power-line technology may allow data transmission over existing domestic electricity cables. There are also four digital mobile networks based on the GSM standard which provide almost complete coverage of the United Kingdom. At present, the data capacity of GSM networks is relatively limited, and voice services provided over GSM networks in the United Kingdom tend to be more expensive than those delivered over fixed lines.

(91) The significant sunk costs involved in constructing a nation-wide telecommunications customer access network make it very unlikely that a new entrant would do so. Indeed, despite the existence of the cable networks, BT continues to have a market share of some 86 % of fixed residential telephony lines in use to receive services. Both as a result of the coverage of its network and as a result of its market share, other

D. THE OPERATION

1. The notified arrangements

(92) The notification essentially comprised the joint venture agreement between the parties, together with its annexes. For present purposes, the most important of the annexed agreements is the marketing services agreement between BiB and BSkyB which provided details of the parties' plans with respect to subsidisation of BiB-compatible digital interactive set-top boxes, digital satellite dishes and low-noise blocks, [...] (*) and the conditions under which consumers were eligible to purchase it. Three further agreements between BiB and Midland were notified, concerning Midland's provision to BiB of a transaction management system, merchant acquiring services and Mondex cards respectively.

(93) A number of related agreements were provided to the Commission for information purposes, although they do not form part of the notification. The most important of these are the agreements between BSkyB and Open TV concerning the application programming interface in BiB-compatible digital interactive set-top boxes, and that between BiB and Open TV concerning the authoring tools for that application programming interface.

2. Structure of joint venture

(94) The shareholdings in BiB will be as follows: BSkyB 32,5 %, BT 32,5 %, Midland 20 % and Matsushita 15 %. The Board will consist of 10 Directors: three appointed by BSkyB, three by BT, two by Midland and two by Matsushita.

(95) BiB has been established for an indefinite duration. Certain major decisions, including material variations to the business plan, concerning BiB will require the consent of each shareholder whose interest in BiB is at least 10 %⁽⁷³⁾. For example, if BiB wished to subsidise

⁽⁷²⁾ For the period January to March 1998. Source: Oftel Market Information Update, November 1998.

⁽⁷³⁾ Below this 10 % threshold, a shareholder loses the right to Board representation and joint control.

set-top boxes for transmission means other than satellite, this would require the unanimous consent of the shareholders. BiB will be jointly controlled by its parent companies.

3. Scope and purpose of joint venture

- (96) BiB has been created in order to develop the infrastructure necessary for the provision of digital interactive television services and to provide such services over that infrastructure. BiB will also provide technical services necessary for digital interactive television services. The geographic scope of BiB's activities is limited to the United Kingdom.

(a) *Infrastructure for the provision of digital interactive television services*

- (97) The BiB infrastructure has been developed specifically to provide digital interactive television services via satellite⁽⁷⁴⁾.
- (98) BiB will provide the content providers with all the infrastructure necessary to provide interactive services: a broadcast and on-line delivery system, conditional access and access control services, a system to allow financial transactions to be completed, a service-creation system and access to a digital interactive set-top box.

Broadcast and on-line delivery system

- (99) Digital satellite transponder capacity will be sub-leased from BSkyB. The up-link of broadcast content to the satellite will be provided by BT, as will the transmission to the up-link site. The software for the broadcast server will be supplied by Oracle and will be based upon Oracle's standard packages. BT has entered into an agreement with Oracle for certain enhancements of the Oracle software. Access to the on-line system is through a network of access points throughout the United Kingdom (Point of Presence network). BT will contract with BiB to supply these services for an initial period of three years.

⁽⁷⁴⁾ Although the parties have indicated that they intend to enter negotiations with a view to making the BiB service available alongside the digital broadcast entertainment services transmitted on digital terrestrial and digital cable in the United Kingdom.

Conditional access and access control services

- (100) Essentially for reasons of copyright protection, both the content broadcast via satellite and delivered on-line will be encrypted. This also prevents unauthorised signals from corrupting set-top boxes. SSSL, BSkyB's wholly-owned subsidiary, will supply BiB with both conditional access and access control services.

System to allow financial transactions on platform

- (101) The completion of transactions on the BiB infrastructure requires a secure environment such that consumers and content providers are willing to transact. BiB has contracted with Midland to provide a transaction management system (TMS). BiB has granted Midland a 10-year exclusivity in respect of the TMS. The TMS will interface with a merchant acquiring system. Midland will similarly supply merchant acquiring services to BiB content providers, on the basis of a 10-year exclusive contract. The present exclusivity is twofold as it affects both content providers and consumers which will contract with BiB the use of BiB's platform or the provision of digital interactive television services.
- (102) Neither of these exclusive agreements prevents a different interactive services company which uses the BiB infrastructure to provide services from using different TMS and merchant acquiring services from those envisaged in the agreements. The BiB-subsidised set-top box also has a slot into which electronic payment cards, such as Mondex, can be slotted. The slot is standardised and will therefore accept alternative payment cards.

Service creation system

- (103) The interactive applications of content providers must be so written as to be compatible with the application programming interface (API) of BiB subsidised set-top boxes. BiB will write applications for content providers on its digital interactive TV services platform, although content providers may also do so themselves.
- (104) Broadcasters and interactive advertisers will also need authoring tools to write applications compatible with

the enhanced Open TV API, whether for purposes of 'side-channels' or to carry out interactive transactions.

- (105) Under the Open Author Agreement between BiB and Open TV, BiB is granted a non-exclusive licence for the necessary authoring tools. The licence covers the United Kingdom and Ireland. Third parties can obtain the necessary authoring tools either from BiB or from Open TV direct.

Digital interactive set-top box

- (106) The most important element of the infrastructure from the point of view of the end consumer is a BiB-compatible digital interactive set-top box. Any telephone line can be used to access BiB services.
- (107) BSkyB, with input from the BiB parties, has specified a digital interactive set-top box, the Digibox, which embeds BSkyB's proprietary conditional access (CA) and access control (AC) systems and BSkyB has ordered such boxes from manufacturers. As the box does not contain a common interface, this means that it is tied to BSkyB's CA and AC systems. However, the Commission has imposed as a condition that BSkyB shall develop and operate Simulcrypt arrangements⁽⁷⁵⁾. The box includes a digital satellite demodulator and has interface ports onto which digital cable, digital terrestrial and broadband telecommunications network sidecar demodulators can be attached. This means that BiB-compatible boxes could be used with all other transmission systems if appropriate sidecars were attached. The box will also include a modem and a standardised slot for electronic payment cards.

Application Programming Interface

- (108) The application programming interface (API) in the box is supplied by Open TV⁽⁷⁶⁾. BSkyB has commissioned Open TV to develop enhancements to the Open TV 1.2 API. These enhancements allow the box to decode high quality still pictures broadcast via satellite (MPEG or JPEG) in addition to moving pictures (MPEG); the quality of sound via PSTN (on-line) is improved (G 729 audio) and finally they allow the API to 'talk' to the interface modules (such as alternative demodulator sidecars or games consoles).

⁽⁷⁵⁾ Condition No 6 of this Decision.

⁽⁷⁶⁾ Formerly known as Thomson Sun Interactive.

- (109) The intellectual property rights for these enhancements will vest in Open TV. By virtue of clause 12.4 of the agreement between BSkyB and Open TV, Open TV undertook not to license these enhancements to any third party in the United Kingdom for two years from the launch date of BiB services. However, following the Commission's intervention, the parties have given up their veto over the licensing of the Open TV 1.2 API enhancements.

Electronic Programme Guide

- (110) BSkyB's specifications for the set-top box allow only one EPG to run, which is its own proprietary EPG. BiB will therefore have a menu position on the BSkyB EPG. As originally notified, Clause 4 of the joint venture agreement (JVA) had provided that BiB would be the exclusive provider of digital interactive TV services via the BSkyB EPG for a period of 10 years. Clause 4 also provided that if a subsidy-recovery mechanism was agreed between the parties and the relevant regulatory authorities, the exclusivity would be limited to 18 months. Following the Commission's intervention the parties have ended the exclusivity for BiB in respect of the BSkyB EPG.

Subsidisation of set-top box, digital satellite dish and LNB: 'Box packages'

- (111) BiB will subsidise 'box packages' with a view to reducing the retail selling price of such set-top boxes, dishes and LNBs to what the parties consider to be an affordable price below GBP 200 including VAT⁽⁷⁷⁾.
- (112) BiB's largest business cost over the first 10 years of its operation will consist of subsidising the retail price of such box packages. The purchase of such packages both by customers who presently take BSkyB's analogue services and by new customers will be subsidised. BiB will pay a higher level of subsidy in respect of the former. The BiB Business Plan envisages that for a substantial number of years most of the subsidy will be directed towards existing BSkyB retail customers.

⁽⁷⁷⁾ The JVA originally provided that BiB would also subsidise the costs of installation of the box and installation or upgrade of a digital satellite dish in the consumer's home. However, subsidisation of installation costs was removed from the business scope of BiB in the agreements signed on 4 August 1998.

(b) Sources of revenue of BiB

(113) BiB will have essentially three sources of revenue. First, it will charge content providers which form part of its own digital interactive service. Secondly, it will charge end-users for certain services which it will itself provide⁽⁷⁸⁾. Thirdly, it will require all service providers which wish to access BiB-subsidised digital interactive set-top boxes to provide their own encrypted services to contribute to its historic and ongoing costs of subsidisation. Thus, BiB's main sources of revenue are derived at the wholesale level, rather than direct from end-users.

(114) BiB proposes to recover contributions to both its historic and its ongoing subsidy costs from two sources. First, BiB expects to recover a proportion indirectly through its general charging mechanisms vis-à-vis content providers. Secondly, BiB proposes to recover subsidy contributions directly from all broadcasters or interactive services providers (including BiB's own services business and BSkyB) who intend to use the box, save for un-encrypted free-to-air broadcasters. All such users will require conditional access and/or access control from SSSL, and SSSL will, as part of its charges for conditional access/access control, levy a contribution to subsidy recovery, in respect of which it will be invoiced by BiB.

(115) The parties' initial proposal was that (a) broadcasters would pay 5% of subsidy and interactive services providers would pay 95% and (b) third parties who were required to pay subsidy recovery would have to pay a substantial initial payment equivalent to their share of the unrecovered historic subsidy costs. The Commission has imposed as a condition the modification of the operation of the subsidy recovery mechanism⁽⁷⁹⁾.

(c) Non-competition provisions

(116) The draft joint venture agreement, forwarded to the Commission on 14 July 1998, stated that for so long as the parties or any affiliate hold shares in BiB and two years thereafter, they would not:

— provide and operate, or hold more than a 20% interest in a company which provides and operates, a platform for the provision of digital interactive television services in the United Kingdom via any transmission means; or

— supply or license to any person the majority of the hardware, software and know-how for such a platform for the purpose of providing digital interactive television services in the United Kingdom via any transmission means.

(117) This non-competitive obligation included digital interactive television services associated with video-on-demand entertainment services.

4. Relationship with BSkyB's services

(118) There is a close relationship between BiB and BSkyB's digital services. The respective infrastructures needed are largely complementary. This is particularly the case for the set-top box. The JVA⁽⁸⁰⁾ commits the parties to promote only digital satellite set-top boxes which are capable of receiving the BiB service for so long as BiB is subsidising set-top boxes. BSkyB may not therefore use a set-top box which is not compatible with BiB for its own digital pay-television service⁽⁸¹⁾. Indeed, the parties have stated that BiB's digital interactive television services' business would not be viable unless it were closely associated with traditional broadcast services, such as BSkyB's, with which consumers are more familiar⁽⁸²⁾.

(119) Along the same lines BSkyB has agreed that the subscription price for its digital pay-television service will be no higher than that of similar analogue packages of satellite entertainment services⁽⁸³⁾. It has also agreed to use reasonable endeavours to ensure that all programmes broadcast on BSkyB's analogue satellite service will be broadcast simultaneously on BSkyB's digital satellite service⁽⁸⁴⁾ and to spend a substantial amount of money on the marketing of its digital pay-television services⁽⁸⁵⁾. The close relationship between the two services is further reinforced by the provisions of the JVA requiring certain advertising of the BiB

⁽⁷⁸⁾ BiB's service will generally be available free to customers with the exception of down-loading of games, learning on-line and limited Internet access for which a separate fee may be charged.

⁽⁷⁹⁾ Condition No 7 of this Decision.

⁽⁸⁰⁾ Clause 20.4 of JVA.

⁽⁸¹⁾ However, BSkyB may promote any other set-top box where the purpose of such promotion relates to the use of such boxes in homes which already have a BiB subsidised set-top box.

⁽⁸²⁾ Pages 47 and 49 of Form A/B.

⁽⁸³⁾ Clause 19 of JVA.

⁽⁸⁴⁾ Clause 19 of JVA.

⁽⁸⁵⁾ Clause 20 of JVA.

service to be integrated with BSkyB advertising⁽⁸⁶⁾ and committing BiB, in its early financial years, to spend a substantial proportion of its total marketing expenditure on advertising via digital television⁽⁸⁷⁾.

changes to the notified agreements are set out in recitals 124 to 134. These are reflected in the new version of the JVA signed on 4 August 1998.

- (120) For the end-user, the two services are closely linked because purchase of the equipment necessary to receive the BSkyB service automatically gives access to that of BiB. Moreover, pursuant to the original marketing services agreement, it was a condition of purchase of a BiB subsidised set-top box that consumers subscribed to BSkyB's digital pay-television service for the minimum contract term of 12 months. The latter requirement has been removed.

5. Relationship with BT's services

- (121) The JVA⁽⁸⁸⁾ requires the parties to negotiate in good faith with a view to BT's and BiB's entering into an agreement under which BT will supply to BiB all BiB's telecommunications requirements for the period ending three years after BiB's launch.

- (122) Pursuant to clause 3.3 (A) of the JVA, the parties agree that a shareholder who wishes to provide digital interactive television services by means of a broadband system can do so only where it has given BiB a right of first refusal to provide such a service and BiB has not agreed to provide such a service on terms at least as favourable as those offered by a third party within six months of the offer or 31 March 1999, whichever is the later. This provision is of most relevance to BT.

E. CHANGES MADE FURTHER TO THE COMMISSION'S INTERVENTION

- (123) On the basis of the analysis carried out by the Commission, and of the comments received from third parties following the publication in the *Official Journal of the European Communities* of a first notice inviting third party comment⁽⁸⁹⁾ and then of a notice published pursuant to Article 19(3) of Regulation No 17, certain features of the notified agreements appeared to be incompatible with Community competition rules. The Commission informed the parties of its concerns. The

(a) Non-competition provisions

- (124) The non-competition provisions in the JVA have been amended to limit them to the business scope of BiB, namely digital interactive television services, including the provision of digital interactive television services associated with broadcast services. Thus, the proviso to the provision relating to digital interactive television services associated with video-on-demand entertainment services was deleted as it went beyond the business scope of BiB.

- (125) The parties further amended the non-competition provision so that it applies only to shareholders with joint control. The non-competition provision continues to apply to a shareholder for a period of 12 months after that shareholder loses joint control, where that loss occurs within three years of the date of the exemption decision pursuant to Article 81(3) of the EC Treaty.

(b) Legal separation

- (126) The Commission was concerned that the combination in a single company of activities relating to the subsidisation of set-top boxes and the recovery of subsidies, together with the operation of services using the set-top box, would lead to a lack of transparency in the operation of the subsidy recovery mechanism which could allow the parties to confer benefits on their own downstream operations in comparison with third parties. In order to address this concern the structure of the joint venture itself has been modified. Two separate companies have been created⁽⁹⁰⁾ for BiB's subsidies of set-top boxes and the recovery of subsidy from third parties⁽⁹¹⁾, and the creation and operation of BiB interactive services⁽⁹²⁾.

- (127) The Board of each of these wholly-owned subsidiaries will consist of shareholder representatives only. No individual will be a member of both. Each of the companies will have its own operational management, responsible to its respective board. These management teams will both report to the chief executive officer of the BiB Group, who will be responsible for the

⁽⁸⁶⁾ Clause 17 of JVA.

⁽⁸⁷⁾ Clause 18 of JVA.

⁽⁸⁸⁾ Clause 8 of JVA.

⁽⁸⁹⁾ OJ C 259, 26.8.1997, p. 3.

⁽⁹⁰⁾ Clause 2.2 of JVA.

⁽⁹¹⁾ Marketing Contributions Co — 'McCo'.

⁽⁹²⁾ Platform Co.

management and performance of the whole BiB Group, and will report to the BiB Board. The two companies will publish annual audited accounts. Auditors will certify that all transactions between the two companies have been carried out at arms' length⁽⁹³⁾. This new management structure ensures transparency and non-discriminatory treatment between the two operations and responds to the Commission's concern.

(c) Access to BiB-subsidised digital interactive set-top boxes

(128) The parties have ended the exclusivity for BiB in respect of the BSkyB EPG. They have also relinquished their veto over the licensing of the Open TV 1.2 API enhancements. The parties are seeking an agreement with Open TV to determine the contribution which Open TV will levy on licences for the Open TV 1.2 API enhancements (and, where relevant, any updates) supplied to third parties, such levy being based on the development costs of those enhancements.

(129) The requirement that customers wishing to purchase a BiB-subsidised set-top box, digital satellite dish and LNB must subscribe to BSkyB's pay-television service has been removed. The only conditions governing purchase of such box packages are now the following⁽⁹⁴⁾. First, that the customer agrees to connect the set-top box to a telephone line for a one-year period. Secondly, if Midland so requests pursuant to the Mondex agreement, arrangements will be made for the issue to the customer of a Mondex card and the opening of a feed bank account⁽⁹⁵⁾. Thirdly, customers agree to the installation of box packages by an installer approved by the parties.

(130) These amendments to the originally notified agreements address the Commission's concern that if competing providers of digital interactive services were to be denied access to BiB-subsidised set-top boxes, or were to be granted access on terms less favourable than BiB, then competition in the digital interactive television services market could be eliminated.

(d) Commitments given by BSkyB in relation to the British regime

(131) The regulatory requirements placed on BSkyB in relation to the supply of conditional access and access control services and in relation to access to its proprietary electronic programme guide exist independently of its participation in the BiB joint venture. In the course of the Commission's examination of BiB, BSkyB has informed the Commission of how it intends to comply with the British regulatory regime. The Commission considers as a fact basic to the making of the decision the British regulatory obligations on BSkyB. If the relevant British authorities were to bring an action against BSkyB for infringement of these obligations, the Commission would consider this situation under Article 8(3)(a) of Regulation 17.

(132) BSkyB has confirmed that its wholly-owned subsidiary, SSSL, will provide access control services under the terms of the Telecommunications Services Class Licence (as granted on 31 December 1997 under Section 7 of the Telecommunications Act 1984) or any licence which supersedes the access control provisions of the Telecommunications Services Class Licence.

(133) BSkyB has further agreed that when requested to supply access control services (within the meaning of the British regime), SSSL will comply with the obligations to cooperate in advance of service launch set out in Regulation 11(4) to (8) of the Advanced Television Services Regulations 1996, as if that Regulation applied to such services⁽⁹⁶⁾. Again, this prevents BSkyB from relying on a possible loophole in the British regime.

(134) The Conditional Access Class Licence prevents providers of digital conditional access services from bundling the various services which constitute the conditional access services. It is unclear whether the British regulatory regime requires providers of such services to supply verification (digital signature) services separately. BSkyB [...] (*) is, in principle, willing to allow [...] (*) to sign its own interactive applications subject to [...] (*) meeting certain financial, technical and other criteria and subject to the agreement of commercial terms, including a condition that the third party takes responsibility for errors in its signing. BSkyB has agreed that it will offer

⁽⁹³⁾ Clause 2.2 of JVA.

⁽⁹⁴⁾ Marketing Contributions Services Agreement between McCo and BSkyB of 4 August 1998.

⁽⁹⁵⁾ Customers are not charged for this service, nor are they required to make any deposits on such an account.

⁽⁹⁶⁾ And as if the reference to the 'primary duty' therein were references to the duty to provide Access Control Services pursuant to the British Regime and references to 'technical services' were to technical services within the said meaning of Access Control Services.

such right [...] (*) on fair and reasonable terms⁽⁹⁷⁾ and on a non-discriminatory basis (which shall include a requirement on such third parties to meet the technical, commercial and financial criteria as are required [...] (*)).

and/or sport programming with interactive applications. The distributor's option to remove or keep all of the icons⁽⁹⁸⁾ is extended, subject to an agreement for the carriage of BiB or BSkyB's services, to allow a situation where some of the icons remain on the screen whilst some of the icons are removed.

F. THIRD PARTY OBSERVATIONS

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

- the restrictions on competition between the participants in BiB are not indispensable
- the duration of the exemption
- the Commission should continue to monitor the joint venture over a number of years, in particular in the field of access to the local loop if there were a risk that BT might have an incentive to slow the development of broadband services in the UK because of its stake in BiB
- BSkyB should be required to enter into negotiations with other interactive service providers who wish to add interactive enhancements to BSkyB programming.

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

(137) In addition, the Commission considered it necessary, as a result of third-party observations, to extend the scope of the condition on the availability of a clean-feed. The condition imposed in this Decision allows more flexibility to companies which distribute BSkyB's movies

II. LEGAL ASSESSMENT

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

A. COOPERATIVE JOINT VENTURE

(139) The joint venture has to be assessed under Regulation No 17 because there is a risk of coordination between the parent companies in the market of the joint venture and in neighbouring markets such as video-on-demand entertainment services.

B. ARTICLE 81(1)

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

1. Applicability of Article 81(1) to the creation of BiB

(a) *Digital interactive television services market*

Restriction of competition between the parent companies — BSkyB and BT are potential competitors

(141) Prior to the conclusion of the BiB joint venture, BT and BSkyB were potential competitors in the provision of

⁽⁹⁷⁾ Terms approved by the Director-General for Telecommunications will be presumed to be fair and reasonable.

⁽⁹⁸⁾ 'All-or-nothing' option in the Article 19(3) Notice.

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

(142) The fact that BT is a potential competitor reflects a more general world-wide development in the telecommunications sector for operators to seek to expand the number and types of services provided over their networks. This diversification increases the return on the capital employed to build, or in the case of BT, maintain the network. More particularly, by virtue of the Digital Subscriber Line family of technologies, traditional copper-line telecommunications customer access infrastructure, such as that of BT, can be upgraded to allow for the provision of services such as those to be provided by BiB in addition to other services such as video telephony, video-on-demand and high-speed Internet access. One operator in the United Kingdom, Kingston Communications, has already committed itself to such an upgrade of its infrastructure⁽⁹⁹⁾. In other European countries, trials are underway. BT has conducted extended residential trials⁽¹⁰⁰⁾. The latest trial ran until March 1999. Some service providers will offer a range of services, including on-demand entertainment, news and information programming, home shopping and home banking.

(143) The general tendency towards diversification of telecommunications operators to provide services similar to those of BiB has been accepted by the parties. Indeed, the parties themselves have stated that 'the main telecommunications operators (other than BT) could become competitors to BiB'⁽¹⁰¹⁾. The parties' claim that BT's competitors should be regarded as potential competitors, whereas BT itself should not, cannot be accepted. The joint venture agreement itself envisages that BT will upgrade its network to allow provision of services such as those to be provided by BiB⁽¹⁰²⁾.

(144) BSkyB is also a potential competitor in the provision of digital interactive television services. BSkyB has extensive experience in running a popular mass market television service. It is the digitisation of such services which allows digital interactive television services to be introduced. There are significant common costs in the

technical services and infrastructure required for both. In the absence of BiB, BSkyB would have required a digital set-top box for its own pay-television business and would have subsidised its retail selling price itself⁽¹⁰³⁾. The marginal cost increase in producing a set-top box capable of allowing interactivity is relatively small in comparison with the overall cost of the set-top box — the parties have estimated the marginal cost to be approximately GBP [...] (*)⁽¹⁰⁴⁾. Given the common infrastructure costs, and given that subsidisation of set-top boxes is BiB's largest single cost over the first [...] (*) years of its operation, the marginal cost increase of establishing an interactive service once the decision has been made to launch a digital television service is relatively small⁽¹⁰⁵⁾.

2. Applicability of Article 81(1) to contractual provisions

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

1. The non-competition provision between the parties contained in Clause 3.1 of the joint venture agreement, as amended at the demand of the Commission.
2. The parties' agreement that a shareholder who wishes to provide digital interactive television services by means of a broadband system may do so only where it has given BiB a right of first refusal to provide such a service and BiB has not agreed to provide such a service on terms at least as favourable as those offered by a third party within six months of the offer or 31 March 1999, whichever is the later⁽¹⁰⁶⁾.
3. The exclusive supply agreements between BiB and Midland Bank in respect of merchant acquiring and transaction management services.

⁽⁹⁹⁾ Source: Inside Cable & Telecoms Europe, <http://www.inside-cable.co.uk>, article of 14 December 1998, 'Kingston first to commit to ADSL in Europe'.

⁽¹⁰⁰⁾ Source: Inside Cable & Telecoms Europe, <http://www.inside-cable.co.uk>, article of 22 December 1998, 'BT's ADSL Trails — More Details'.

⁽¹⁰¹⁾ Form A/B, at page 77.

⁽¹⁰²⁾ Clause 3.3 (A) of JVA, referred to at recital 119.

⁽¹⁰³⁾ ONdigital is subsidising the retail selling price of the digital set-top boxes necessary for its service.

⁽¹⁰⁴⁾ Response of 8 August 1997 on behalf of BiB parties to request for information of 25 July 1997.

⁽¹⁰⁵⁾ For example, the total investment in BiB is GBP [...] (*) million (of which BSkyB is in any event contributing [...] (*)%). The peak annual cost of running the BiB services is GBP [...] (*) million (in [...] (*)%, of which approximately [...] (*) is attributable to subsidisation of the set-top box).

⁽¹⁰⁶⁾ Clause 3.3 (A) of JVA.

4. The provisions of the JVA requiring certain advertising of the BiB service to be integrated with BSkyB advertising⁽¹⁰⁷⁾.
5. The commitment of the parties to promote only digital satellite set-top boxes which are capable of receiving the BiB service for so long as BiB is subsidising set-top boxes. However, BSkyB may promote any other set-top box where the purpose of such promotion relates to the use of such boxes in homes which already have a BiB-subsidised set-top box and BSkyB agrees to spend a substantial amount of money on the marketing of its digital pay-television service⁽¹⁰⁸⁾.
6. BSkyB's commitment that the subscription price for its digital pay-television service will be no higher than that of similar analogue packages of satellite entertainment services and its commitment to use reasonable endeavours to ensure that all programmes broadcast on BSkyB's analogue satellite service will be broadcast simultaneously on BSkyB's digital satellite service⁽¹⁰⁹⁾.

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

(a) Non-competition provision

- (147) Subject to recital 149, the agreement amongst the parties not to compete in the provision of digital interactive television services is necessary for, and directly related to, the establishment of BiB, given the technical and financial risks involved in entering a new market, and the level of investment required. The uncertainty inherent in such a joint venture, and the need to ensure a stable base of operations in its early years, justify this non-competition clause.
- (148) The fact that the non-competition clause continues to apply to a shareholder for a period of 12 months after that shareholder loses joint control provided that the

loss occurs within three years of the date on which this Decision takes effect, is justified as a protection for the joint venture and for the investors against a parent company withdrawing from the joint venture and taking unfair advantage of the know-how acquired during its participation in the joint venture in order to compete in the same market.

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

(b) BiB's right of first refusal

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

(c) Exclusive agreements between BiB and Midland Bank

- (151) Both a transaction management system and merchant acquiring services are essential parts of the infrastructure necessary for BiB Platform Co.'s service. Midland was willing to bear the full cost of developing the software necessary for the transaction management system, in return for a fee equivalent to a percentage of each transaction. This allowed BiB to reduce its initial capital requirements and to match its payments to income in an economically efficient manner. The financial risk of the development costs remains with Midland. However, a period of exclusivity allows Midland the opportunity to recoup its initial investment, with no guarantee that it will do so. In terms of merchant acquiring services, Midland has undertaken to provide the services at an advantageous fixed rate to help with the establishment of BiB. Midland, on the other hand, requires a guarantee that BiB will not change suppliers once it is established.

⁽¹⁰⁷⁾ Clause 17 of JVA.

⁽¹⁰⁸⁾ Clause 20 of JVA.

⁽¹⁰⁹⁾ Clause 19 of JVA.

Moreover, neither agreement prevents other providers of digital interactive services from seeking transaction management or merchant acquiring services from companies other than Midland. The exclusive agreements, which will play with regard to content providers and end-users using the BiB platform or contracting BiB services, thus constitute the necessary quid pro quo for Midland's willingness to incur up-front capital costs for the benefit of the operation of the joint venture. They are thus crucial to its participation in BiB and cannot be considered in isolation from the joint venture.

(d) Commitments of the parent companies in markets related to BiB's (Clauses 17, 19 and 20 of the JVA)

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

3. Effect on trade between Member States

- (153) An agreement which may have an influence, direct or indirect, actual or potential, on the pattern of trade between Member States meets the criterion of effect on trade between Member States⁽¹¹⁰⁾.

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

of the service in other countries are likely to decrease in the future⁽¹¹¹⁾.

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

- (156) However, even if this is not the case, the agreement affects the competitive structure for the provision of digital interactive television services throughout the United Kingdom⁽¹¹²⁾. As a result of this operation entry in the relevant market in the United Kingdom is made more difficult to other possible Community competitors. The latter is also applicable to the prohibition to the BiB's parent companies, in the non-competition provision, of holding more than a 20% interest in a competing company. Potential entrants in the digital interactive television services market in the United Kingdom cannot rely on the investments of BiB's parent companies. Finally, by establishing a prime mover with substantial advantages, BiB is likely to procure certain services from other non-British content providers⁽¹¹³⁾. There will thus be an effect on the flow of trade.

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

C. ARTICLE 81(3)

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

⁽¹¹¹⁾ 'Over time it could be expected that some or all of [the] barriers to internationalising the service would decline. It is entirely feasible to envisage BiB and other transactional platform providers in different Member States developing in the medium term and expanding into other Member States.' (Form A/B, at page 49).

⁽¹¹²⁾ Cases 6 and 7/73 *Commercial Solvents v Commission* [1974] ECR 223 at paragraphs 30 to 35.

⁽¹¹³⁾ Form A/B, at page 32.

⁽¹¹⁰⁾ See for example, Case 42/84 *Remia v Commission* [1985] ECR 2545.

1. Improvement in distribution of goods and technical and economic progress

(159) In developing the BiB joint venture, the parties have overcome the current technological limitations of both satellite broadcast technology and narrowband telecommunications customer access infrastructure. The former is, for the time being, capable of only one-way communication and could not alone provide interactive services of the type envisaged by BiB. The latter, while capable of the two-way communication inherent in telephony is not, at the moment, suitable for services which require a higher bandwidth. In combination, however, their use enables provision of a new form of service which had not been offered yet, available to the vast majority of consumers in the United Kingdom. Retailers of goods and services also obtain a new outlet for their products. The creation of the joint venture, therefore, contributes to an improvement in the distribution of goods and technical and economic progress⁽¹¹⁴⁾.

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

(161) The digital interactive services could also be provided by upgrading BT's copper network. If the medium term effect of BT's participation in the joint venture were to be a reduction in its economic incentive in upgrading its narrowband telecommunications customer access infrastructure, the Commission's positive assessment of BiB's impact on technical and economic progress would require reconsideration in the light of the broader developments in the market. As was explained in recital 86, BT owns the only such nation-wide infrastructure and has a very high market-share of fixed residential lines in use. If upgraded, it would provide an alternative national transmission mechanism for the provision of

broadband interactive services. In addition, it could carry other services, such as video telephony, broadband internet access and video-on-demand. One telecommunications operator in the United Kingdom has already upgraded its network and it is being used for provision of BiB-type services. BT itself is conducting trials.

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

2. Benefit to consumers

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

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

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

⁽¹¹⁴⁾ See Commission Decision 98/536/EEC (Case IV/31.734: *Film purchased by German television stations*) (OJ L 284, 3.10.1989, p. 36, at recital 49); Decision 90/25/EEC (Case IV/32.265 — *Concordato Incendio*) (OJ L 15, 19.1.1990, p. 25, at recital 25).

3. Indispensability

- (166) BT and BSkyB have the necessary expertise to provide some form of interactive services individually. However, by cooperating together in BiB they are able to provide a better service and to do so more quickly. Their participation, together with Midland Bank and Matsushita, is thus indispensable to the creation of BiB, and to its ultimate establishment on a new market. BT has gained skills and experience in the course of its past interactive television trials in the development and integration of interactive multimedia services which it contributes to the joint venture. This is in addition to its expertise in the provision of telecommunications services which have been vital to the operation of the BiB telecommunications return path and its connections with the servers. BSkyB contributes its experience in set-top box design and operation, together with its knowledge of consumer demand for pay-television. Midland contributes expertise in the area of merchant acquiring and transaction management, and the integration of these services into the BiB infrastructure. Finally, Panasonic contributes its technical expertise, particularly in the area of set-top box design.
- (167) The prohibition to hold more than a 20% interest in a competing company is indispensable for this operation. The success of BiB would be jeopardised in case of a transfer to a competitor of the unique ideas and strategies, which are being developed by the parties in BiB.

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

- (168) Companies other than BiB, notably the various cable operators, have plans to launch digital interactive television services. The BiB parties have estimated that a subscriber base of at least one million subscribers is necessary to achieve the necessary scale for the provision of digital interactive television services. Following the consolidation in the United Kingdom cable industry, the cable networks of Cable & Wireless Communications, NTL and Telewest each have a reach of more than one million homes. NTL has already launched a commercial trial⁽¹¹⁵⁾. Cable operators have

an advantage in the provision of such services as their cable networks have two-way capability. This allows them alone, or in cooperation with third parties, to use the network for interactive services. Other companies also have plans to introduce digital interactive television services, in particular WebTV and Videonet.

- (169) However, both BSkyB and BT have very important positions in the United Kingdom, in markets neighbouring and closely related to that in which the BiB joint venture will be active. Their positions in these markets are safeguarded, at least in the medium term, by the existence of barriers to entry. Both therefore possess a degree of market power which is central to the legal assessment of the impact of the elimination of potential competition between BT and BSkyB as a result of the creation of the BiB joint venture.
- (170) Accordingly, the Commission considered that the combination of the very significant market power of BT, and in particular of BSkyB in related markets, with that in which BiB will be active such as the customer access infrastructure market, the technical services for pay-television and digital interactive services, the pay-television market and the market for the wholesale supply of film and sport channels for pay-television, risked eliminating a substantial part of competition on the markets for digital interactive television services⁽¹¹⁶⁾. The conditions set out in this Decision should ensure that this risk does not materialise and that, in particular, competition to BT comes from the cable networks, that third parties are ensured sufficient access to BiB's subsidised set-top boxes and to BSkyB's films and sport channels and that set-top boxes other than BiB's set-top box can be developed in the market, so that the digital interactive television services remain open to competition.
- (171) Even given the prohibition in the non-competition clause, preventing BiB's parent companies from holding more than a 20% interest in a competing company, there is no chance that competition will be eliminated as a result of the creation of BiB. The conditions imposed upon the parties ensure that the relevant market will remain open and that BiB will face significant competition. The conditions imposed on the parties can be summarised as follows:

⁽¹¹⁵⁾ NTL is testing the service of Yes Television on its cable network in Cardiff until Summer 1999. Research is being carried out on the possibilities of a full-scale launch. Yes Television offers entertainment and music on demand, along with news and information services, travel services, educational services and home shopping. Source: Inside Cable & Telecoms Europe, <http://www.inside-cable.co.uk>, article of 11 January 1999, 'Cardiff gets UK's first interactive TV'.

⁽¹¹⁶⁾ In this respect the parties' revised business plan provided to the Commission on 12 August 1997 is illuminating. It was based on the assumption that little competition would emerge on the digital interactive television services market: 'BiB is the sole provider of digital television interactive services, as defined in the joint venture agreement, to both BSkyB subscribers and to [...] (*) % of cable subscribers'.

(a) *Competition from the cable networks*

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

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

- (173) BiB is to subsidise the set-top box which will be used both for its own service and for BSkyB's digital pay-television service. BSkyB and BiB together control the access of competing digital interactive television services and pay-television operators to those boxes. BSkyB's control is ensured by its position on the technical services market — that is, by the supply of conditional access and access control services. BiB controls access by means of the operation of the subsidy recovery mechanism which requires all providers of encrypted services to contribute to its historic and ongoing subsidy costs as part of their conditional access and access control payments.
- (174) Third party access to BiB-subsidised set-top boxes is important because of the market position of BSkyB. BSkyB has a market share of some [...] (*)% in the pay-television market. In theory, competitors to BiB and BSkyB which wished to provide services using digital

satellite could launch a competing set-top box. However, the capital costs of establishing a competing infrastructure, combined with the general reluctance of consumers to acquire more than one set-top box, makes this unlikely. This conclusion is reinforced by BSkyB's control of film and sports. In practice, therefore, they are more likely to seek access to BiB/BSkyB's existing set-top box infrastructure⁽¹¹⁷⁾. This has been the case in respect of analogue pay-television services in the United Kingdom. There is no reason to presume that it will be different in respect of digital services, where the investment costs of establishing a set-top box infrastructure are even larger.

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

Legal separation of BiB

- (176) Pursuant to the amended joint venture agreements (JVA)⁽¹¹⁸⁾ BiB will establish legally separate companies for BiB's activities in respect of the subsidisation of set-top boxes and the recovery of monies from third party users of the box and the creation and operation of the BiB interactive services. Each company will have separate management and each will publish annual audited accounts. In addition, it has been imposed as a condition of exemption that auditors shall certify that all transactions between the two companies have been carried out at arm's length, in accordance with the principles set out in the OECD transfer pricing guidelines. This should ensure transparency and non-discriminatory treatment between the two operations, and prevent the subsidy mechanism from being used as an artificial barrier to entry on the market for digital interactive television services.

Operation of subsidy recovery mechanism

- (177) The Commission has imposed a condition on the operation of the subsidy recovery mechanism which seeks to ensure that it is transparent and non-discriminatory. The operation of the subsidy recovery mechanism also falls to be regulated by the United

⁽¹¹⁷⁾ See Bertelsmann/Kirch/Premiere, at recital 56.

⁽¹¹⁸⁾ Clause 2 of the JVA.

Kingdom authorities pursuant to Directive 95/47/EC and to national measures. The Commission considers that compliance with the condition will be presumed where the parties comply with the British arrangements.

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

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

Supply of technical services to third parties

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

(181) Secondly, downstream service providers which wish to use BiB-subsidised set-top boxes, and those which do use the boxes, require information about the technical specifications of the set-top box, including proposed changes to the specifications. In the absence of such information, they would be unable to develop their own services and to continue to up-date them in response to any changes to the specifications of the set-top box. The Commission has therefore imposed a condition that such information be provided to interested parties⁽¹¹⁹⁾. It now appears likely that the majority of the relevant

information will be held by BSkyB. However, this position may change. To ensure that there is no gap in the parties' duty to provide relevant information to third parties, information provision conditions are imposed on both BSkyB and BiB McCo.

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

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

(183) BiB's cable and digital terrestrial competitors will not be able to place interactive links in the most popular pay-television channels in the United Kingdom. This would only be possible if both technical⁽¹²⁰⁾ and commercial obstacles were overcome. They would require them to reach an agreement with a competitor, BSkyB, which has significant market power in upstream markets and an incentive to foreclose the downstream digital interactive television services market.

(184) It is, therefore, necessary to impose a condition on BSkyB's wholesale supply of its film and sports channels to its cable and digital terrestrial competitors. BSkyB will be obliged to offer to distribute its film and sports channels either with or without ('clean-feed') interactive applications, at the choice of the purchaser on a non-discriminatory basis. This prevents BSkyB from bundling interactivity at the wholesale supply level with its channels to the detriment of both competitors to BiB on the digital interactive television services market and its own competitors in pay-television. BiB's competitors would not be able to integrate their own interactive

⁽¹¹⁹⁾ The parties have raised with the Commission as a possible means of complying with this condition the use of a website, parts or all of which may be password protected, for the provision of the non-disclosure agreement and/or the supplemental technical agreement and/or the technical information. The Commission considers that this is one of the ways in which the parties could fulfil this condition. However, the choice of mechanism is a matter appropriately left to the parties.

⁽¹²⁰⁾ Both cable operators and ONdigital use different set-top boxes and interactive technology to BSkyB/BiB. Evidence provided by BSkyB and third parties indicated that although it would be possible in theory to re-author in real-time the interactive elements in BSkyB's film and sports channels so that they would function with these different technologies, doing so would have cost and timing implications for the competing cable and/or digital terrestrial operators, making this option at best significantly less attractive, and at worst impossible.

services into these channels. However, they would be able to do so in respect of channels which are not owned by BSkyB. [...] (*) it would also be possible for BiB's competitors to negotiate agreements for the use of their different interactive services in respect of film pay-per-view services⁽¹²¹⁾. Thus competition with BiB will not be eliminated.

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

- (185) It is a condition of exemption that BSkyB limits the exercise of its veto rights in the joint venture agreement to the extent that it will be obliged in certain circumstances to support any proposal to subsidise other set-top boxes as part of an agreement for carriage of the BiB service on cable and/or digital terrestrial television. Given that companies requesting BiB to subsidise other set-top boxes would in practice be competitors of BSkyB on its core market, this condition is intended to address BSkyB's conflict of interest in its decisions as a BiB shareholder and its interests as a pay-television operator. This should ensure that BiB as a commercial company is free to take decisions in relation to BSkyB's competitors on commercial grounds, and is not limited by BSkyB's other commercial interests.

(e) *Anti-avoidance*

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

5. Conclusion

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

D. DURATION OF THE EXEMPTION AND CONDITIONS

- (188) Pursuant to Article 8 of Regulation No 17 a decision in application of Article 81(3) of the EC Treaty has to be issued for a specified period and conditions and obligations may be attached thereto. Pursuant to Article 6 of Regulation No 17 the date from which such a decision takes effect cannot be earlier than the date of notification.

- (189) In this case, this Decision takes effect from the date on which all of the changes to the arrangements referred to in recitals 124 to 134 were made, and the conditions set out in this Decision were fulfilled. Therefore, the relevant date is 4 August 1998.

- (190) As for the duration of the exemption decision, the Commission has examined BiB's business plan, the joint venture agreements and the conditions prevailing on the United Kingdom market, in order to ascertain what would be the minimum period for which BiB would need the support of its parent companies, in the form permitted by this Decision, to establish itself as a viable business in the new market of the digital interactive television services. There is no doubt that the present operation entails a significant financial risk for the shareholders, who will invest significant resources in a new market with a considerable degree of uncertainty as to the response of United Kingdom consumers to the new digital services proposed. The parties predicted that BiB would not make an operating profit until [...] (*) and the shareholders would not receive back their initial cash investment until [...] (*). This prediction is confirmed by the Business Plan of the parties. The Commission considers a period of seven years to be sufficient and appropriate in the special circumstances of the United Kingdom market [...] (*). The contractual clauses described in recitals 145 to 152 which are directly related and necessary to the creation and operation of BiB are exempted for the same period of seven years. The prohibition in the non-competition provision, which has been assessed under Article 81(1) and (3), is also exempted for a seven-year period which is the period considered necessary for [...] (*).

- (191) The most crucial requirements to safeguard competition are attached as conditions, owing to the need to prevent an elimination of effective competition on the market for digital interactive television services. Strict compliance with these requirements is so important that the Commission must ensure immediate consequences in the event of a breach.

- (192) However, the principle of proportionality requires that far-reaching legal, financial and commercial

⁽¹²¹⁾ NTL and Telewest operate the Front Row pay-per-view service which is independent of BSkyB.

consequences do not ensue from occasional or individual mistakes whose effects on the market are negligible. As a matter of principle, for an exemption to be based on certain conditions, those conditions must be proportionate to the competition concern. Trivial breaches of conditions should not inevitably lead to the ending of any exemption. The Commission considers that in relation to the subsidy recovery mechanism and the requirements to provide information, it is appropriate to distinguish between trivial and material breaches of these conditions. The Commission considers that the concept of breach as used in Article 3 will allow national authorities and national courts to determine whether a condition has been materially breached.

(193) Accordingly, infringements of Conditions Nos 7, 8 and 9 cannot be considered to breach a condition attached to this Decision unless such infringements fulfil the criteria set out in Article 3.

(194) The Commission has expressed its concerns about the impact of BT's participation in BiB on the development of the customer access infrastructure market. However, the Commission concluded that this evaluation is premature. The Commission therefore may consider it necessary to conduct a review of BT's participation in the joint venture in the medium term. If it were proved that such participation was impeding the supply of services using broadband customer access infrastructure in the United Kingdom, the Commission might consider this fact to be relevant pursuant to Article 8(3) of Regulation No 17,

HAS ADOPTED THIS DECISION:

Article 1

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

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

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

Article 2

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

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

The auditors who are required to certify on an annual basis that the marketing contribution activities of McCo. have been undertaken at arms' length to the activities of BiB Services Co. will interpret the term 'arms' length' in accordance with the transfer pricing guidelines.

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

A. The BiB Parties will procure that retailers who sell digital interactive reception equipment with the benefit of marketing contributions and installers of such equipment are informed in writing that there is no requirement that a purchaser of such equipment should take out a subscription to any pay-television services and that services other than BSkyB's services will be available via the BiB box including those non-subscription services which are transmitted via digital satellite for reception on BiB boxes. The BiB Parties will further require that purchasers of equipment benefiting from marketing contributions are advised in writing at the point of sale that there is no such requirement and that services other than BSkyB's services will be available via the BiB box including those non-subscription services which are transmitted via digital satellite for reception on BiB boxes.

B. BSkyB will put in place written procedures, of which it will provide copies to the Commission, to ensure that all of its analogue customers, when offered a subscription to BSkyB's digital satellite services ('Sky Digital Subscription'), are informed clearly in writing (by notice approved in writing by the Commission) that there is no requirement for them to take out a Sky Digital Subscription in order to be eligible to purchase a BiB box and that services other than BSkyB's services will be available via the BiB box including those non-subscription services which are transmitted via digital satellite for reception on BiB boxes.

C. BSkyB will put in place written procedures, of which it will provide copies to the Commission, to ensure that its agents

for the sale of Sky Digital Subscriptions who also sell BiB boxes are informed clearly in writing that there is no requirement on the purchaser to take out a Sky Digital Subscription in order to be eligible to purchase a BiB box and that services other than BSkyB's services will be available via the BiB box including those non-subscription services which are transmitted via digital satellite for reception on BiB boxes.

Condition No 3: (Availability of a clean feed)

Where movies and/or sports programming (but not advertising time paid for by parties other than BSkyB or BiB) on any of BSkyB's movies and/or sports channels includes on-screen representations directing the viewer to BiB's digital interactive television services and/or BSkyB's enhanced movies and/or sports television services, BSkyB will give distributors of such channels, on a non-discriminatory basis, an option either:

- (i) where the distributor is also a distributor of BiB's digital interactive television services and/or BSkyB's enhanced movies and/or sports television services (as the case may be), to receive a signal for the channel(s) which include(s) the on-screen representation and interactive applications (authored in BSkyB's chosen technology) directing the viewer to such of BiB's digital interactive television services and/or BSkyB's enhanced movies and/or sports television services as the distributor is carrying, or
- (ii) to receive a signal for the channel(s) such that the on-screen representations directing the viewer to such of BiB's digital interactive television services and/or BSkyB's enhanced movies and/or sports television services as the distributor is not carrying may not be viewed by means of, at the distributor's option, either:
 - (a) (where delivery of the channel is by satellite) a signal which includes the on-screen representations within a part of the signal which is transmitted separately from the main television picture; or
 - (b) (where delivery of the channel is by landline) a signal which does not include the on-screen representations or, at the distributor's option, includes them within a part of the signal which is transmitted separately from the main television picture⁽¹²²⁾; or

such other means as is agreed by the parties. This is subject in any such case to the distributor bearing any costs incurred in the development and ongoing provision of any such solution, including, where relevant, the costs relating to the installation, operation and maintenance of a landline and any related equipment necessary to provide the feed by landline.

⁽¹²²⁾ BSkyB shall have the right to refuse a request for delivery by landline only where this is approved by a suitable British regulator.

Condition No 4: (Divestiture of cable)

- A. BT shall not buy or seek any broadband cable television franchises in the United Kingdom beyond its existing holdings, and shall dispose of any such franchises acquired in the course of any other transaction. This undertaking shall however not restrict BT from providing broadcast services (should BT be permitted to do so in the future), broadband services or broadband interactive services (including for the avoidance of doubt in competition with the franchises in Westminster and Milton Keynes) over its own networks.
- B. With effect from the date of this Decision (the 'Exemption Decision') to divest itself of its broadband cable television franchises in Westminster and Milton Keynes (together 'the Businesses') on the following basis:
 - (i) BT shall use its best efforts to arrange for the sale of the Businesses, at fair market value, within [...] (*) months of the Exemption Decision;
 - (ii) BT shall maintain the Businesses in legally separate entities and shall operate them in a manner which enables it to maintain, as far as possible, their viability, marketability and value pending sale and final disposal;
 - (iii) prior to the sale of the Businesses, BT shall separately manage and hold separate the Businesses from the other businesses of BT in the United Kingdom. Structural changes to the Businesses, until the date of such sale, shall not be undertaken by BT until after BT shall have informed the Commission of any such proposed change and the Commission shall not have explicitly opposed such proposed additional change in writing within two weeks of receiving BT's notice of change;
 - (iv) BT shall, as soon as reasonably practicable after receipt of the Commission's Decision, submit to the Commission a list of three nominations of accountancy firms, investment banks or similar undertakings. One such firm or bank or other body shall be appointed, subject to the approval of the Commission, as an independent expert. Such expert shall, if the Commission so requests, report to the Commission on whether or not BT is complying with subparagraph (iii).
- C. If the Businesses have not been sold within the deadline set out in subparagraph B(i), BT shall appoint, subject to the approval of the Commission, a trustee in relation to the Businesses (such trustee may be the expert appointed in accordance with subparagraph B(iv) above). The terms of appointment shall be such that the trustee shall use his best efforts to sell the Businesses at fair market value within [...] (*) months of the Exemption Decision or on such other terms as may be agreed between BT and the Commission.

- D. If the trustee has not sold the Businesses in accordance with paragraph C, the trustee shall be obliged to sell the Businesses for the best possible price they are reasonably able to obtain within [...] (*) months of the Exemption Decision. (The remaining terms and conditions of the trustee's appointment shall continue to apply.)
- E. BT or, where relevant, the trustee shall notify the Commission in writing of the identity of the proposed purchaser of the Business. If, within ten working days of receipt of such notification the Commission has not informed BT or the trustee in writing to the contrary, the proposed purchaser shall be deemed to be acceptable to the Commission.

Condition No 5: (Veto rights)

- A. BSkyB will vote in favour of any resolution of BiB to authorise its subsidiary which is responsible for promotional activities by means of marketing contributions for the subsidisation of set-top boxes ('McCo.') to provide marketing contributions or similar financial contributions in respect of sales of digital interactive set-top boxes where such resolution, where relevant including the proposed means of financing and any other consequent changes, has been recommended by the Chief Executive Officer of BiB and unanimously agreed to by the other BiB partners.
- B. This condition will apply subject to the following criteria being met:
- (i) the relevant digital set-top boxes are capable of receiving and running all of BiB's interactive services either in Open TV or reauthored format;
 - (ii) the operator(s) to whom it is proposed to provide marketing contributions or similar financial contributions in respect of sales of digital interactive set-top boxes have undertaken to make capacity available for BiB's interactive services for a period equivalent to that for which BiB has secured transponder capacity;
 - (iii) in the event that each of the three other BiB shareholders has a commercial interest in such a proposal (independently of their respective interest in BiB), BiB's auditors providing an opinion that the proposal is not, when taken as a whole, significantly less favourable than the provision of marketing contributions in respect of sales of BiB boxes set out in the BiB Business Plan. The auditor may take into account all factors which appear to the auditor to be relevant, including the balance of risk and reward to be derived from such proposal as compared to that to be derived from the provision of marketing contributions in respect of BiB boxes;
 - (iv) the proposal (a) does not require BSkyB to commit funding to BiB or McCo. in addition to that which it

has already committed pursuant to the JVA; (b) is not funded through revenues which would otherwise be available for distribution to BSkyB as distributable profits; and (c) does not result in BSkyB losing joint control of BiB, in the event that the other shareholders commit additional funding to BiB and BSkyB does not; and

- (v) the proposal does not reduce the funds contemplated as available within the agreed business plan for use as marketing contributions towards DTH digital interactive set-top boxes.

Condition No 6: (Conditional access and Simulcrypt)

- A. BSkyB and Sky Subscribers Services Limited ('SSSL') confirm that SSSL will offer to develop and to operate Simulcrypt arrangements with all conditional access providers who administer access to non-SSSL digital television decoders in the United Kingdom. This offer to develop and operate Simulcrypt arrangements will remain open for the duration of the exemption.
- B. SSSL will (and BSkyB will procure that it will) confirm in writing its offer to develop Simulcrypt arrangements within 21 days of a written request from a conditional access provider made in the required manner.
- C. SSSL will (and BSkyB will procure that it will) use all reasonable endeavours to procure that Simulcrypt arrangements are operational within 12 months of the relevant request or within such other timescale as is agreed between the parties and to this end BSkyB and SSSL will cooperate fully with the conditional access provider (and its technology provider, if different).
- D. In the event that BSkyB/SSSL is unable to meet these deadlines, a reasoned request for an extension must be submitted to OFTEL at least one month before the expiry of the deadline, which extension must be granted unless the inability to comply with such time frame is due primarily or exclusively to culpability on the part of BSkyB or SSSL. OFTEL will inform in writing the Commission of its reasons to accept or reject the request for the extension at least two weeks before adopting its decision. If the Commission does not object to OFTEL's proposal within a period of two weeks, it will be understood that the Commission accepts this proposal.
- E. This condition is subject to:
- (i) the conditional access provider who wishes to operate a Simulcrypt arrangement (and its technology provider, if different) cooperating fully with SSSL, and

if appropriate, SSSL's technology provider, News Digital systems Limited (NDS), in developing a Simulcrypt arrangement between the NDS technology administered by SSSL and the conditional access system employed by the conditional access provider and agreeing fair and reasonable commercial terms for such development;

- (ii) the conditional access provider agreeing with SSSL fair and reasonable commercial terms for ongoing arrangements relating to the operation of the Simulcrypt arrangement, including, without limitation, arrangements for the cross carriage of necessary data; and
- (iii) the security of the conditional access provider's system not being compromised such that it creates a threat to the security of the system used by SSSL.

Condition No 7: (Subsidy recovery)

A. The BiB Parties confirm that McCo. will carry out its activities in the United Kingdom for the recovery of marketing contributions under arrangements with SSSL and, as relevant, other conditional access and access control providers each of which is, or will at the relevant time be, subject to the British regime.

B. The recovery of marketing contributions by McCo. shall be permitted provided that the following conditions shall apply:

- (i) recovery in respect of marketing contributions will be made via:
 - (a) charges to customers for broadcast conditional access services (including BSkyB); and
 - (b) charges to customers for access control services (including BiB's subsidiary which carries out the business of an interactive service platform operator 'Services Co.') and such charges will be made on a fair, reasonable and non-discriminatory basis;
- (ii) the subsidy recovery element of any conditional access and access control charges will be based on a charge per card entitled (conditional access) or per authentication (access control) basis which may vary over time provided that:
 - (a) different charges may be made for different classes of conditional access and access control usage, so long as such differentiation does not distort, prevent or restrict competition within or between members of any of the following classes of

purchasers of conditional access or access control services or between such classes: broadcasters, retailers of broadcast services, BiB Services Co. and its competitors, competitors to BiB Services Co. *inter se*, and any other class of purchasers of conditional access or access control services which may from time to time emerge;

- (b) different options taking account of bulk purchases of conditional access and/or access control services may be offered on a non-discriminatory basis;

(iii) recovery will be made:

- (a) in accordance with a scheme (or schemes) allocating recovery charges on an objective basis between customers for broadcast conditional access services and customers for access control services on each of which the Director-General for Telecommunications has:

— been consulted, and

— had prior notice of at least 30 days of the form of the scheme which is put into practice, and

— raised no objection to that form of scheme being put into practice

or

- (b) as otherwise required by the Director-General for Telecommunications from time to time, or

- (c) as determined in the resolution of any dispute:

— by a court of competent jurisdiction, or

— by a competent national authority, or

— by a procedure contemplated by Directive 95/47/EC or the British regime or any other relevant national legislation or regulation implementing the same or any relevant national legislation or regulation governing the provision of access control services, or

— under an appropriate and independent arbitration procedure which the BiB Parties will procure is made available to third parties.

C. Compliance with this condition shall be presumed where the BiB Parties have operated in accordance with the British regime.

D. References in this condition to the Director-General for Telecommunications shall be read as references to such regulator or regulatory body as from time to time is entrusted with the regulation of the British regime.

execution of a supplemental technical agreement, time shall run from the date of receipt in the required manner of the relevant executed supplemental technical agreement, which shall be made available to the interested party within ten working days of the relevant request;

Condition No 8: (Provision of information by McCo.)

A. The BiB Parties shall procure that McCo. shall not in any way discriminate between BiB Services Co. and any other interested party in connection with:

- (i) the dissemination of technical information within its responsibility;
- (ii) the dissemination of changes to technical information within its responsibility which would affect the ability of interested parties to utilise the features of BiB for such purpose.

(d) BSkyB will advise affected parties if the BiB box specification changes immediately after it advises manufacturers of BiB boxes;

(e) BSkyB will advise affected parties of any functional change:

- (i) as regards the intention to introduce such functional change, immediately after completion of the technical specification and before testing together with an estimate of the time at which the change will be implemented;
- (ii) as regards any alterations to the intentions and estimated timings referred to above, immediately after deciding to make such alterations;

B. Where a company within the BiB Group receives a request in the required manner from an interested Party which is not within its responsibility but is within the responsibility of another party, it will provide within ten working days the name and address of each person whom it believes could supply such technical information and forward the request to such person or persons.

provided that if any information falling within the first exclusion in the definition of functional change is information which will affect the ability of affected parties to deliver broadcast and/or interactive services through BiB boxes such information will be advised to them as soon as reasonably practicable;

Condition No 9: (Provision of information by BSkyB)

BSkyB shall take the following steps in relation to the dissemination of technical information regarding the functional features of BiB boxes:

- (a) within ten working days of the date of receipt of a request made in the required manner from an interested party, BSkyB or SSSL will make available to such interested party a non-disclosure agreement;
- (b) within ten working days of the date of receipt in the required manner of a non-disclosure agreement executed by such interested party, BSkyB will make available to such interested party a list of technical information, which shall specify any item which requires the execution of a supplemental technical agreement, should such party wish to have access to it;
- (c) within ten working days of the date of receipt of a request made in the required manner, BSkyB will make available copies of any item of technical information requested by any interested party who has received a list of technical information in accordance with the provision of paragraph (b) above. Where access to a particular item requires

(f) BSkyB shall procure that SSSL complies with the provisions of paragraphs (a) to (e) with regard to technical information within its sphere of responsibility;

(g) where BSkyB or any member of the BSkyB Group receives a request in the required manner from an interested party for technical information which is not within its responsibility, but is within the responsibility of another party, it will provide within ten working days the name and address of each person whom it believes could supply such technical information and forward the request to such person or persons.

Condition No 10: (Anti-avoidance)

A. The BiB parties will ensure that no other member of the BiB Group does anything which would, if carried out by McCo., be a breach of the requirements set out in Conditions Nos 2(A), 7 and 8 or which has the effect of avoiding the effect of any such requirement.

B. Breaches of the abovementioned requirements shall not be a breach of this condition unless they would have been a breach of a condition set out in any of Conditions Nos 2, 7 and 8.

Article 3

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

- (a) such breaches have been clear and serious; or
- (b) such breaches have had serious and material adverse affects on a third party; or
- (c) such breaches have resulted in irreparable and serious damage to a third party; or
- (d) although the individual breaches are minor, there have been several breaches demonstrating a persistent failure properly to comply, provided that, if a breach is shown to exist in a contractual term used in more than one contract or in a commonly used commercial practice, only one breach shall be considered to have occurred, irrespective of the number of such contracts or examples of such practice; or
- (e) where such breaches relate to interested parties who are currently providing services using BiB boxes, the breaches have been of long duration, no regard being made to the duration of any dispute resolution procedure, and provided that in the case of a breach shown to exist in a contractual term, time shall run for the purpose of this indent only when the circumstances to which the term relates have arisen and for so long as they continue.

Article 4

For the purpose of the conditions set out in Article 2, the terms used shall be construed in accordance with the definitions set out in Annex II to this Decision.

Article 5

This Decision is addressed to:

BT Holdings Limited
Newgate Street
London EC1A 7AJ
United Kingdom

British Sky Broadcasting Limited
Grant Way
Isleworth
Middlesex TW7 5QD
United Kingdom

Midland Bank plc
27-32 Poultry
PO Box 648
London EC2P 2BX
United Kingdom

Matsushita Electric Europe (Headquarters) Limited
Furzeground Way
Stockley Park
Uxbridge
Middlesex UB11 1DD
United Kingdom

Done at Brussels, 15 September 1999.

For the Commission

Karel VAN MIERT

Member of the Commission

ANNEX I

List of notified agreements and chronology of their provision to Commission

1. In the notification the parties referred to a number of different agreements, not all of which were supplied with the notification. In response to a request for clarification from the Commission, the parties stated in a letter of 6 August 1997 that the following 16 agreements were notified:
 1. The joint venture agreement and its annexes
 2. EPG content design, look and feel
 3. Start-up costs
 4. Business plan and annual operating plan and budget
 5. Agreed form completion board/extraordinary general meeting resolutions
 6. Agreed form taste and ethics policy
 7. Memorandum and Articles of Association
 8. Box specification
 9. Transponder capacity term sheet
 10. Marketing services agreement
 11. Technology transfer and licensing agreement
 12. Content provider terms
 13. Initial commitments agreement
 14. Digital terrestrial television commitments — deleted in agreements of 4 August 1998
 15. Subordinated loan agreement
 16. Funding loan agreement.
2. By letter of 30 March 1998, the parties provided the Commission with final drafts of 3 more agreements, dated 27 March 1998, which they requested form part of the notification:
 1. Transaction management system agreements, (between BiB and Midland)
 2. Merchant acquiring agreement (between BiB and Midland)
 3. Mondex agreements (between BiB and Midland).
3. By letter of 14 July 1998, the parties provided the Commission with a revised draft of the joint venture agreement itself, dated 6 May 1998, without its annexes. Some of the amendments were made to address the Commission's concerns.
4. By letter of 25 September 1998, the parties provided the Commission with copies of the joint venture agreement and its annexes which were completed by the parties on 4 August 1998. The digital terrestrial television commitments agreement (referred to above at point 14) was deleted from the completed agreements, while the

marketing services agreement (referred to above at point 10) was subdivided into two separate agreements: the marketing contributions services agreement and the advertising and promotional services agreement. Two new agreements were signed, namely a loan agreement and the marketing contributions recovery agreement.

5. An incorrect version of one of the completed agreements concerning the payment of subsidy was provided at that time. The correct version was provided to the Commission on 9 November 1998 in response to a request for information.
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ANNEX II

'Affected party': means any interested party who is at the relevant time delivering broadcast and/or interactive services through BiB boxes (or who is committed to do so and is preparing to commence such services) and who has current non-disclosure agreement.

'Another party': means another member of the BSkyB Group, a member of the BiB Group, a BiB Party or a third party.

'BiB box' or 'BiB boxes': means digital interactive set-top boxes sold with the benefit of marketing contributions provided by BiB.

'BiB box specification': means British Sky Broadcasting STB Specification Issue 3.00 of 30 July 1997, British Sky Broadcasting STB Specification V3.0 Errata V5.0 and British Sky Broadcasting STB Technical Guidelines Version V1.2 of 23 October 1997 as updated and amended from time to time.

'BSkyB Group': means British Sky Broadcasting Group plc.

'Conditional access provider': means a person who is licensed to provide conditional access services pursuant to the class licence granted by the Secretary of State on 7 January 1997 under Section 7 of the Telecommunications Act 1984 for the running of telecommunications systems for the provision of conditional access services.

'Functional change': means information which is intended to be implemented to become technical information and which comprises software intended to be downloaded into BiB boxes for the delivery of broadcast and/or interactive services, but excluding:

- downloads to address problems affecting the operation of software already in BiB boxes,
- downloads related to security of BiB boxes or to the security of any conditional access system or access control system utilised for broadcasts and/or interactive services accessible through BiB boxes.

'Interested party': means any broadcaster, cable operator, telecommunications operator, digital terrestrial television platform operator or satellite direct to home platform operator, whether for broadcast only or for interactive services or for any combination thereof, including BiB Services Co.

'Marketing contributions': means the subsidy which BiB will provide for BiB boxes, as set out in Clause 16 of the JVA and the marketing services agreement.

'Non-disclosure agreement': means the standard form confidentiality agreement, which BSkyB or SSSL may require an interested party to enter into before making available a list of technical information to that interested party and which must be current in the event that an affected party or an interested party is to have access to any information the subject of Condition No 9.

'Non-SSSL digital television decoders': means decoders which do not contain the conditional access technology employed by SSSL.

'Purpose': means, in respect of any interested party, the purpose of utilising the features of BiB boxes to deliver broadcast services, whether or not interactive, through BiB boxes and no other purpose.

'Request': means a written request for any item or items of technical information or for a list of technical information in either case for the purpose.

'Required manner': means in respect of any request or other communication by an interested party or conditional access provider:

- to BSkyB: a registered letter sent to BSkyB's registered office addressed to the head of regulatory affairs,
- to BiB: a registered letter sent to BiB's registered office addressed to the compliance officer.

'Simulcrypt': means the use of the European common scrambling algorithm in two populations of digital television decoders, each population containing a different conditional access technology, in order to facilitate the ability of retailers of digital television services using either of such conditional access technologies to opt to offer their services to consumers via digital television decoders containing the other conditional access technology (subject to such other population of decoders containing the requisite level of functionality for the type of services proposed to be offered by such retailer) together with the associated synchronisation of the two technologies required to implement such process.

'Supplemental technical agreement': means any appropriate licensing agreement which BSkyB or SSSL may require in relation to the release of a specific item of technical information.

'Technical information': means information about the current functional technical characteristics of BiB boxes, including the BiB box specification, which is the subject of completed technical specifications in written and/or diagrammatic form, but excluding:

- information, including information in relation to proprietary technology, which it is essential for a conditional access services supplier or access control services supplier and/or any of its technology suppliers to maintain in strict confidence in order to protect the security and integrity of its systems, or of the conditional access services or access control services which it supplies or intends to supply and/or its ability to provide a secure and confidential service to each of its customers, and
- information which any member of the BiB Group, BSkyB or SSSL has a statutory duty or obligation under any regulatory licence binding upon it or SSSL to maintain in confidence, and
- information which any member of the BiB Group, BSkyB or SSSL is contractually bound to maintain in confidence and has no right to divulge to third parties, and
- information required exclusively for the purpose of manufacturing a box, and
- in respect of SSSL, any information which does not relate to the operational and functional aspects of BiB boxes, which arise from the design of the conditional access or access control system or from the design of the electronic programme guide,

and, for the avoidance of doubt, the above definition of technical information does not include creative information about the manner in which the functional technical characteristics of BiB boxes may be utilised for broadcasting and interactive applications.

'Transfer pricing guidelines': means the OECD transfer pricing guidelines for multinational enterprises and tax administrations, as updated from time to time.

'British regime': means the British regime for conditional access and access control services, which incorporates the British implementation of the relevant parts of Directive 95/47/EC of the European Parliament and of the Council, namely:

- the Advanced Television Services Regulations 1996 (as amended) (SI 1996 Nos 3151 and 3197), and
- the Conditional Access Services Class Licence granted on 7 January 1997 pursuant to Section 7 of the Telecommunications Act 1984, and
- the Telecommunications Class Licence ('TSL') as revoked and re-issued on 31 December 1997 pursuant to Section 7 of the Telecommunications Act 1984, and
- any re-enactment, re-issue or amendment of the above or any of them, provided that the reference in Condition No 15 to Regulation 11(4)-(8) of the Advanced Television Services Regulations 1996 is to that Regulation as in force at the date of publication of the Article 19(3) Notice/Decision.

By way of explanation, the British regime contains provisions for the resolution by the Director-General for Telecommunications of disputes in a number of ways.
