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96/177/EC: Commission Decision of 19 July 1995 declaring a concentration to be incompatible with the common market and the functioning of the EEA Agreement (Case No IV/M.490 - Nordic Satellite Distribution) (Only the English text is authentic) (Text with EEA relevance)

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COMMISSION DECISION of 19 July 1995 declaring a concentration to be incompatible with the common market and the functioning of the EEA Agreement (Case No IV/M.490 - Nordic Satellite Distribution) (Only the English text is authentic) (Text with EEA relevance) (96/177/EC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Community,

Having regard to Council Regulation (EEC) No 4064/89 of 21 December 1989 on the control of concentrations between undertakings (1), as amended by Regulation (EEC) No 2367/90 (2), and in particular Article 8 (3) thereof,

Having regard to Article 57 of the Agreement on the European Economic Area,

Having regard to the Commission Decision of 24 March 1995 to initiate proceedings in this case,

Having given the undertakings concerned the opportunity to make known their views on the objections raised by the Commission,

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

Whereas:

(1) The procedure under consideration concerns the proposed setting up, by Norsk Telekom AS ('NT`), Tele Danmark A/S ('TD`) and Industriförvaltnings AB Kinnevik ('Kinnevik`) of a joint venture under the name of Nordic Satellite Distribution ('NSD`).

(2) By decision dated 13 March 1995, the Commission ordered the suspension of the concentration as a whole, pursuant to Article 7 (2) and Article 18 (2) of Regulation (EEC) No 4064/89 (hereinafter: 'the Merger Regulation`), until it took a final decision.

(3) By decision of 24 March 1995, the Commission found that the notified concentration raised serious doubts as to its compatibility with the common market. The Commission accordingly initiated proceedings in this case, pursuant to Article 6 (1) (c) of the Merger Regulation.

I. THE PARTIES

(4) NT, TD and Kinnevik have set up a joint venture called Nordic Satellite Distribution (NSD) for the provision of satellite transmission services and distribution services via cable networks or direct-to-home broadcasts for television programmes in the Nordic region (Denmark, Sweden, Norway and Finland).

(5) NT is a Norwegian company controlled by Telenor AS, which is in turn owned by the Norwegian State. Telenor AS is the principal provider of telephone services in Norway and owns and/or leases transponder capacity from the satellites Thor, Intelsat and TV-Sat, situated at 1 degree West. NT owns through Telenor Avidi AS a large cable network in Norway. Finally, NT also provides television distribution services to the direct-to-home market in Norway, Sweden and Finland and in Denmark through its subsidiary Telenor CTV.

(6) TD is the Danish telecom operator, 51 % owned by the Danish State. It operates under a concession granting it the exclusive right to provide public voice-telephony services and other related services in Denmark, as well as to install and operate the Danish public telecommunications network infrastructure. TD owns a national broadband distribution network called the Hybrid Network, which is currently used for the transmission of radio and television signals to local distribution networks. TD's cable subsidiaries distribute TV channels to its own and other local networks.

(7) Kinnevik is a private Swedish group of companies with activities mainly in forestry, farming, packaging materials, television and media, and telecommunications. In the latter areas Kinnevik owns or controls companies in the Scandinavian countries which are mainly active in the following main fields:

- satellite television broadcasting (to direct-to-home and cable subscribers) of commercial channels (TV 3, TV G, TV 6, Z-TV) and pay-tv channels (TV 1000, Film Max and TV 1000 Cinema),

- distribution of satellite television (through its subsidiaries Viasat Sweden, Viasat Norway and Viasat Denmark),

- Conditional Access Systems,

- radio broadcasting.

In addition, Kinnevik has a 23 % shareholding in the commercial television channel TV 4 (a Swedish channel) and (. . .) (4).

Finally, Kinnevik has a 37,4 % shareholding in Kabelvision AB, a cable television operator in Sweden.

II. THE OPERATION

(8) The operation involves the creation, by NT, TD and Kinnevik, of the joint venture Nordic Satellite Distribution AS (NSD) which will be in the business of providing transponder capacity and the transmission and distribution of satellite TV channels to the Nordic market.

(9) It is the aim of NSD to establish an attractive satellite position for transmission of TV signals to the Nordic countries.

(10) NSD will provide satellite TV channels to cable TV operators and to direct-to-home households.

(11) Is is the intention that the distribution of satellite TV channels to direct-to-home users and to cable TV networks provided by NSD shall take place through the parents' distribution companies Viasat and Telenor CTV and through the parents' cable TV operators.

III. COMMUNITY/EEA DIMENSION

(12) NT, TD and Kinnevik have a combined aggregate worldwide turnover of ECU 5 260 million. TD and Kinnevik have a Community-wide turnover of more than ECU 250 million, of which not more than two-thirds is achieved in one and the same Member State. The operation therefore has a Community dimension.

(13) At the same time, since the combined turnover of the undertakings concerned in the territory of the EFTA States equals more than 25 % of their total turnover in the EEA territory, the operation is also a cooperation case in accordance with Article 58 and Protocol 24 of the EEA Agreement.

IV. THE STRUCTURE AND TECHNOLOGY OF THE INDUSTRY

(14) The provider of a TV channel, whether this is a public, advertising based, mini-pay or pay-TV, is called a broadcaster.

(15) If the channel is to be transmitted via satellite from the studio, the TV signals are sent to an up-link station. Up-link is the process of sending a TV signal from an earth station to a satellite. The TV signals can be broadcast in clear or encrypted form.

(16) From the up-link station the TV signals are sent to the satellite that retransmits them. Satellites used for TV are placed in a geostationary orbit position and are therefore able to maintain a constant beam on a given territory. Each satellite contains several transponders that are elements on a satellite used to received and transmit TV signals. The geographical area where the TV signals transmitted by a transponder can be received by direct-to-home customers having standard receiving equipment is called the footprint. As a rule, with the present technology (analogue), each transponder will have a capacity to transmit one TV channel. The introduction of digital technology is expected to increase the capacity of each transponder five to ten times.

(17) The TV signal is received by a satellite dish on the ground. The receivers can be (1) direct-to-home households with (normally) smaller dishes; (2) cable TV operators with one or more much larger dishes; or (3) SMATV operators (5).

(18) A special technical infrastructure is required to operate pay-TV. This technical infrastructure is called a conditional access system, and is required to ensure that only authorised viewers, i.e. subscribers to the particular encrypted channel(s), can receive the channel(s). Pay-TV are invariable encrypted. In the Nordic area all channels broadcasted by satellite are encrypted in contrast to other parts of Europe. When encryption takes place a datastream is inserted along with the TV signal for use by the conditional access system. A conditional access system consists essentially of (1) an adaptor for decryption (decoder), (2) a subscriber management system (SMS), (3) a Subscriber Authorization System (SAS) and, finally, (4) an encryption system.

(19) To receive encrypted TV signals a consumer needs a decoder equipped with a decryption facility and a security processor. The decoder decrypts the television picture, which is encrypted when the TV signal is transmitted.

(20) The conditional access system requires the transmission of a data stream together with the TV-signal, containing information on the channels or packages of channels subscribed to and on the entitlement of the subscribers to receive the programmes. If an open encryption system is used (see below) a 'personal` smart card is made available to the viewer which is inserted into the decoder to scan through the datastream that comes along with the TV signal to find out if its identity is present. If the smart card finds its 'unique key`, the decoder decrypts the TV signal and passes it on to the TV set.

(21) The conditional access system is based on the use of an encryption system in which the messages are encrypted. A broadcaster needs an agreement with a supplier giving him the right to encrypt and decode TV channels in a given encryption system. However, this is not the case for cable TV operators, since it is possible for cable operators to develop and use their own encryption system. An encryption system can either be closed or open.

(22) A closed system implies that only broadcasters signing an agreement with the owner of the system are allowed to encrypt in this system. Normally, such an agreement includes a right for a particular operator to administrate the SMS and, thus, prevents other operators from using the system. The use of a closed system makes it necessary for the consumer to purchase or hire a special decoder to receive TV channels encrypted in this system. This means that the households have to buy or rent an additional decoder if they want to receive TV channels which are encrypted in another system.

(23) An open system means that decoders are available from many sources and that the consumer can, with the same decoder, receive TV channels in different open systems by using different smart cards. Normally, any broadcaster for a minor payment can acquire the right from the owner to use such an open system.

(24) Nearly all European encryption systems are closed; for example Videocrypt (used by BSkyB and Adult Channel in the UK and by Multichoice in more than 30 European countries including the Nordic countries) and Syster/Nagravision (used by Canal+ in France and Spain, Premiere in Germany and Austria and Teleclub in Switzerland). However, as a rule, open encryption systems are used in the Nordic countries.

(25) In addition to the decoder base and access to an encryption system a subscriber management system ('SMS`) and a subscriber authorization system ('SAS`) are also needed. SMS is the computer system in charge of managing the subscriber base (the billing and collection of subscriptions, telephone answering, statistics, etc.). SAS is a software designed to open or close the authorization of the individual subscriber to receive pay-TV channels. Control of the SMS, which contains vital information about the customers, would be especially important for a pay-TV broadcaster or a cable TV operator. It must be assumed that such operators would be very reluctant to let a competitor take over their SMS.

(26) Transparent transmission means that encryption takes place when the signal is transmitted and decryption first takes place in the household. At the moment, direct-to-home households receive transparent transmission. This is not currently the case for households connected to cable TV networks. Cable TV networks consists to a large extent of several separate cable units, and in each unit there is a 'head-end` in which reception takes place. Currently the cable operators need to have one decoder for each head-end and for each TV channel. By transparent transmission, a TV household connected to a cable TV network receives the signal directly from the satellite and, hence, the cable TV operator could save an encoding and decoding system in each head-end.

V. CONCENTRATION

JOINT CONTROL

(27) NSD is to be owned 33,3 % by each of NT, TD and Kinnevik. Its board of directors will consist of four directors: each party will nominate one director and one independent director who is to be nominated subject to agreement between the parties shall also be the chairman of the board.

(28) According to Article 5.2 of NSD's Shareholders' Agreement, board resolutions will be adopted by a majority of directors, except for a number of matters for which unanimity is required. These matters include:

(. . .).

(29) The chairman of the board of directors shall (. . .).

(30) As a result of the above, it can be concluded that NSD will be jointly controlled by its three parent companies.

FULL FUNCTION JOINT VENTURE

(31) NSD's main activities will be the following:

- to negotiate and enter into agreements with programme providers (broadcasters) for distribution of television channels via satellite,

- to establish a leading satellite position (named by the parties as a Nordic 'Hot Bird`) for the Nordic market by leasing satellite capacity in the orbital positions 1 °W and 5 °E,

- to create a programme strategy based on a new package of television channels adapted to the Nordic countries,

- to distribute such a package via satellite to the cable television (cable TV), master antenna television (SMATV) and direct-to-home markets in the Nordic countries. This will include offering Subscriber Management Services, distributing smart cards and operating a Subscriber Access System,

- to promote and implement a digital transmission standard and a joint Nordic encryption system to be used for cable TV, SMATV and direct-to-home,

- to develop new products and services related to the activities of the company. (. . . indication of services not to be provided by NSD).

(32) NSD has been established for an indefinite term. It will have all the necessary assets and staff in order to carry out its business activity on a lasting basis.

(33) When NSD starts to operate, NSD itself will be the contracting party to any new contracts to be concluded with broadcasters. All Viasat's and Telenor CTV's agreements with broadcasters shall be transferred to NSD, provided that such broadcasters give their consent.

(34) NSD will provide satellite transponder capacity and satellite network services subleased from Telenor and other independent satellite operators to broadcasters. Telenor owns and operates the Thor satellite, positioned at 1 °W and has reserved a number of transponders on the Intelsat satellite in the same orbital position. Furthermore, Telenor controls all transponders on the satellite TV-Sat, also in the position 1 °W.

(35) According to the Cooperation Agreement between Telenor and NSD, these companies will have a mutual right of first refusal for the lease and provision of satellite transponder capacity for the transmission of television programmes (. . .). This means that NSD shall have a right of first refusal:

- for the lease of satellite transponder capacity and satellite network services from Telenor,

- for the provision of satellite capacity and satellite network services to third parties wishing to broadcast in the Nordic countries who had initially approached Telenor.

(36) Telenor has a right of first refusal to provide NSD or its affiliates with all the transponder capacity and satellite network services they may need. In the case of excess capacity in the satellite network service leased by NSD, Telenor is entitled to use this capacity (. . .).

(37) In addition, Kinnevik and TD have entered into lease agreements with the Swedish satellite operator Nordiska Satelitaktiebolaget (NSAB) for the lease of (. . .) transponders situated at 5 °E. On this position, NSAB owns the Sirius satellite and the Tele-X satellite, each with five transponders. (. . . details on the transponder lease agreements and the special rights of Kinnevik and TD with respect to the NSAB satellites on 5 °E).

(38) NSD will offer an integrated satellite transmission service to programme providers. The fact that NSD will sublease satellite transponder capacity and network services from Telenor or TD/Kinnevik does not put into question its full-function character at this level, since NSD will control the use of this transponder capacity for a long time. Lease contracts for satellite transponder capacity are usually concluded for a long period (7 to 10 years) which normally coincides with the life of the satellite itself. NSD will therefore be able to develop its own commercial strategy on a lasting basis.

(39) NSD will develop a new package of television channels which will be specifically adapted to the Nordic audience in terms of programme mix and language.

(40) Regarding the direct-to-home distribution of TV channels as stated above, before the setting-up of NSD both NT and Kinnevik offered television distribution services in the Nordic countries. NSD will now grant to the Viasat companies the exclusive right to distribute. NSD's television channels to the direct-to-home and SMATV households in Denmark and to the direct-to-home, SMATV and cable TV households in Sweden. Viasat Sweden will continue to be 100 % owned by Kinnevik, but Viasat Denmark will be owned by Kinnevik and TD (51 % - 49 %). TD has a conditional option to acquire an additonal (. . .) % of the share capital in Viasat Denmark in 1998.

(41) In Norway NSD will have, for the time being, two representatives: Viasat Norway (100 % owned by Kinnevik) and Telenor CTV. It is foreseen (. . .).

(42) As the exclusive distributor of NSD, the Viasat companies will have:

- the right and obligation to distribute the TV channels provided by NSD,

- the possibility to distribute other television channels subject to NSD's approval. The only limitation (. . .).

(43) The price to subscribers of the individual channels included in NSD's package will be decided by (. . .). According to NSD's Programme Strategy, NSD's distributors shall prepare every year a marketing budget per channel or package of channels, which shall reflect the agreements entered into between NSD and the broadcaster. These programme budgets shall be presented to and approved by NSD, and any deviations from them shall be approved by NSD.

(44) The fact that, as stated above, Viasat's and Telenor CTV's agreements with broadcasters will be transferred to NSD with effect from NSD's start of operations, and that NSD itself will negotiate and enter into any new agreements shows that NSD will take up all responsibilities with respect to distribution. Although the Viasat companies and Telenor CTV will not be owned by NSD (except for Viasat Finland), they will carry out NSD's strategic decisions on distribution, on the basis of (. . .) and budget approved by NSD.

(45) NSD shall provide and control its subscriber access system (SAS). Viasat and Telenor CTV will keep the subscriber management system (SMS), and will therefore make available smart cards to customers, and carry out the administration of subscriptions and payments, but they shall pay a monthly fee per smart card for the SAS services provided by NSD. NSD also intends to develop a new SAS for digital services (. . .).

(46) With respect to cable distribution, NT and TD's cable operators will be appointed NSD's representatives for the procurement and sale of TV channels on the cable TV market and a part of the SMATV market. This implies that:

- NT and TD's cable operators shall have the right and obligation to procure the sale of satellite TV channels provided by NSD within their respective geographic areas, but NSD is entitled to sell any channel to other cable or antenna operators within the same area,

- the two cable operators shall be able to distribute a TV channel which NSD cannot provide subject to NSD's prior approval,

- NSD shall have (. . .).

(47) In a similar way as that agreed with Viasat, NT and TD's cable operator's agreements with broadcasters shall be transferred to NSD with effect from NSD's start of operations subject to the approval of the broadcasters. NSD will therefore assume the full responsibility for the provision of satellite TV channels to the cable networks owned by the parties.

(48) Despite the fact that NSD will be relatively small in economic terms, since it will only employ around (. . .) people the first year and around (. . .) within two or three years and it will have assets for a value of around ECU (. . .) million as a result of all the above elements, it can be concluded that NSD will have all the necessary resources to perform all the functions normally carried out by companies operating in the same market, and will therefore constitute a full-function joint venture.

COOPERATIVE ASPECTS

(49) NSD's parent companies are currently competitors mainly at the distribution level, since in the direct-to-home segment in Norway, Denmark and Sweden NT, through Telenor CTV, competes with Kinnevik's Viasat companies and in some regions there is competition between Viasat and the cable operators of TD and NT.

(50) In the direct-to-home distribution market (. . .) Viasat (. . .) will become the exclusive distributor of NSD's package of TV channels in these countries. In the meantime, the transfer of all distribution contracts to NSD and the exclusive right to negotiate new ones prevents the parent companies from providing direct-to-home distribution services on their own and from developing a distribution strategy to pursue their individual interests.

(51) The parties' cable operators and Viasat will continue operating in the same areas, but they will all act as NSD's representatives offering as a general rule the same package of satellite TV channels. As for the direct-to-home segment, the transferral of the cable operators' contracts as well as the right to negotiate to NSD prevents the parent companies from providing these services on their own.

(52) There is also competition at present between NT and TD in a very marginal market in economic terms: TV up-linking services to the satellite (see (56)). Both parents currently provide these services from their respective countries, but the insignificance of this market in economic terms clearly shows that the operation has neither the object or the effect of coordinating the activities of these two parent companies with respect to up-linking services.

(53) Finally, the activities of NSD's parent companies in upstream or downstream markets are not likely to lead to any coordination of their competitive behaviour. NT does not compete as a satellite operator with TD or Kinnevik. Kinnevik will broadcast its pay-TV and commercial channels through NSD, but none of the other parties are broadcasters.

(54) The facts described above lead to the conclusion that the setting-up of NSD has neither the object nor the effect of coordinating the competitive behaviour of undertakings which remain independent. It can therefore be concluded that the present operation constitutes a concentration within the meaning of Article 3 of the Merger Regulation.

VI. RELEVANT PRODUCT MARKETS

(55) The operation involves the following three product markets:

(i) provision of satellite TV transponder capacity and related services to broadcasters;

(ii) distribution of pay-TV and other encrypted TV channels to direct-to-home households;

(iii) operation of cable TV networks (see (165)).

(i) Provision of satellite TV transponder capacity and related services to broadcasters

(56) Several companies are in the business of providing satellite transponder capacity. These companies - satellite operators - launch and operate satellites and lease transponders to broadcasters for transmissions of TV signals. According to the parties, around 250 transponders are available for transmission of TV signals to Europe (turnover approximately ECU 625 Million). The most important satellite TV channels in the Nordic countries are currently being provided by Astra, Thor, Intelsat 702 and Sirius. These transponders are normally leased to broadcasters who through licensing arrangements deliver their TV channels to the distributors of cable-TV and direct-to-home consumers.

(57) Distribution of TV signals via satellite (transponders) is a market distinct from TV distribution by terrestrial links, since considerable differences exist between the two modes of distribution both technically and financially (see Decision IV/M.469 - MSG Media Service). The NSD operation will result in a reorganization of existing transponder capacity and will not lead to an enlargement of satellite transponder capacity suitable for Nordic viewers.

(ii) Distribution of satellite pay-TV and other encrypted TV channels to direct-to-home households

(58) On this market (hereafter called direct-to-home distribution), the distributor of pay-TV and other encrypted channels market and sells the channels or a package of channels to the direct-to-home households and provides the households with the necessary smartcard. In the Nordic area most direct-to-home distributors sell the channels in packages (a bouquet of channels) of which some contain up to 25 channels of all types. Normally, the distributor will offer a 'basic package` that contains mixed financed pay-TV and advertising-financed TV channels. In addition, the customer has the option of adding other TV channels to the package. Several pay-TV channels and other encrypted channels are marketed in the Nordic countries.

(59) There are currently three major distributors in the Nordic countries: Multichoice (a distribution company owned by FilmNet) and Kinnevik and NT's distribution companies. It is intended that the direct-to-home distribution of TV channels by NSD shall take place through the parent distribution companies on an exclusive basis (see (40) to (42)).

(60) The market for direct-to-home distribution has a high growth potential. Compared to transmission via cable networks, direct-to-home reception is currently a smaller segment of the market (see (62)). (. . .), there are approximately 720 000 direct-to-home households in the Nordic countries (Sweden has around 360 000 direct-to-home households, Denmark 170 000, Norway 160 000 and Finland around 30 000). However, the parties estimate that at the end of 1998 the Nordic direct-to-home segment will comprise (. . .) million households.

(iii) Operating cable-TV networks

(61) The cable operators provide the following services to households connected to their networks: maintainance of the network, sale and marketing of TV channels. In addition, the cable operators target the SMATV households in order to sell the TV channels also to this segment. Households wanting access to pay-TV normally rent a decoder from the cable TV operator. However, cable TV operators normally operate heir own SMS and SAS based on their own encryption system and sell these services to broadcasters wanting to transmit pay-TV or other encrypted channels in the network.

(62) From the point of view of the viewer there are considerable differences between the possible transmission routes - terrestrial, direct-to-home satellite and cable - which affect both technical requirements and finance. While terrestrial transmission and satellite television only require the viewer to install an aerial or a satellite dish at his own expense, cable TV is dependent on the maintenance of a cable network, which is financed by the viewer by means of cable fees (see IV/M.469 - MSG/Media Service). As shown, currently approximately 4,3 million of the 10 million Nordic households are connected to cable TV networks and around 0,7 million are connected to SMATV of which some receive the signal from cable TV operators.

>TABLE>

(63) Cable TV is currently the predominant transmission route for satellite-distributed TV in the Nordic countries. However, the cable TV market has reached a saturation point and is currently characterized by slow growth, and it is expected that no more than 50 % to 60 % of the 10 million TV households in the Nordic countries are likely in the foreseeable future to be cabled, largely because of terrain difficulties and the dispersion of the population in a wide geographical area which would be uneconomical to cable. It could be argued that there exists a certain competitive link between the cable TV market and the market for direct-to-home satellite distribution. However, the choice between transmission by cable or direct-to-home is not possible for a large number of currently not cabled households in the Nordic countries in the foreseeable future.

A further element which can limit the option for a household in the fact that in some households the acquisition of satellite dishes is prohibited on aesthetic grounds by the landlord or by the owners' association in the case of multiple dwellings. Lastly, a household already on cable or having a satellite receiver is normally not ready to make a further investment in another form of transmission (lock-in-effect). For the reasons mentioned above, it appears that the operation of cable networks is an independent relevant market.

(64) The Nordic cable TV market consists of a number of cable networks of different size each consisting of several separate cable units. At the individual head-ends the cable TV operator will normally have satellite dishes directed towards all relevant satellite alternatives.

VII. RELEVANT GEOGRAPHIC MARKET

(i) Provision of satellite TV transponder capacity and related services to broadcasters

(65) A broadcaster wishing to transmit to a specific area needs a transponder with a footprint (the geographical area where the TV signals distributed by a satellite can be received by direct-to-home households having standard receiving equipment) that covers the relevant geographical area.

(66) Technically, it is possible for the households in the Nordic countries to receive signals from all European satellites. Quality of reception depends on the size of the receiving dish and on the strength of the transponder signal. However, economic and aesthetic considerations will limit the dish size generally used and, as a rule, the Nordic direct-to-home households will only have equipment which is adequate to receive signals from certain satellite positions. For cable TV operators the situation is quite different, since, as they are not faced with the same economics and aesthetic restrictions as the direct-to-home households, they will be able to receive signals from nearly all European satellite positions.

(67) For transmission to direct-to-home households, one way of defining the geographical scope of transponders is to consider the size of the dish necessary to receive good quality signals from the transponders in question. According to technical information (. . .), Société Européenne des Satellites (SES), which owns the Astra satellites, has specified its main markets to be areas where signals can be received by dishes of up to 60 cm in diameter. On the basis of a 60 cm dish size, the Nordic satellites (Intelsat702/Thor/TV-Sat and Sirius/Tele-X), the Astra satellites and the Eutelsat satellites are relevant for Nordic viewers.

(68) The transponders on the Nordic satellites have a footprint which enables all Nordic viewers with a 60 cm dish to receive the signals from the transponders. Astra and Eutelsat are also relevant for the Nordic area since direct-to-home households in the whole of Denmark and in the southern parts of Norway and Sweden with a 60 cm dish could receive signals from some of Eutelsat and Astra's transponders. Astra cannot be received in Finland with a 60 cm dish.

(69) From a technical point of view, for a broadcaster who wants to target only Denmark the transponders on Astra and Eutelsat would be as relevant as the Nordic transponders. However, a broadcaster who wants to operate on a Nordic basis, transponders which only cover parts of the Nordic market will not be considered as an attractive alternative. For such a broadcaster there will be imperfect substitution between NSD's transponders and the transponders on Astra and Eutelsat. This is supported by information (. . .) in which it is stated that prior to the establishment of the Nordic satellite positions there was no transponder capacity with an ideal foot-print for the Nordic countries.

(70) Furthermore, it has to be borne in mind that compared to the Nordic satellites, Astra and Eutelsat are international businesses with a Central European scope. Information (. . .) indicates that the fee for leasing a transponder on Astra or Eutelsat will be (. . .) higher than the fee will be for leasing a Nordic satellite transponder. If NSD maintains a considerable price difference, transponders on Astra and Eutelsat will not be an alternative for a broadcaster who wants to be a competitive player in the Nordic area.

(71) However, in this case, technical questions relating to footprints and size of dishes, and the prices of transponders are not determinant for the definition of the relevant geographic market since the operation will create such barriers to entry for providers of transponder capacity suitable for Nordic viewers that the operation in itself will lead to the creation of a separate Nordic market. As will be shown in the assessment, through its control over the transponder capacity and the links to Kinnevik as an important broadcaster and distributor of Nordic TV channels, and through the links to TD and NT as important cable operators, NSD will be in a position to foreclose other satellite operators from leasing transponders to broadcasters wanting to target Nordic viewers.

(ii) Distribution of satellite pay-TV and other encrypted TV channels to direct-to-home households

(72) Direct-to-home distribution is a retail operation with direct local contact with the viewer, FilmNet, Kinnevik and NT operate national companies providing these services. Marketing of the services is national. Furthermore, the operation itself will foreclose the Nordic region for new distribution companies, since it will in effect be impossible for a potential entrant to create a smart card with an attractive programme package (see (138) to (141)). The market is likely to be national, but it will not change the assessment whether the market is defined as national or Nordic and therefore this question can be left open.

(iii) Operation of cable TV networks

(73) Competition between operators for connections takes place on a national scale in terms of marketing efforts. That seems to be particularly the case in Denmark. Cable TV operators are faced with different market conditions in different countries in terms of geography, marketing and legislation. Operation of cable TV networks is, therefore, a national market.

VIII. ASSESSMENT

(74) The operation essentially involves the following separate markets:

A. provision of satellite TV transponder capacity and related services to broadcasters;

B. operation of cable TV networks;

C. distribution of satellite pay-TV and other encrypted TV channels to direct-to-home households.

The operation will have an impact on the affected markets either horizontally or through the vertical links created. NSD will, after the operation, control an integrated infrastructure for the provision of TV services to the Nordic area as well as the right to transmit some of the most important TV channels in the area.

The assessment first discusses the effect of the operation on the transponder capacity market (section A). It goes on to deal with the operation's effects on the markets for cable TV (section B) and distribution of satellite pay-TV and other encrypted channels to direct-to-home households (section C). Section D discusses issues relating to economic and technical progress and section E discusses undertakings which the parties propose to give. The Commission's conclusions are set out in section F.

A. PROVISION OF SATELLITE TV TRANSPONDER CAPACITY AND RELATED SERVICES TO BROADCASTERS

A.1. Market structure and capacity

(a) Transponder capacity available for the Nordic 'Hot Bird`

(75) Currently, there are five satellites in the position 1 °W and 5 °E. These are:

- Thor with five transponders (. . . number of transponders to be used by NSD. . .),

- Intelsat with 10 transponders (. . . number of transponders to be used by NSD. . .),

- TV-Sat with five transponders (. . . number of transponders to be used by NSD. . .),

- Sirius, owned by the Swedish State-owned company NSAB, with five trasnponders (. . . number of transponders to be used by NSD. . .),

- Tele-X, owned by NSAB, with five transponders (. . . number of transponders to be used by NSD. . .).

Telenor owns and operates the Thor satellite, positioned at 1° West. Furthermore, Telenor has leased from German Telecom the TV-Sat satellite and, in addition, has reserved all the transponders on the Intelsat satellite, both satellites also located at 1 degree West. At the same time, Kinnevik and TD have entered into an agreement with the Swedish satellite operator NSAB for the lease of four transponders on the Sinus satellite and two on the Tele-X satellite, both situated at 5 °E. This agreement is intended to be transferred to NSD prior to the date of the commencement of operations.

(76) NSD and its parents will directly or indirectly control a large majority of the capacity available for the Nordic 'Hot Bird`. Of a total of 30 transponders in the position 1 °W and 5 °E, NSD will immediately lease 19.

(b) Competition from Astra and Eutelsat

(77) The parties claim that the Astra and, to a lesser extent, the Eutelsat satellites are actual competitors to the Nordic satellites, since direct-to-home households in the Southern parts of Scandinavia can receive signals from some of Eutelsat's and Astra's transponders with standard equipment. According to the parties, more than 50 transponders on Astra and Eutelsat are currently used for channels which are aimed at or of interest to Nordic households.

(78) It is true that today approximately 70 % of the Nordic direct-to-home households have their dishes directed to Astra. In addition, practically all Nordic cable networks have dishes directed to Astra and Eutelsat. However, it has to be borne in mind that, except for Kinnevik's four channels and a pay-TV channel which is transmitted from Astra to Nordic viewers, all channels on Astra and Eutelsat are in foreign languages and aimed at other non-Nordic countries. Several of these channels can be said to be of interest to Nordic countries. Several of these channels can be said to be of interest to Nordic households, for example Eurosport and MTV Europe, and it cannot be excluded that others are popular in certain regions (for example German language programmes in the southern parts of Denmark). Nevertheless, national channels are by far the most popular. National language is the most decisive element in the selection of a channel by the viewer and to make cost-effective TV advertising, the industry has to use national TV channels.

(79) In addition, Astra and Eutelsat have a central European scope. They have up to now not shown a particular interest in the Nordic area and the foot prints of the satellites do not cover the whole Nordic area. The satellites which NSD controls have foot prints aimed at Nordic viewers in particular. Consequently, broadcasters using NSD's transponders will obtain an advantageous position compared to competitors without access to NSD's transponders. Anyhow, because of the operation Astra and Eutelsat will not be significant competitors to NSD's Hot Bird as providers of transponders to broadcasters wanting to target Nordic viewers. The reasons are as follows:

(i) the importance of Kinnevik's TV channels

Through the link to Kinnevik as a broadcaster, NSD will be able to offer some very popular Nordic TV channels on an exclusive basis. As a result, the majority of Nordic direct-to-home households will direct their dishes toward NDS's satellites;

(ii) the link to Kinnevik as a major distributor

Getting onto the Viasat package of satellite TV channels will be vital for broadcasters aiming at the Nordic DTH market, because of the pulling power of the popular Kinnevik channels being offered there. By the operation, Viasat will exclusively distribute these channels available from the NSD satellites. Therefore, it will be vital for broadcasters to be on the NSD satellites so as to be on the Viasat distribution package;

(iii) the link to the parents as major cable TV operators

Because of NSD's link to TD and NT as major cable TV operators a broadcaster must anticipate the possibility of not getting access to a large part of the Nordic cable networks if it transmits from Astra or Eutelsat;

(iv) the price difference

(. . .);

(v) no capacity on Astra and Eutelsat

All transponder capacity on Astra and Eutelsat is currently occupied.

(i) The importance of Kinnevik's TV channels

(80) The relationship between Kinnevik as a broadcaster and NSD as a supplier of transponder services will be instrumental for the parties in creating a 'Nordic Hot Bird`. NSD will offer a package of approximately (15 to 30) programmes including the TV3 channels of Kinnevik. The TV3 channels will play a major role in creating the 'Nordic Hot Bird`. When launched (TV3 Sweden in 1989 and subsequently TV3 Denmark and TV3 Norway in 1991) they were transmitted from Astra. The TV3 channels became very popular TV channels in these countries. According to the parties TV3 can be watched by about 50 % of all households in Sweden, Norway and Denmark. Information from cable operators indicates that more than 70 % of their viewers regularly watch TV3 and that the channel ranks among the four most popular channels in each country. Cable TV operators generally indicated that TV3 is the most important channel to carry, apart from the national terrestrially distributed channels. In this connection, one has to bear in mind that Nordic viewers can watch the national channels without having to buy a dish or to subscribe to cable TV. Therefore, the reason for a household to buy a dish or subscribe to cable TV is to get access to additional channels, of which TV3 is the most important.

(81) In addition, the parties will within a short time be able to add more attractive TV channels to the package. Kinnevik owns other channels (TV6, TVG, Z-TV) which will also be transmitted exclusively from NSD's transponders.

(82) It appears that following the operation Astra will not be a major provider of satellite TV channels to the Nordic market. Currently, five transponders on Astra are used for Nordic TV channels and no Nordic TV channels are transmitted from Eutelsat. Four of the five Nordic transponders on Astra are leased by Kinnevik and used for its channel TV3 Denmark, TV3 Sweden, TV3 Norway and TV1000. Because of the operation, (. . .).

(83) Kinnevik's four transponders on Astra (. . .).

(84) Furthermore, NSD will also provide Astra's most popular foreign language TV channels in the Nordic countries: Eurosport, Discovery, Children's Channel, CNN Int., MTV Europe. (. . .) will be transmitted in a more attractive Nordic version in NSD's package. (. . .), other international channels are also considering Nordic versions of their channels which will be subtitled or dubbed. It is most likely that these channels will also be transmitted from NSD's satellites. NT has exclusive rights to distribute (. . .) in the Nordic area. Undoubtedly, such rights will be transferred to NSD and it is likely that NSD will be able to get exclusive rights to other popular channels.

(85) Based upon the abovementioned, it appears that broadcasters will stop transmitting the Nordic channels on Astra and that Astra will not have many popular foreign language channels to offer to Nordic viewers which they cannot get from the Nordic satellites, some even in a Nordic version.

(86) The position of NSD is likely to be further strengthened by the fact that the national broadcasters in Denmark are planning to launch satellite channels as supplements to their terrestrially distributed channels. It appears that NSD is the only realistic distribution possibility for these companies. Furthermore, the inclusion of these companies in NSD will take away strong potential broadcasters for potential competitors to NSD seeking to distribute satellite television to the Nordic area.

(87) The parties do not deny the strength of Kinnevik's channels. On the contrary, they consider those channels a decisive element in the operation. Information provided by the parties shows that they concur with the Commission's expectation that, after and as a result of the operation, most dishes in the area will be turned towards 1° W or 5°E.

(88) The parties' acceptance that most dishes in the area (70 % of which are presently directed at Astra) will be turned towards the Nordic satellites as soon as TV3 moves to them from Astra, seems to lead to the conclusion that TV3 is by far the most important satellite TV channel to most Nordic direct-to-home households, and to confirm the 'pulling power` of the Kinnevik channels mentioned earlier.

(89) The parties state that TV channels carried by Astra and Eutelsat will still be attractive for Nordic direct-to-home households and mention the fact that it is possible for households to receive signals from more than one satellite position by using certain equipment. Such equipment includes motorized dishes and fixed dishes with side-feeds. If the wish to, households can also buy another fixed dish.

(90) However, it seems clear that there are several problems with such equipment. There are aesthetic and planning concerns raised by the large size of the dishes required to fit side-feeds. They are also costly. The high cost of the motorized and second dish solutions also militates against them. A ratio of 2:1 in price difference between side-feed and standard equipment has been mentioned by (. . .). Motorized dishes are even more expensive, and the cost of buying two standard dishes is obvious.

Furthermore, even if such solutions were inexpensive and easy to integrate into a household, it seems likely that a consumer receiving (15 to 30) TV channels from NSD using standard equipment will be reluctant to spend money on other equipment so as to receive additional channels from Astra or Eutelsat.

(91) It is clear, therefore, that, because of the operation, very few Nordic direct-to-home households will direct their dishes towards Astra, Eutelsat or other satellite operators and, therefore, broadcasters wanting to target Nordic viewers will not see these satellites as alternatives to NSD.

(ii) The link to Kinnevik as a major distributor

(92) A broadcaster transmitting from Astra or Eutelsat will be excluded from NSD's package of satellite TV channels. In the Nordic countries satellite TV channels are sold in packages and by the operation NSD will offer very attractive packages. To be excluded from NSD's packages of channels will put a broadcaster in a very disadvantaged position compared to NSD's broadcasters. It is very unlikely that such broadcasters could develop new packages which could compete with NSD's package of channels. Another option would be to get onto FilmNet's packages of channels. However, compared to what NSD's packages can offer (i. e. The Kinnevik channels including TV3, the Nordic versions of other channels (see (80) to (84)) FilmNet's package (see (135)) will not be an attractive choice for a broadcaster. Besides, Filmnet's position as a significant player on this market will be undermined because of the operation (see (143)).

(iii) The link to the parents as major cable TV operators

(93) A broadcaster transmitting from Astra or Eutelsat must anticipate the possibility of exclusion from a large part of Nordic viewers connected to cable networks. Currently the parties control about (20 to 30 %) of the approximately five million households connected to cable TV networks and SMATV networks in the Nordic countries. However, in the digital environment NSD will effectively be able to control a much larger part of the cable TV network in the Nordic area due to its role as a 'gate keeper` to the Nordic cable TV networks (see point (131)).

(iv) The price difference

(94) It seems likely that broadcasters will be able to lease transponders on NSD at lower prices than on Astra and Eutelsat. This is mainly because of the difference in population covered by the Nordic foot print of NSD compared to the central European foot prints of Astra and Eutelsat. This means that broadcasters aiming at Nordic viewers will obtain a price advantage on NSD's satellites compared to competing broadcasters without access to NSD's satellites. In addition, a broadcaster transmitting from Astra or Eutelsat can reach only approximately 70 % of the potential Nordic direct-to-home households while competitors on NSD's satellites can reach all Nordic households using standard receiving equipment. For these reasons alone, most broadcasters wanting to target Nordic viewers will not see transponders on Astra or Eutelsat as relevant alternatives to NSD's transponders.

(v) No capacity on Astra and Eutelsat

(95) All transponder capacity on Astra and Eutelsat is occupied and in addition, the market for TV transponder capacity is for the moment characterized by a rise in demand and a shortage on the supply side. Furthermore, Kinnevik which currently leases four transponders on Astra directed at the Nordic region. (. . .).

(c) Potential competition from future capacity

(96) The parties expect the current situation in which there is a shortage of transponders to change because of a net increase in transponders in the near future.

(i) Astra/Eutelsat

(97) The parties claim that Astra has plans to launch a new satellite in 1995 which will increase its transponder capacity from 64 to 82 and, in 1996, a further satellite will increase Astra's capacity to 102 transponders. Other satellite operators with European coverage, for example Eutelsat, will also launch new satellites in the near future and thereby increase the total transponder capacity.

(98) Undoubtedly, Astra, Eutelsat and other satellite operators have plans to (and will) increase the capacity of transponders in the coming years by launching new satellites. However, according to information currently available to the Commission, transponders will not be available for Nordic broadcasters in the next three to four years at least. Besides, even if transponders for Nordic viewers were to be available there would not be so many that it would be possible to create a package that could compete commercially with NSD's.

(ii) NSAB

(99) The parties have in a letter of 12 April 1995 mentioned that the Swedish satellite operator NSAB has announced plans to launch a 32-transponder satellite to become operational by mid-1997. However, these 32 new transponders are covered by (. . . special rights of Kinnevik and TD (see also (37)) . . .). These agreements are not directly related and necessary to the implementation of the operation. They are therefore not ancillary and are subject to an assessment under Article 85 of the Treaty.

(iii) New players using new satellites

(100) It is not likely that new players will launch and operate TV satellites for the purpose of targeting the Nordic area. According to the parties, the construction cost of a satellite varies between ECU 40 and 100 million. To this must be added launching costs of between ECU 20 and 75 million and insurance costs of approximately 20 % of the insured loss (consisting of construction costs and launching costs). It usually takes more than five years from the decision to build a new satellite until the satellite can begin transmitting.

(iv) New players using second-hand satellites

(101) The parties argue that there is a second-hand market for operative satellites which means that potential operators can buy or ease an operative satellite and move them into the position they prefer. In this connection the parties point to the fact that the satellites currently situated at 1° W and 5° E are 'second-hand satellites`. Furthermore, according to the parties, it is possible to tilt the satellite so that the entire foot-print is moved.

(102) However, according to information available to the Commission, although it is possible to re-point the satellite to a different region of the earth, the footprint coverage is unlikely to be ideal since the satellite was not originally designed to cover the new region. In addition, even if an independent satellite operator chose to carry through such an operation, such satellites would be competing with NSD's 'Hot Bird` with all its competitive programming advantages transmitting (15 to 30) TV channels of which several are Nordic channels not accessible for other satellite operators than NSD.

(103) In view of the above, it seems unlikely that it would be economically sensible for a new company to enter the market for provision of transponder capacity to the Nordic area by using second-hand satellites.

(d) Digitalization

(104) The introduction of digital technology will increase the capacity of a satellite by five to 10 times. [. . .], digitalization on a commercial basis will take place within the next one or two years. However, the transition from analogue to digital technology will require the replacement of the majority of the receiving equipment of the cable networks and direct-to-home households. This means significant investments for cable operators and direct-to-home households. The direct-to-home households would at least have to invest in a digital decoder which will cost between ECU [. . .]. For that reason alone, practically all companies which have supplied information to the Commission agree that it will take several years before a majority of the Nordic satellite TV households will invest in the necessary equipment. [. .], it is generally accepted that there will not be a pure digital environment before the end of this century, but for quite a long period both analogue and digital transmissions will exist side by side. Consequently, in this transitional period there will be double illumination of the TV channels in both digital and analogue transmission and therefore a need for more capacity than before digitalization.

(105) Furthermore, NSD will control the transponder capacity of the Nordic satellites, and it is not evident why digitalization would make it more attractive for a potential new supplier of transponder capacity to supply transponder capacity directed towards the Nordic area. It seems more reasonable to conclude that a potential supplier of transponder capacity in the digital environment will not supply transponder capacity for the Nordic area, for the same reasons as expressed above.

(106) The need for more channels for specialized pay-TV, video-on-demand, etc. could mean a strong demand for digital transmission capacity. Information supplied to the Commission indicates that capacity created by digitalization could easily be absorbed by introduction of new capacity-intensive products such as video-on-demand etc. On that basis, it must be assumed that the increase in transponder capacity for the Nordic area due to the introduction of digital technology will be absorbed by NSD itself.

A.2. Conclusion

(107) In its communication of 10 June 1994 on satellite communications relating to the provision of - and access to - space segment capacity, the Commission announced its intention to use the competition rules to remove all national restrictions within the European Union on access to space segments. This was stressed again in the Commission's Communication to the European Parliament and the Council on the status and implementation of Directive 90/388/EEC on competition in the markets for telecommunications services (COM(95) 113 final of 4 April 1995). In particular, former dominant positions held by national incumbent telecommunications operators as a result of national legislation should not be directly or indirectly replaced by dominant positions held by private companies as a result of commercial agreements.

(108) NSD will through the operation acquire a dominant position on the market for satellite TV transponder services suitable for Nordic viewers. Currently Telenor controls all three satellites in the position 1°W and the present leasing agreements with NSAB (the Swedish satellite operator) ensures NSD control of the majority of the transponder capacity situated on 5°E.

(109) Through its control over most transponder capacity, the links of Kinnevik as an important broadcaster of Nordic TV channels and distributor of satellite TV channels to direct-to-home households, and through the links to the parents as cable TV operators, NSD will be in a position to foreclose other satellite operators from leasing transponder to broadcasters.

(110) Even if Astra and Eutelsat could be considered actual competitors, they will not have transponders to offer any broadcasters wishing to transmit channels to Nordic households. Of the five 'Nordic` transponders on Astra, Kinnevik controls four and in this connection it has to be borne in mind that (. . . .). This will contribute to the strengthening of NSD's dominance and shows that it is the intention of the parties to prevent Astra from being a competitor. For these reasons it can be concluded that NSD in the short term will dominate the market for transponders suitable for transmitting TV signals to Nordic viewers.

(111) In the medium to long term (1996 and onwards) it is very unlikely that new satellite operators, Astra or Eutelast would be able to challenge NSD's dominant position. In the next two to three years there will be insufficient capacity left on Astra and Eutelsat or on other satellites not controlled by NSD. It will take even more time before digitalization will have an impact on the supply of transponder capacity. The additional capacity becoming available through digitalization is likely to be absorbed by NSD. Furthermore, competition within NSD will be defined by NSD, since NSD will be able to determine which companies will broadcast through NSD. For these reasons it is likely that NSD even in the medium to long term will be able to maintain its dominant position on this market.

(112) The above conclusions are reinforced by the existence of the (. . . . special rights) on 5° E even if these are not to be considered ancillary and are therefore to be assessed under Article 85 of the Treaty.

B. OPERATION OF CABLE TV NETWORKS

B.1. Market structure

(113) In the Nordic area about 4,2 million of 10 million households in total receive cable TV. The number of cable TV connections is only expected to grow slowly in the coming years, since most of the areas where it is economically sensible to lay cables have by now been cabled. Compared to other European countries the Nordic cable TV sector is characterized by physically smaller units, where each network tends to have relatively few connections. However, a few large operators with many units control about 80 % of all connections in the Nordic area.

(a) Denmark

(114) Denmark has around 2,3 million households of which 1,05 million are connected to cable TV networks and 250 000 households connected to SMATV networks. TD Kabel TV, owned by TD, operates the largest network and supplies approximately (600 000 to 700 000) cable TV and SMATV households (approximately 50 % of all households connected to cable TV and SMATV). The second largest operator is Stofa A/S with around (100 000 to 150 000) households. Sofa is controlled by Telia, the Swedish telecom operator. Besides these two operators the market consists of a large number of aerial associations.

(115) Until now it has not been possible to enter the Danish cable TV market with full-scale operations, as TD has had a legal monopoly on the ownership of commercial cable TV infrastructure and the transmission of TV signals by cable across municipal borders. However, according to a parliamentary decision from April 1995 the Danish legislation on telecommunication and cable TV activities will be liberalized in two steps: the first step will be implemented 1 July 1995, and the second step will be implemented not later than 1 January 1998. The implementation of step one means that cable operators other than TD will be allowed to own cable network infrastructure. However, until the implementation of step two TD will retain the exclusive right to provide the infrastructure for transmission of radio and TV signals as well as other telecommunication services across municipal borders. Third parties will get the right to make use of TD's infrastructure on a leased-line basis, but will be excluded from offering cross-municipal-border transmission in their own infrastructure. Denmark is made up of 275 municipalities. The average population of a municipality is 19 000 inhabitants.

(116) The fact that, despite the liberalization, undertakings other than TD are denied the right to provide infrastructure for transmission of signals across municipal borders means that competitors are denied the economies of scale from which TD currently benefits. Furthermore TD will be in a position where it will obtain knowledge about the strategic considerations of their competitors, since all offers made by the competitors of TD will necessarily involve a contractual relationship with TD regarding the use of TD's infrastructure. In contrast, TD can make an offer without being forced to negotiate the terms for using another company's infrastructure.

(117) As a result of its legal monopoly, TD has obtained a very strong position on the Danish cable TV market. The implementation of step one will remove some of TD's exclusive rights, but TD will still have some legal protection from which it will be able to maintain or even develop its position. Although the legal situation is expected to change, the heavy investment needed to build up a cable network, together with the dominant position already held by TD, make new entry unlikely. The proposed concentration will lead to a strengthening of TD's dominant position (see sections B.2 and B.3 below).

(118) It should be noted, that Stofa A/S, a private Danish cable TV operator, has filed a complaint with the Commission concerning Danish legislation on cable TV. The Commission has questioned (6) the Danish Government on the points raised by Stofa. In particular, the Commission has asked the Danish authorities to lift the current provisions prohibiting private companies from owning cable TV networks and to ensure that companies other than TD are allowed to transmit signals across municipal borders in Denmark.

(b) Norway

(119) Norway has around 1,9 million households of which 565 000 are connected to cable TV and 120 000 are connected to SMATV. There are three large cable TV operators that cover approximately 70 % of all households connected to cable. Telenor Avidi, owned by NT, is the largest cable operator with about (180 000 to 200 000) connections (approximately 30 % of all connections). Janco Kabel-TV AS, owned by Helsinki Media SA, has about 22 % of all connections, and Norkabel AS has about 20 % of all connections. Norkabel is owned by TCI and others.

(120) Retransmission of satellite television programmes by way of cable networks does not require a special licence in Norway. Cable TV companies are legally obliged to carry the national TV stations NRK and TV2. The Norwegian legislation also states that agreements concerning retransmission of satellite broadcasts shall contain a clause to the effect that Norwegian cable networks may enter the agreement on equal terms.

(121) Although NT is the market leader, the Norwegian cable TV market consists of three competitors of almost equal strength and NT probably does not have a dominant position at present. According to the Norwegian competition authority, direct competition between cable TV operators is to a large extent possible since about two-thirds of all connected households have the possibility of choosing an alternative cable TV supplier. Furthermore, the Norwegian cable TV market is expected to grow by 2 to 3 % per year and the penetration is expected to reach a level of 40 to 50 % of the total amount of households.

(c) Sweden

(122) Sweden has around 3,9 million households of which around 1,9 million are connected to cable TV networks and approximately 600 000 are connected to SMATV networks. Svenska Kabel-TV AB, which is owned by Telia AB (controlled by the Swedish State), is the dominant operator with approximately 1,2 million connections (about 50 % of all connections). (. . .) Kinnevik has a 37,4 % interest in the second largest cable operator Kabelvision AB ((. . .) has the majority shareholding), which has around 300 000 subscribers (about 18 % of all connections). Two other companies - Stjern-TV AB and Sweden-On-Line AB - have each around 150 000 connections. The Cable Act was adopted in 1992 and has removed all important legal barriers to entry.

(123) Kinnevik has a 37,4 % interest in Kabelvision and (. . .). In 1993 Kabelvision stopped distributing FilmNet's pay TV channels, and it was only after intervention of the Swedish competition authorities that Kabelvision recommenced distribution of FilmNet in 1994. Therefore, it is reasonable to conclude that Kinnevik has an important influence on Kabelvision's commercial policy. In any case the fact that potential competitors will have to take into account the possibility that Kinnevik may be able to influence the commercial strategy of Kabelvision is enough to influence the actions of competitors.

(d) Finland

(124) Finland has around 1,9 million households of which approximately 780 000 are connected to cable TV networks and about 100 000 to SMATV networks. The largest cable TV operator is Helsinki Television OY, owned by Helsinki Media, with about 190 000 connected households (approximately 20 % of all connections). The second largest is Telecom Kabel-TV OY, owned by the public telecom operator, with approximately 120 000 connections. Four smaller companies have shares between 4 % and 6 % of all connections while the rest (about 40 % of all connections) are operated by many small companies.

(125) The parties to the operations are not active on the Finnish cable TV market. (. . .).

B.2. Impact of NSD on the cable TV market

(126) The cable TV operators questioned by the Commission have said that they would, for competitive reasons, have to carry the NSD package of programmes, at least in Denmark, Norway and Sweden. Due to the dominant position of NSD on the transponder market, this will give NSD a strong position towards the cable TV operators, since cable TV operators will have to negotiate with NSD to obtain the TV channel from on NSD, instead of directly with broadcasters, as is the case today. The establishment of NSD will therefore lead to an important change in the negotiating position of cable TV operators.

(127) The parties have argued that the creation of NSD would not prevent the independent cable operators from negotiating directly with Kinnevik in order to obtain the TV3 channels and Kinnevik's other channels if operators do not want to negotiate with NSD. It is true that the NSD agreements do not prevent such arrangements, however, it must be assumed that the parties interest is to promote Kinnevik's channels on a NSD package. In addition, in order to carry the channels of which NSD will most likely obtain exclusivity ((. . . mention of channels. . .) and probably more since it is the intention of NSD to obtain such exclusivity arrangements) independent broadcasters would have to negotiate with NSD. Thus, it seems that negotiations directly with NSD in order to carry NSD's package will be the most realistic choice for the majority of cable operators. In principle, a cable TV operator could get programmes from Astra, or other satellites not controlled by NSD and in such a case they would negotiate directly with broadcasters. However, only non-Nordic language channels will be available on Astra or other satellites.

(128) Furthermore, the independent cable TV operators in Denmark, Norway and Sweden would have to negotiate prices and other terms with a competitor (this applies also if the cable TV operators negotiate directly with Kinnevik since Kinnevik is a part of NSD). This is also the case in areas where households have a choice between being connected to cable TV or buying a private dish, since NSD will control the direct-to-home market as well. NSD would thus be in a position to price-discriminate or impose terms on independent cable operators in favour of the cable operators owned by the parents or in favour of its direct-to-home operations.

(129) It should be noted that several independent cable operators which have supplied information to the Commission have shown a great deal of concern about the possibility of discrimination by NSD in order to favour its own interests. However, even if there was no discrimination, NSD would still be able to exploit its position on the cable TV markets due to its dominant position on the transponder market.

(130) According to the parties, in the digital environment it is the intention of the parties to (. . .) implement a joint Nordic encryption system and a joint Nordic head-end. NSD will control the system and the head-end, and have plans to offer (. . . various services. . .) such a solution (transparent transmission) could be economically attractive to many cable TV operators, since they could eliminate an encoding and decoding system in each head-end and thereby reduce costs significantly. This is of particular relevance in areas with many smaller cable TV networks, as in the Nordic countries. Some independent cable TV operators have hundreds of head-ends or more and need a decoder for each channel in each head-end, with current technology. Undoubtedly, many cable operators would be reluctant to give up providing the SMS themselves, since this is a critical part of most cable TV operations and would make them dependent on NSD. Considering the economic benefits for cable households, and the fact that subscribers connected to the networks will not notice any difference if NSD provides transparent transmission together with SMS and SAS, it would be difficult for a smaller cable TV operator to reject such a solution, if it became a reality.

(131) Consequently, if NSD develops and implements such a system in the digital environment, it is msot likely that the majority of households connected to cable networks in the Nordic countries will receive transparent transmission of signals using NSD's joint Nordic encryption system. (. . .) Consequently, it is also difficult to assess the competitive and economic aspects of transparent transmission. However, it must be foreseen that by controlling such a system NSD will be in a position to strengthen its function as a 'gate keeper` for broadcasters wishing to get access to Nordic cable networks. It would be very difficult for a broadcaster without access to NSD's system for encryption to get access to cable networks should such a system be developed.

B.3. Conclusion

Denmark

(132) TD controls approximately 50 % of the cable connections in Denmark, and has a dominant position on the Danish market due to the legal regime there. The creation of NSD will result in the strengthening of TD's dominant position because:

(i) NSD will be able to discriminate in favour of TD when offering channels to Danish cable operators;

(ii) NSD's monopolist position as regards provision of programming will mean that the terms offered to cable operators will be those most favourable to TD, rather than to others;

(iii) Cable operators in competition with TD will have to negotiate with TD as an NSD partner.

This situation is unlikely to change after the first step of liberalization, as TD will still retain many advantages over its competitors due to its past legal monopoly.

Sweden, Norway and Finland

(133) The parties control or influence about 18 % and 30 % of the cable and SMATV connections in Norway and Sweden respectively and nothing in Finland. Because of NSD's dominance of the transponder market, the arguments in point (i) to (iii) above will apply to the competitive situation between the parties' cable operators in Norway and Sweden.

(134) However, because of the relative strength of competitors in Norway and Sweden it seems unlikely that dominant positions of the parties in Norway and Sweden will be created as a result of the operation.

C. DISTRIBUTION OF SATELLITE PAY-TV AND OTHER ENCRYPTED TV CHANNELS TO DIRECT-TO-HOME HOUSEHOLDS

C.1. Market structure

(135) There are currently three major distributors in this market: FilmNet (Multichoice), Telenor CTV and Viasat. To be competitive a distributor must have a TV channel or package of TV channels on his smart card which a considerable number of viewers find attractive. The three companies use competing smart cards with different TV channels:

- FilmNet's card contains its own pay-TV channel FilmNet Plus, The Complete Movie Channel and BBC. In Denmark the card only contains FilmNet Plus and/or FilmNet The Complete Movie Channel,

- Telenor CTV markets the CTV card which includes MTV, Eurosport Nordic, Discovery, Children's Channels, CNN and FilmNet The Complete Movie Channel. In Sweden (and planned for Denmark) the card also includes FilmNet Plus,

- The Viasat card includes TV3 (TV3 Denmark, TV3 Sweden or TV3 Norway) and its own pay-TV channels TV 1000, Film Max and TV 1000 Cinema.

According to (. . .), by March 1995 Viasat, FilmNet and Telenor CTV provided the following numbers of smart cards in the Nordic countries:

>TABLE>

(136) Measured in numbers of smart cards sold, Viasat as a distribution company has a very strong position on this market. It can be noted, that according to the FilmNet/Telenor agreement (see 137) (. . .). However, it has to be borne in mind that Viasat's smart cards will also contain the CTV package and include Kinnevik's channels, which will be sold exclusively by Viasat. On that basis, it can be concluded that the operation will create a dominant position of Viasat on this market. (. . .).

(137) The FilmNet/Telenor agreement: FilmNet is currently being broadcast from the Thor satellite. FilmNet's lease of a transponder on the Thor satellite and its distribution company Multichoice's distribution of Telenor's CTV package in Sweden is based on an agreement with Telenor AS dated October 1992. FilmNet saw the NSD operation as a threat to its interest as a distributor of pay-TV in the Nordic countries and has filed a complaint with the Commission concerning the proposed operation. In addition, Nethold (the owner of FilmNet and Multichoice) has initiated arbitration against Telenor for alleged breaches of the abovementioned agreement. In December 1994 the Norwegian Court granted an injunction against Telenor by which Telenor, among others, was forbidden to implement the agreement with the Viasat companies by which Viasat could sell Telenor's CTV package. The Court decision would have blocked the NSD operation and made it necessary for the parties to negotiate a settlement with Nethold. By an agreement between Nethold and Telenor dated 29 March 1995) (. . .).

C.2. Foreclosure effects on the market for distribution of TV channels due to the NSD operation

(138) The NSD operation will foreclose competitors from this market because:

(i) By its control of Nordic transponder capacity and its link to Kinnevik as a broadcaster, NSD will be the dominant provider of TV channels to Nordic viewers;

(ii) as discussed above (see 126 to 131), NSD will, to a large extent, control access to the Nordic cable sector, by means of its parental links to cable operators.

For these reasons, there would be very little room for a new distributor in the Nordic market. It is thus unlikely that a potential competitor would be able to establish a distribution business able to compete with NSD in the Nordic area.

(139) The parties claim that the NSD agreement allows an independent broadcaster to lease a transponder from NSD without having to make distribution agreements with the parent's distribution companies. Such a broadcaster would be free to enter into agreements with other distributors. The parties find that the intention of such a policy is confirmed by the abovementioned new agreement with FilmNet.

(140) However, such a broadcaster would have to make an agreement with NSD which is jointly controlled by Kinnevik. Kinnevik could thereby influence the price and terms for the lease contract and Viasat would be able to obtain information about such a potential competitor.

(141) Furthermore, it is highly unlikely that NSD will lease transponders to broadcasters without making the lease dependent on a distribution agreement between the broadcaster and Kinnevik's distribution company. It is clear from information made available by the parties that NSD's transponders first and foremost are a means to develop a Nordic satellite TV distribution system. To lease transponders to broadcasters who do not want to be distributed by NSD would counteract the purpose of the operation. Furthermore, in a period with shortage of supply of transponders it is not necessary for NSD to lease transponders to such broadcasters. The attempt of the parties to confirm its 'open` lease-policy by referring to the new agreement with FilmNet is not convincing: The FilmNet agreement is the outcome of a negotiated settlement. Through a court decision in Norway FilmNet blocked parts of the NSD operation and it was necessary for Telenor to reach a settlement with FilmNet. Before the court decision it was not the intention of the parties to reach such a settlement with FilmNet.

C.3. Conclusions

(142) The foreclosure effect of the operation as regards new entrants to this market will mean that the only likely competitors in this market will be Viasat and FilmNet.

(143) The agreement between FilmNet and Telenor allows FilmNet to (. . .) and to continue to market its own smartcards and therefore to control the SAS and SMS. The agreement, therefore, apparently permits FilmNet to continue to be an important player in the market for distribution of TV channels to direct-to-home households. However Viasat will strengthen its position on the distribution market through the attractive package of channels it will put on the market, and this will undermine FilmNet's position as a significant player in this market.

(144) It can therefore be concluded that Viasat will obtain a dominant position on this market as a result of the operation.

D. ECONOMIC AND TECHNICAL PROGRESS

(145) According to the parties NSD will lead to economic and technical progress. In the short to medium-term the creation of a Nordic 'Hot Bird` will thus give an improved distribution of satellite TV in the Nordic region, and in the long term, after digitalization, in the parties view NSD will make substantial rationalizations possible for cable TV operators and SMATV networks to the benefit of the consumers.

(146) The Commission cannot share this reasoning: the establishment of NSD will not in the short to medium term lead to an improved distribution of satellite TV to the Nordic region, since NSD does not add any new transponder capacity. Consequently, the number of satellite TV channels offered to Nordic viewers in the short term will not be affected by the operation. The Commission recognizes that it is necessary for a satellite operator to be able to promote its satellite position, but in view of the Commission the vertical integration of the operation is not necessary in order to do so. Rather the operation is likely to affect the way in which available transponder capacity is allocated to broadcasters.

(147) In the long term, with the introduction of digital technology, the parties will use NSD to create an integrated infrastructure for the distribution of satellite TV and other related services.

(148) According to the parties, in the digital environment it is the intention to (. . .) implement a joint Nordic system for encryption to be used for the direct-to-home, SMATV and cable TV market. This implies that the individual TV households will only need one decoder box irrespectively whether they receive the signals from cable or via a satellite dish antenna. This means that the SMS and SAS systems of DTH, SMATV, and cable TV networks can be integrated. Furthermore, cable TV networks could have considerable cost savings by not having to decode and encode signals in each of their head-ends. According to the parties the system will allow independent cable TV operators to use NSD as a supplier and at the same time still be able to run their own SMS systems. Furthermore, the system will provide SMATV networks with improved possibilities for reception of pay-TV and even allow them to run their own SMS, which is basically not possible today.

(149) Because of NSD's dominant position as provider of TV channels from Nordic transponders, the Commission considers that it is most likely that the majority of direct-to-home households and independent cable operators in the Nordic countries will be forced to use an encryption system used by NSD. Broadcasters who want to target Nordic viewers will have to lease NDS's system. Thus, if the plans are carried through, NSD's joint Nordic encryption system would become the dominant system in the Nordic region.

(150) The Commission recognizes the long-term economic benefits of having an integrated system for transmission of satellite TV (. . .). Thus, it is impossible to assess to what degree NSD's plans for a joint Nordic encryption system would enable NSD to exclude broadcasters from transmitting TV channels to Nordic viewers. A closed encryption system could make the new infrastructure highly anticompetitive. The same applies to an open system if the system becomes dominant and third parties cannot get access to such a system. (. . .).

(151) The Commission considers that an infrastructure as described by the parties could be highly efficient and beneficial to consumers. However, it must be an open infrastructure accessible for all interested parties. In particular the Commission takes the view that the participation of such a strong broadcaster as Kinnevik in NSD means that there is a high risk that this will not be case. Therefore, it is likely that the operation will lead to less variety in the offer to Nordic TV households in the future. Furthermore, in the opinion of the Commission the vertically integrated nature of the proposed operation is not necessary in order to create such an integrated infrastructure.

(152) Consequently, the arguments made by the parties with regard to technical and economic progress cannot be accepted since the conditions of Article 2 (1) (b) of the Merger Regulation are not met.

E. UNDERTAKINGS PROPOSED BY THE PARTIES

(153) By letter of 7 July 1995 the parties proposed giving a series of undertakings in order to remove the doubts against the proposed concentration. The proposed undertakings relate to the following points:

- Tele Danmark and Norsk Telekom waive all rights to interfere with the use of Kinnevik's transponders on Astra,

- Tele Danmark and Kinnevik will waive their (special) rights (. . .) for transponders on the Swedish satellite position 5 °E,

- They will make two of their existing transponders available for other broadcasters on commercial terms on the day of clearance. (. . .) The other transponder is leased from NSAB and any contract awarded concerning this transponder will be subject to NSAB's approval. The undertaking shall cease to have effect if the transponders have not been leased by third parties within six months from the day of clearance of NSD,

- NSD will dispose freely of the first (. . .) transponders transferred to NSD at 1 °W. The parties will establish a procedure through which (. . .) of (. . .) additional NSD transponders will be made available for broadcasters not related to NSD. NSD undertakes to communicate to the market with not more than 180 days and not less than 60 days notice when new capacity will become available. Third parties will then be given the opportunity to place a binding offer for lease of capacity. NSD is free to dispose of transponders which have not been leased by third parties as part of the procedure,

- NSD shall not acquire exclusive distribution rights for (. . .) specified Nordic and international channels. The undertaking shall only apply for (. . .) years and only for analogue, and not for digital transmissions,

- If Kinnevik offers its channels free of charge to a cable TV operator in a given country, it will likewise offer the channel(s) concerned to any cable operator free of charge, as long as this operator is willing to give the channel free distribution. If Kinnevik introduces payment, the channels will still be offered on non-discriminatory terms provided the cable operator is willing to give the channel concerned free distribution. (. . .) These undertaking will be valid for (. . .) years,

- The parties undertake to agree that all commercial relations between NSD and its shareholders shall be based on arm's length principles.

(154) In the Commission's view, these undertakings are insufficient to avoid the abovementioned creation or strengthening of dominant positions. The three first mentioned undertakings will have only a minor short term effect on the availability of transponders to third parties: the first undertaking that TD and NT waive all rights to interfere with the use of Kinnevik's four Astra transponders is unlikely to have any effect of relevance since Kinnevik will be free to dispose of these transponders. The second undertaking to waive their (special) rights (. . .) for transponders on the Swedish satellite position will have no short term effects since the parties would still control (. . .) of a total of ten transponders on this position. In addition, the undertaking does not exclude NSD from leasing additional transponders on the Swedish position if such becomes available. Anyway, the (special) rights (. . .) are non-ancillary and constitute only an additional element reinforcing the Commissions conclusions (see 112). The third undertaking to make two of their existing transponders available for other broadcasters will have only a minor short term effect. (. . .) Furthermore, the price and other terms are decided by NSD.

(155) The undertaking that NSD will make (. . .) out of additional (. . .) transponders available for broadcasters not related to NSD does not contain a time limit and, therefore, it is unclear when additional transponders will be available. Furthermore, the fact that NSD itself will distribute these (. . .) transponders will make it extremely difficult to control whether the price and other leasing terms are fair and on-discriminatory.

(156) The undertaking that NSD shall not acquire exclusive distribution rights to (. . .) satellite TV channels is too limited in scope. (. . .) of the (. . .) TV channels are owned by Kinnevik and the (. . .) channels do not include three of the most popular international TV channels (. . .), to which NT has exclusive rights. In addition, the undertaking shall only apply for (. . .) years and only for analogue, not for digital transmission. (. . .) Furthermore, this undertaking would be difficult to enforce.

(157) The undertaking that Kinnevik will offer its TV channels to cable TV operators is ambiguous. The undertaking contains several conditions and it seems to deprive the cable operator of the right to choose or maintain its own programme policy and marketing strategy. It would be very difficult to enforce this undertaking.

(158) The last mentioned undertaking in which the parties agree to base all commercial relations on arm's length principles is very difficult to enforce.

(159) All in all, the undertakings are not sufficient to solve the competition problems indentified above. They are too limited in scope, mostly behavioural and would be very difficult to control and enforce.

(160) The Advisory Committee on Concentrations agrees with the Commission that the proposed undertakings offered by the parties are not sufficient to make the setting up of the joint venture compatible with the common market and the EEA Agreement. This view is also taken by third parties which the Commission has asked for comments on the undertakings offered by the parties.

F. CONCLUSION

(161) As a result of the operation, NSD will acquire a dominant position on the market for satellite TV transponder services suitable for Nordic viewers.

(162) NSD's dominant position on transponders will strengthen TD's dominant position on the cable TV market in Denmark.

(163) Viasat will obtain a dominant position on the market for distribution of pay-TV and other encrypted channels to direct-to-home households as a result of the operation.

(164) The vertical integration of NSD means that the positions of the parties in various markets reinforce each other. Particularly it should be noted that the positions of the parties in the downstream markets (cable TV networks and distribution) reinforce the dominant position on transponders by deterring potential competitors from broadcasting from other transponders to the Nordic area.

(165) Apart from the three markets analysed in this Decision the Commission has investigated four other areas - pay-TV, other commercial TV channels, up-link services and provision of encryption systems - in which the parties are active. The Commission has found that, as to these activities, the parties will not obtain or strengthen a dominant position due to the operation,

HAS ADOPTED THIS DECISION:

Article 1

The concentration by way of the creation of a joint venture as notified by Norsk Telekom AS, TeleDanmark AS and Industriförvaltnings AB Kinnevik is hereby declared incompatible with the common market and the functioning of the EEA Agreement.

Article 2

This Decision is addressed to:

1. Norsk Telekom AS,

Keysersgate 15,

N-0165, Oslo;

2. TeleDanmark A/S,

Kannikegade 16,

DK-8000, Aarhus C;

3. Industriförvaltnings AB Kinnevik,

Skeppsbron, 18,

S-10313, Stockholm.

Done at Brussels, 19 July 1995.

For the Commission

Karel VAN MIERT

Member of the Commission

(1) OJ No L 395, 30. 12. 1989, p. 1.

(2) OJ No L 257, 21. 9. 1990, p. 13.

(3) OJ No C 63, 2. 3. 1996, p. 3.

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

(5) The SMATV segment consists of entities receiving the TV signals using a satellite master antenna and retransmitting the signal within a smaller network. Normally the SMATV operators have no system for operating pay-TV and, if they do, it is carried in the network on the basis of collective payment from all residents. The SMATV operators will rarely contract directly with the broadcasters, but will normally be customers of local cable operators.

(6) Commission letter of 23 December 1994 to the Danish Government.