

***Case No COMP/M.1327 -
NC / CANAL + / CDPQ /
BANK AMERICA***

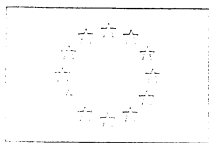
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**REGULATION (EEC) No 4064/89
MERGER PROCEDURE**

Article 6(2) NON-OPPOSITION

Date: 03/12/1998

***In electronic form on the EUR-Lex website under document
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COMMISSION OF THE EUROPEAN COMMUNITIES

Brussels, 03.12.1998
SG (98)D/11282

In the published version of this decision, some information has been omitted pursuant to Article 17(2) of Council Regulation (EEC) No 4064/89 concerning non-disclosure of business secrets and other confidential information. The omissions are shown thus [...]. Where possible the information omitted has been replaced by ranges of figures or a general description.

PUBLIC VERSION

MERGER PROCEDURE
ARTICLE 6(1)(b) DECISION

To the notifying parties

Dear Sirs,

Subject: Case No IV/M.1327-NC/Canal+/CDPQ/BankAmerica

Notification of 23/09/1998 pursuant to Article 4 of Council Regulation No 4064/89.

1. On 23.09.1998 the Commission received a notification of a proposed concentration pursuant to Article 4 of Council Regulation (EEC) No 4064/89¹ by which Canal +, Capital Communications CDPQ, Inc. (« CDPQ ») and BankAmerica International Investment Corporation (« BankAmerica ») will acquire joint control over NC NumériCable Holding (« NCH »).
2. This notification was declared incomplete on 9 October 1998. The notification became effective within the meaning of Article 4 (2) of Commission Regulation (EC) 447/98 on 20 October 1998.

¹ OJ L 395 p.1 ; corrected version OJ L of 257 of 21.9.1990, p.13 ; as last amended by Regulation (EC) No 1310/97, OJ L 180, 9.7.1997, p.1., corrigendum in OJ L 40, 13.2.1998, p.17.

I. THE PARTIES

3. Canal+ is a French company that, with its affiliates, is active mainly in pay television broadcasting, the distribution of television services by cable and satellite, and the production and distribution of programming.
4. BankAmerica forms part of the corporate group of BankAmerica Corporation which provides diverse financial products and services to individuals, businesses, government agencies and financial institutions throughout the world.
5. CDPQ is a wholly owned subsidiary of Caisse de dépôt et placement du Québec (hereafter "Caisse de dépôt"). Caisse de dépôt is a portfolio management company which invests the funds entrusted to it by Québec public pension and insurance plans as well as various public bodies. The activity of CDPQ is to invest in companies operating in all areas related to communications, including audio-visual production, wireless technology, multimedia, publishing and media.
6. NCH's sole asset is 99.9% of the shares of NC NumériCâble ("NumériCâble", previously known as Compagnie Générale de Vidéocommunication), a French *société en nom collectif*. NumériCâble operates cable television networks in France through controlled subsidiaries.

II. THE OPERATION

7. Canal+ currently owns 99.9% of the share capital of NCH. Canal+ wishes new shareholders to subscribe to a capital increase of NCH. For their part, BankAmerica and CDPQ have agreed to invest in NCH through an acquisition vehicle, which they jointly control, called Exante, a Luxembourg *société à responsabilité limitée*. As a result of the Transaction, Exante will hold 37% of the shares of NCH, the remaining 63% being held by Canal+.

III. CONCENTRATION

Joint control

8. Canal+ and Exante have also entered into a Shareholders Agreement dated September 16, 1998 ("NC Holding Shareholders Agreement"). Following this Shareholders Agreement, Canal+, CDPQ and BankAmerica (the last two via Exante) will be in a position to veto actions, such as the Annual Budget and the Business Plan, which determine the strategic commercial behaviour of NCH. Canal+, CDPQ and BankAmerica will thus have joint control over NCH and its subsidiaries, within the meaning of the Merger Regulation.²

Full-Function Joint Venture

9. NC Holding is already a fully-functioning economic entity and will continue to operate on a long term basis in cable television services; in addition, its cable networks will be used to provide high-speed cable modem access to the Internet and

² See Section III.2 of the Commission Notice on the concept of concentration, OJ 1998 C 66, p. 5.

perhaps data and voice telephony services. NC Holding already has and will continue to have the necessary financial resources, personnel, and other assets to provide cable television services. In addition, following the capital increase resulting from the entry of Exante as a new shareholder of NC Holding and the receipt of the financial and human resources to be provided under the telephony provisions of the NC Shareholders Agreement relating to Telecommunications Services, it will have additional resources to expand its scope of activities into these areas. Decisions shall be taken in the primary interest of the joint venture, and any agreement between the shareholders or any company controlled by them and a company of the NC Group will be on an arm's-length basis pursuant to customary commercial terms and conditions. Finally, the term of the NC Holding Shareholders Agreement is fifteen years.

10. NCH will be a full-function joint venture following the Transaction because it will perform on a lasting basis all the functions of an autonomous economic entity within the meaning of the Merger Regulation.
11. As a result, the operation constitutes a concentration to be assessed in accordance with the criteria set forth in the Merger Regulation.

IV. COMMUNITY DIMENSION

12. The joint worldwide turnover of the undertakings concerned exceeds ECU 5,000 million (Canal+ Group : ECU []million, BankAmerica Corporation: ECU [] million, Caisse de Dépôt : ECU []million).
13. The aggregate EC-wide turnover of at least two of the undertakings concerned exceed ECU 250 million (Canal+ Group: ECU [] million, BankAmerica Corporation: ECU [] million, Caisse de Dépôt: ECU [] million), but they do not achieve more than two-thirds of their aggregate community-wide turnover within one and the same Member State. The notified operation therefore has a community dimension, but does not constitute a co-operation case under the EEA Agreement, pursuant to Article 57 of that Agreement.

V. RELEVANT PRODUCT AND GEOGRAPHIC MARKETS

14. NumériCâble is active in cable television distribution in France.³ The Commission has in previous decisions defined pay television as a separate market, distinct from free access television, financed by advertising or by State contributions. The geographic market would be national, in particular for cultural reasons⁴. Therefore, the first relevant market to assess this operation would be the pay-television market in France or in the French speaking territories in Europe.

³ Numéricable is starting to experiment in the field of Internet access and it plans to provide telecommunication services in the future.

⁴ See decisions in cases :

- IV/M.110-ABC/Générale des Eaux/Canal+/W.H. Smith TV ;
- IV/M.410-Kirch/Richmond/Telepiù ;
- IV/M.469- MSG Media Service.

15. The Commission has also examined the impact of the present concentration in the pay-television market in Spain for the purposes of its assessment of possible anti-competitive co-ordination between the parent companies in Spain, as a result of the notified operation. The Spanish pay-tv market is a separate market following the same reasoning of the previous paragraph⁵. The Commission's assessment in the Spanish market includes the market for the wholesale supply of films and sports channels for retail pay-tv. The geographic market would be Spain, in particular for cultural reasons and the national regulatory framework. However, for the purposes of this case, it is not necessary to further define the product or geographic markets affected by the notified operation.

VI. COMPETITIVE ASSESSMENT

A. DOMINANCE

France or the French speaking territories in Europe

16. There are no affected markets within the meaning of Form CO. NumériCâble has around [20-30] % of French cable television subscribers. Other competitors, in terms of subscribers, are France Télécom Cable [20-30]%, Lyonnaise Communications, [20-30]% and ANOC [15-25]%. The concentration will not have any negative effect on competition in France or in any other European French speaking territory because BankAmerica and CDPQ are not present in the pay-tv market in these geographic markets. The transaction just improves the financial position of the joint venture. There is no horizontal overlap nor any vertical link created between the parties as a result of this transaction in France or in the European French speaking territories.

B. CO-ORDINATION OF COMPETITIVE BEHAVIOUR

Spain

17. Pursuant to Article 2 (4) of the Merger Regulation, to the extent that the creation of a joint venture has as its object or effect the co-ordination of the competitive behaviour of undertakings that remain independent, such co-ordination shall be appraised in accordance with the criteria of Article 85 (1) and (3) of the EC Treaty. In order to establish a restriction of competition in the sense of Article 85 (1) of the EC Treaty, it is necessary that the co-ordination of the parent companies' competitive behaviour is likely and appreciable and that it results from the creation of the joint venture, be as its object or its effect.

1. Definition of a candidate market for co-ordination

18. According to Article 2 (4) second sub-paragraph of the Merger Regulation, the Commission shall, when making the said appraisal, take into account in particular whether two or more parent companies retain to a significant extent activities in the same market as the joint venture or in a market which is downstream or upstream from that of the joint venture or in a neighbouring market closely related to this market.

⁵ See decisions in cases :

- IV/M.709-Telefónica/Sociedad Canal Plus/Cablevisión (6 (1) (c) decision of 19.7.1996);
- IV/M.1022-Cable I Televisio de Catalunya.

19. The BankAmerica and CDPQ's groups have controlling interests in Cableuropa. Cableuropa via the operation of cable networks is a future significant competitor to Sogecable's (Canal+Spain) very strong market position in the Spanish pay-tv market⁶. At the same time Cableuropa is a buyer of pay-tv rights from Sogecable.
20. Sogecable is under joint control of Prisa and Canal+⁷. Cableuropa⁸ is under joint control of BankAmerica and CDPQ. Therefore, all the undertakings concerned are both in the same product/service market of NCH (pay television and, in vertically related markets for the wholesale supply of films and sports channels for retail pay-tv) in a neighbouring geographical market (Spain).
21. Given this situation, the Commission has to evaluate whether the link created by the notified operation will have an impact on competition in the Spanish pay-tv market and/or in the Spanish market for the wholesale supply of films and sports channels for retail pay-tv, within the meaning of Article 2 (4) of the Merger Regulation.

2. Assessment under Article 2 (4)

22. There is not enough evidence to support the conclusion that the operation has the object of co-ordinating the competitive behaviour of Sogecable and Cableuropa in the Spanish pay-tv market or in the Spanish market for the wholesale supply of films and sports channels for retail pay-tv. However, it might be the effect of the operation to give way to co-ordination of the competitive behaviour of Sogecable and Cableuropa in these markets, at least in their vertical relation, i.e. with regard to access to the content rights needed to operate in the pay-tv market.

Current structure of the pay-tv market and of the market for the wholesale supply of films and sports channels for retail pay-tv in Spain

a) Players/Competitive position

23. SOGECABLE has [1-2] million subscribers in terrestrial/analogic pay-tv (Canal+Spain) and [100.000- 1 million] subscribers in digital satellite pay-tv (Canal Satélite Digital).
24. TELEFONICA has [100.000-500.000] subscribers in the pay-tv market via satellite (Vía Digital). It has also by law a right to obtain licences to operate in all cable-franchised territories in Spain but it is not operating in this segment yet⁹.
25. CABLEUROPA (jointly controlled by BANKAMERICA/CDPQ/GENERAL ELECTRIC) is one of the most significant future competitors to Sogecable in the pay-tv market via cable. It has been granted licences in Barcelona, Valencia, Sevilla, Mallorca and in other Spanish regions. Cableuropa has started to provide

⁶ Sogecable operates analogic/terrestrial pay-tv and digital satellite pay-tv in Spain.

⁷ See cases :

- IV/M.709-Telefónica/Sociedad Canal Plus/Cablevisión, (6 (1) (c) decision of 19.07.1996) ;
 -IV/M.902-Warner Bros./Lusomundo/Sogecable.

⁸ See case IV/M.1251-Particitel International/Cableuropa.

⁹ Two licences will be granted in each cable-franchised territory for two operators. Telefónica has the right to obtain one of the licences in each territory. Telefónica will be able to start to operate next year.

cable services in Valencia in September 1998. Cableuropa would count in Valencia with about [5.000-10.000] homes cabled.

26. RETEVISION has obtained licences in Madrid and in other Spanish regions. It will compete in pay-tv via cable in the near future.
27. Given the number of subscribers of Sogecable in the Spanish pay-tv market, in relation with the market position of the competitors, which have either substantially less subscribers (Telefónica) or are just new entrants, with no market share (Retevisión) or still with a very limited number of clients (Cableuropa), there are strong indications that Sogecable might have a dominant position in the Spanish pay-tv market¹⁰. There also indications that Sogecable and its subsidiaries would have a dominant position in the Spanish market for the wholesale supply of films and sports channels for retail pay-tv, given their control of the most important premium pay-tv contents necessary to operate in the pay-tv market, stemming from exclusive contracts with most of the Hollywood majors studios¹¹ and control over the most important pay-per view football rights in Spain¹².

b) Concentrated market/links between the parties

28. Sogecable and Telefónica have unsuccessfully tried to join their pay-tv interests in Spain in the last years¹³. At present Telefónica and Sogecable have both shareholdings in Audiovisual Sport¹⁴. Audiovisual Sport has been granted the power to exploit (usufruct) the football rights for the Spanish Premier League, for which the rights' holder remains, on an exclusive basis, Canal Satélite Digital (Sogecable) until the year 2001.
29. Cableuropa and Retevisión jointly control CTC in Catalonia¹⁵
30. As a conclusion the present structure of the Spanish pay-tv market and the market for the wholesale supply of films and sports channels for retail pay-tv is characterized by:
 - (i) a very strong market position of one of the players, Sogecable and;
 - (ii) a highly concentrated market with links among all market players in a number of joint ventures.

Risk of horizontal co-ordination between Sogecable and Cableuropa as a result of the operation

¹⁰ The Commission's serious doubts about the dominant position of Sogecable in the Spanish pay-tv market were shown, in the 6 (1) (c) decision adopted by the Commission in case IV/M.709-Telefónica/Sociedad Canal Plus/Cablevisión of 19.7.1996.

¹¹ Fox, Paramount, Universal, Sony/Columbia, Warner...

¹² Via Canal Satélite Digital and Audiovisual Sport.

¹³ See case IV/M.709-Telefónica-Sociedad Canal Plus Cablevisión in 1996 and the common digital platform announced by Telefónica and Sogecable on 27.7.1998.

¹⁴ Audiovisual Sport is participated by Gestsport-Sogecable (40%) ; GMAF-Telefónica (40%) and TV3 (20%).

¹⁵ See decision on 28.1.1998; case IV/M.1022-Cable I Televisio de Catalunya.

31. The creation of the joint venture and the risk of financial retaliation by CDPQ and BankAmerica over NC in the French market following their acquisition of joint control may give rise to a risk of horizontal co-ordination between the parent companies in so far as Sogecable, under the joint control of Canal+ and Prisa, and Cableuropa, under the joint control of BankAmerica and CDPQ, are both pay-tv operators in Spain, and as such, they are in direct competition. It thus must be examined whether following the deal between Canal + and CDPQ/BankAmerica in France, these parties would still have incentives to compete in the Spanish market or whether they would make their commercial policies converge in order to maximise their profits, given the Spanish market's characteristics already conducive to co-ordination.
32. The Commission considers that the possibility of horizontal co-ordination is, in the absence of additional evidence and in particular with regard to co-ordination on prices, to be excluded, because Cableuropa is, at this stage, a new entrant in the pay-tv market and it needs to get as many subscribers as possible in the start-up phase, thus rendering a horizontal co-ordination with Sogecable on prices, quite unlikely. In addition, the product offered by Cableuropa, consisting of an unbundled package of services (internet, telephony and pay-tv) somehow differentiates this operator from Sogecable's single offer of pay-tv services, therefore rendering even more unlikely a possible horizontal co-ordination.

Risk of vertical co-ordination between Sogecable and Cableuropa as a result of the operation

33. NCH is the second biggest cable operator in France in terms of homes cabled [20-30]%. NC has suffered heavy losses amounting to hundreds of millions of French francs per year. Cableuropa's parents are now, and will continue in the future, co-financing the cable interests of Canal + in France via NC (about [] as a first contribution in exchange of the shares in NC). The success of NC's cable businesses is very important to Canal+ (new revenues from voice, Internet, etc). Cableuropa has consequently a very significant and real power to retaliate against Canal+ in France if it was not given favourable conditions in the access to the audio-visual rights that it needs to develop its pay-tv activities in Spain. It can thus be concluded that, as a result of the NC deal, both companies have a strong incentive to co-ordinate their competitive behaviour at least with regard to the access to Sogecable's content. In particular Canal+ has a strong incentive to favour Cableuropa in its supply arrangements. This could in turn lead to a situation in which there would be discrimination with regard to other players in the cable segment of the pay-tv market in Spain.
34. Some days after the NC deal was signed, Sogecable and Cableuropa reached a content distribution agreement, on a non-exclusive basis¹⁶. Cableuropa has been the only cable distributor to reach such an agreement. This, undoubtedly, reinforces the Commission's serious doubts about a likely co-ordination between Sogecable and Cableuropa as a direct result of the French operation. This strong risk of co-ordination has been the object of two complaints lodged in the course of the procedure concerning the present operation.

¹⁶ The distribution agreement includes 14 channels such as Disney, Discovery Channel, TNT Classic movies and pay-per view films. The contract does not include the premium Canal+ channel or any pay-per view football rights.

35. The notifying parties have basically argued that the risk of vertical co-ordination between Sogecable and Cableuropa should be discarded because it would not be in Prisa's interest, which jointly controls Sogecable, to discriminate in favour of one cable operator and consequently to limit the potential benefits accruing to Sogecable for the sale of its contents to as many pay-tv operators as possible. This argument does not seem convincing for the following reasons.
36. Although it is true that Prisa plays a significant role as a local partner of Canal+ in the Spanish pay-tv market, Sogecable's policy and strategy with regard to the chain of operation of the audio-visual rights (production, management, distribution¹⁷) is substantially determined by Canal + France for the whole Canal+ group¹⁸. []. The product offered to the subscribers in France or Spain is basically the same one adapted to national characteristics¹⁹. []. The competitive strategy of Sogecable has always followed the policy of the Canal+ Group, as illustrated by the launching of Canal Satélite Digital in Spain following Canal Satélite in France.
37. In addition, Sogecable has explicitly shown in its undertakings to the Commission (see below) its possible interest to distribute its tv programs under some form of exclusivity. This in turn would prevent Sogecable from distributing its own

17 « ...Canal+ and Pathé decided to create a European movie distribution network to give films better exposure outside their national markets. The network is built around AMLF in France, Pathé Guild in the UK, Tobis in Germany and Sogepaq in Spain. It will distribute European movies produced or acquired by Pathé or Canal+, as well as foreign productions for which the partners acquire the rights. » (page 43 Canal+ 1997 Annual Report).

18 See case IV/M.709-Telefónica/Sociedad Canal Plus/Cablevisión, 6 (1) (c) decision of 19.7.1996.

See Canal Plus 1997 Annual Report :

- « After successfully launching the premium channel concept...Canal + began exporting its proven format to new markets in 1989, teaming up with leading media partners in each country.... The Group now leads the European digital television market, with more than 1.5 million subscribers in France, Spain and Italy » (cover page of Canal+ 1997 Annual Report).

- « We also successfully launched the Canal Satélite digital package in Spain.... The Subsidiaries Division was reorganised around Le Studio Canal+, Ellipse Programme and Canal+D.A./Canal+Image (formerly UGC D.A.). Most importantly our agreements with Pathé, Sony, Polygram and most recently, Warner Bros have given us greater leverage in Europe in both movie production and distribution, two key factors in controlling content. » (Mr. Lescure's forewords in Canal + 1997 Annual Report). « The Division works in synergy with the entire Group and supports its international strategy » (page 42).

- « A comprehensive growth strategy: « Thanks to this content driven strategy, Canal+ is the only company with the ability to provide quality channels for its various digital packages in Europe.... The Group has naturally applied this marketing strategy outside France. In co-operation with partners, it is the marketing operator of the Canal Satélite Digital package in Spain and the D+ package in Italy. » (page 17).

- « Both and outside France, the Group covers all aspects of pay television, from the production of channels and services to marketing » (page 30)

19 - « Revenues ..other European versions of the French channel... » (page 57 of Canal+ 1997 Annual Report).

- « It (The Group) also wanted to give each channel a strong national identity by devoting substantial air time to local films and sports and by creating programs that reflect a specific personality. The Group made major strides as a distributor during the year with the introduction of a digital package in Spain and of a reformatted digital package in Italy based on the Canalsatellite made in France. These developments dovetail with the Group's content strategy;... » (page , Canal+ 1997 Annual Report).

programs to as many cable operators as possible. As a consequence, because of the French operation, Cableuropa would become the preferential and natural partner of Sogecable, likely to be favoured in these exclusive supply arrangements. The selection of a preferential partner in the cable market in Spain would be an economically rational behaviour and would be designed to maximise Sogecable profits in the pay-tv market. It is accordingly of no financial harm to Prisa.

38. Therefore, due to the structure of the affected pay-tv markets, the Commission considers that there are strong indications that the notified operation could have led to the co-ordination of the competitive behaviour of Sogecable and Cableuropa in the Spanish market, in their vertical relation, i.e. with regard to access to the content rights needed to operate in the pay-tv market. The Commission also considers that there are indications that this co-ordination could have entailed a discrimination policy vis à vis other market players in their access to Sogecable's content, therefore putting them at a competitive disadvantage. However, the Commission does not consider necessary to further investigate the competition concerns raised by the operation because following the undertakings given by the parties (see below), the notified concentration no longer raises serious doubts within the meaning of article 6 (1) (c) of the Merger Regulation.

VII. MODIFICATIONS TO THE ORIGINAL CONCENTRATION

39. Canal+ and Sogecable submitted undertakings to the Commission on 19.11.1998 in order to remove the competitive concerns raised by the operation with regard to the Spanish pay-tv market.
40. Canal+ undertakes the following: " In connection with the proposed acquisition by Canal+, BankAmerica, and Caisse de Dépôt et Participations du Quebec of joint control over NC Numéricable Holding SNC (Case IV/M.1327 NC/Canal+/BankAmerica/CDPQ), Canal+ hereby informs the European Commission of the following:
1. Canal+ hereby agrees that any negotiations with Spanish cable operators with respect to theme channels or other television programming over which Canal+ (including for this purpose any subsidiaries over which Canal+ has sole control) has Spanish distribution rights shall be conducted in a fair and non-discriminatory manner consistent with applicable European Union and Spanish competition laws. It is understood that the foregoing undertaking does not prevent Canal+ from entering into exclusive agreements with cable operators for specific theme channels or other television programming, provided that the negotiations are conducted in a fair and non-discriminatory manner consistent with applicable European Union and Spanish competition laws.
 2. This undertaking shall be in force for so long as (i) market conditions in Spain and (ii) the notifying parties' respective ownership interests and other rights in Sogecable, Cableuropa, and NumériCable remain substantially the same.
 3. Canal+ shall use any power it may have over Sogecable to cause Sogecable to comply with its undertaking to the European Commission, as set forth in the letter of Mr. Juan Luis Cebrian, Consejero Delegado, addressed to Mr. Götz Drauz on November 19, 1998."

41. Sogecable undertakes the following²⁰: Sogecable, including their subsidiaries, commits not to discriminate among cable operators in Spain in relation with the distribution of theme channels or any other television programs over which it has distribution rights for Spain. The possible granting of exclusive distribution rights will be also subject to the non-discrimination obligation within the meaning of community and national competition rules. Finally the non-discrimination commitment is to be seen by Sogecable not only on terms of price but also in the context of the competitive position in the market of the cable operators with regard to Sogecable. The last paragraph of the undertakings sets out that the undertakings will remain in force for so long as the conditions in the Spanish market and the shareholdings of the notifying parties (Canal+, BankAmerica and CDPQ) in Sogecable, Cableuropa and NumériCable remain substantially the same than the current situation.
42. The Commission considers that the undertakings given would mean that future distribution agreements signed by Canal+, Sogecable or their subsidiaries, concerning their pay-tv audiovisual rights in Spain will be subject to these non-discrimination clauses. In practice, the undertakings constitute a powerful deterrent for Canal+ and its subsidiaries not to discriminate and ensure fair and equal treatment to cable pay-tv operators which need, to different extents, the content owned by Canal+ to successfully operate in the pay-tv market. In addition to that, the monitoring of the respect of the commitment does not cause any major problem because the Commission has, as a current reference, the content distribution agreement signed in September 1998 between Sogecable and Cableuropa. For the future, if Canal+/Sogecable were to sign additional distribution agreements with Cableuropa, the competition authorities and the market players will have again, through the assessment of the conditions attached to the granting of those rights, a useful reference to evaluate whether Canal+ follows or not a discriminatory policy in the distribution of the contents for which it owns the rights for pay-tv, be it on an exclusive basis or not. The implementation of this undertaking will help to keep the market open in relation to the access to essential pay-tv content. The undertaking has to be read in the context of an application of Article 2 (4) of the Merger Regulation and of the competition concern that it intends to solve, i.e. the likely risk of an anti-competitive vertical co-ordination raised in the spillover market identified in this decision. The undertaking does obviously not cover any other possible anti-competitive behaviour in the Spanish pay-tv market or in other markets, not addressed by this decision. The undertaking does not prejudice either a possible assessment under the competition rules of the agreement signed between Sogecable and Cableuropa in September 1998.
43. Therefore, the Commission concludes that these undertakings are sufficient to remove its serious doubts within the meaning of Article 6 (1) (c) of the Merger Regulation, and to render the concentration compatible with the common market.

²⁰ Letter of Mr. Juan Luis Cebrián to Mr. Götz Drauz on November 19, 1998, in Spanish. See annex.

VIII. ANCILLARY RESTRICTIONS

44. The parties have notified as ancillary restrictions to the concentration the following provisions of the NC Holding Shareholders Agreement:

a) Article 4.12.2

45. In the event that Exante, in consultation with Canal+ and NumériCâble, determines to proceed with the provision of Telecommunications Services, Article 4.12.2 of the NC Holding Shareholders Agreement provides that Exante, Canal+ and NC Holding will “use their best efforts to cause the relevant parties . . . to commit to TelCo, to the fullest extent permitted by applicable law, that no other party will be permitted to provide Telecommunications Services on the Networks, other than as provided in Article 4.12.1.”
46. The parties have confirmed to the Commission that this provision amounts to granting to TelCo²¹ an exclusive right of use to the NC Group network for the provision of Telecommunications Services. The parties argue that they would not be willing to make the heavy investments required in developing and upgrading the cable networks of NumériCâble to provide new services if they could not be assured of reaping the benefits of their investments. The Commission concludes that these rights are justified and are covered by the present decision.

b) Article 7.1

47. Article 7.1 of the NC Holding Shareholders Agreement provides that Canal+ and Exante undertake not to acquire an interest (other than an investment of less than 5%) in a third party, or establish, participate, directly or indirectly, in the acquisition, merger or operation of any cable franchise in France unless the opportunity to do so has been proposed to NC Holding and NC Holding declines such proposal.
48. The non-compete clause provided for in Article 7.1 can only be considered necessary and directly related to the concentration to the extent that the non-compete obligation would be limited to the situation where the parent companies enjoy a controlling stake in the joint venture. Therefore, this decision only covers this non-compete clause for so long as the parent companies hold a controlling interest in NCH.

²¹ Depending on the results of the feasibility study which Exante plans to carry out, Telecommunications Services will be provided by TelCo over the cable network controlled by NC.

IX. CONCLUSION

49. For the above reasons, and subject to the full compliance with the commitments made by the parties, the Commission decides not to oppose the notified operation and to declare it compatible with the common market and with the functioning of the EEA Agreement. This decision is adopted in application of Article 6 (1)(b) of Council Regulation (EEC) No 4064/89.

For the Commission,

ANNEX

En relación con la propuesta adquisición por Canal+, BankAmerica y la Caisse de Dépôt et Participations du Quebec del control conjunto sobre SNC (As. IV/M.1327) NumériCable Holding SNCABLE, por la presente, manifiesto a la Comisión lo siguiente :

1. SOGECABLE se compromete a que sus negociaciones con los operadores españoles de cable, en relación con los canales tematicos u otros programas de televisión sobre los que SOGECABLE (incluidas las empresas que controla) es titular de un derecho de distribución para España, serán llevadas a cabo de un modo justo y no discriminatorio, de acuerdo con las normas de la competencia comunitarias y nacionales aplicables.
2. El compromiso anterior no impedirá ni limitará el derecho de SOGECABLE a ceder dichos canales o programas en régimen de exclusiva, siempre que tal cesión sea lícita de acuerdo con las normas de la competencia comunitarias y nacionales aplicables.
3. No se entenderá como trato discriminatorio el hecho de que SOGECABLE tome en consideración para la cesión exclusiva o no exclusiva de dichos canales o programas, elementos distintos del precio ofertado (unitario o total), tal y como la relativa posición competitiva en el mercado de los operadores de cable ofertantes con respecto a SOGECABLE.
4. Este compromiso permanecerá en vigor mientras que (i) las condiciones de mercado en España y (ii) las participaciones de las partes notificantes en SOGECABLE, Cableuropa y NumériCable permanezcan sustancialmente idénticas a la situación actual.